**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 Number P14**
**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 applicable non-bankruptcy law excuses the non-debtor party from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession?
2. Whether, in a case where a class of claims is proposed to be impaired under a joint, multi-debtor plan, 11 U.S.C. § 1129(a)(10) requires acceptance from at least one impaired class of claims of each debtor, or, alternatively, acceptance from one impaired class of claims of any one debtor?

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## OPINIONS BELOW

The bankruptcy court ruled in favor of the Petitioner, Tumbling Dice Inc., finding that section 365(c)(1) permits the Petitioner to assume the executory contract with the Respondent, Under My Thumb. The bankruptcy court also found that the Petitioner satisfied the requirements of section 1129(a)(10) by obtaining acceptance from at least one impaired class of creditors. The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the rulings of the bankruptcy court.

The Respondent appealed to the United States Court of Appeals for the Thirteenth Circuit. The Court of Appeals ruled that the plain language of section 365(c)(1) barred the Petitioner from assuming the executory contract with the Respondent. The Court of Appeals also ruled that because the Respondent rejected the proposed reorganization plan, the Petitioner failed to satisfy the requirements of the section 1129(a)(10). The Supreme Court has granted the Petitioner writ of certiorari.

## STATEMENT OF JURISDICTION

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

## STATUTORY PROVISIONS

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

11 U.S.C. § 102.

11 U.S.C. § 365.

11 U.S.C. § 1121.

11 U.S.C. § 1122.

11 U.S.C. § 1123.

11 U.S.C. § 1124.

11 U.S.C. § 1126.

11 U.S.C. § 1129.

## STATEMENT OF THE FACTS

The bankruptcy code functions to keep a bankrupt business operational while they restructure their debts. In this case, the Petitioner, Tumbling Dice, Inc. ("Tumbling Dice"), entered into a non-exclusive license agreement with the Respondent, Under My Thumb. The license at stake is vital to Petitioner's reorganization efforts. After Petitioner proposed a reorganization plan, every creditor but Respondent accepted the plan. Now, Respondent expects this Court to dismantle the plan and relieve them from their contractual obligations. If that were to happen, Petitioner would lose a crucial component of their business structure and their prospects of emerging from bankruptcy would be bleak. Instead, Petitioner urges this court to confirm the plan, and hold Respondent accountable for the contract entered into by both parties before Tumbling Dice filed for Chapter 11 reorganization. (R. at 4–5.)

### I. Tumbling Dice, Inc. enters a license agreement with Under My Thumb for the use of software to run its casino loyalty program.

Tumbling Dice owns and operates one of the largest gaming operations in the country. (R. at 4.) Tumbling Dice is a holding company that wholly-owns eight subsidiary hotels and casinos. *Id.* The company owes its success in part to its casino loyalty program, "Club Satisfaction", which has enabled Tumbling Dice to maintain a large client base for the last thirty years. (R. at 4–5.) Club Satisfaction administers amenities to guests who frequent Tumbling Dice's properties, including discounted nights at Tumbling Dice hotels, VIP concert tickets, and private chef's dinners. (R. at 4.) These amenities incentivize clients to return to Tumbling Dice's properties, thus creating brand loyalty. *Id.* The gaming industry has recognized the utility of these loyalty programs, as such programs are now a common feature of casinos nationwide. *Id.*

Eager to boost the effectiveness of Club Satisfaction, Tumbling Dice sought the services of Under My Thumb–a software designer specializing in customer loyalty programs–to revamp

Club Satisfaction for the digital age. *Id.* Tumbling Dice Development, LLC ("Development")–one of Tumbling Dice's wholly-owned subsidiaries–was created for the sole purpose of contracting with Under My Thumb. (R. at 4–5). Development struck a deal with Under My Thumb ("the Agreement") whereby Under My Thumb would design an integrated, comprehensive software system ("the Software") for Club Satisfaction, and grant Development a non-exclusive license to use the patented Software and extend the benefits of such use to Development's affiliated entities. *Id*. In exchange, Development would reimburse Under My Thumb for a portion of the development costs and pay a monthly fee for the continued use of the Software. *Id.* The terms of the Agreement prohibited Development from assigning or sublicensing their rights to non-affiliated third parties without Under My Thumb's express written consent (R. at 5.)

The revamped Club Satisfaction was a massive success for Tumbling Dice. (R. at 5.) The Software enabled Club Satisfaction members to make purchases by swiping a "player card" at gaming machines and tables in Tumbling Dice's casinos. *Id.* Tumbling Dice could then collect the data from the player cards to determine members' spending habits and tailor the program's amenities to suit specific customer preferences. *Id.* Equipped with this information, Tumbling Dice could provide powerful incentives for members to patronize their resorts. *Id.* After the player cards were introduced, membership in Club Satisfaction tripled and members increased their spending. *Id.* In light of this success, Tumbling Dice acknowledged that "given the prevalence of casino loyalty reward programs in the industry in recent years, the Software is an essential part of [our] ongoing business model." *Id.*

Under My Thumb also benefitted from the agreement. *Id.* Because the license was non-exclusive, Under My Thumb licensed similar versions of the Software to third parties for fees. (R. at 4–5.) Moreover, because the monthly payments that Development paid to Under My Thumb

under the license calculated based on member participation in Club Satisfaction, Under My Thumb received payments that were much larger than expected. *Id.* Indeed, the contractual relationship carried on smoothly for years, until Tumbling Dice suddenly stopped making payments. (R. at 5–6.)

## II. Saddled with debt from an unrelated transaction, Tumbling Dice, Inc. is forced to file for Chapter 11 bankruptcy.

Four years after the parties entered the Agreement, a hedge fund called Start Me Up, Inc. acquired Tumbling Dice, Inc.'s stock through a leveraged buy-out. (R. at 6.) The eight resort subsidiaries were put up as collateral for the loans used to acquire Tumbling Dice, however Development was not required to act as a borrower or guarantor due to the subsidiary's limited function and the non-exclusive nature of the agreement. *Id.* The loan amounted to $3 billion, and as the loan debt began to sink the company, Tumbling Dice filed for Chapter 11 bankruptcy to reservice the debt. *Id.* As of the petition date, Tumbling Dice and its resorts jointly and severally owed the lenders approximately $2.8 billion. *Id.* They also owed $120 million to their unsecured creditors, including $6 million to Under My Thumb for research and development costs associated with the Software. *Id.*

Tumbling Dice managed to negotiate a reorganization plan ("the Plan") with their creditors after lengthy negotiations and much heartache, including a non-binding mediation ordered by the bankruptcy court that did not involve Under My Thumb. *Id.* The Plan stipulated a complete restructuring of Tumbling Dice's debts, lowering the interest rate, and extending payments by a period of twenty years. (R. at 7.) Start Me Up was permitted to regain their equity interest in the company, but this was contingent upon an injection of capital to fund a 55% distribution to the unsecured creditors. *Id.*

The Plan was a joint plan, meaning that Tumbling Dice filed it on behalf of all of its debtor-subsidiaries. *Id*. The Plan expressly stated that "the Debtors' estates are not being substantively consolidated, and no Debtor is to become liable for the obligations of another." *Id.* The Plan proposed that Tumbling Dice would assume the Agreement pursuant to sections 365 and 1123(b)(2) of the Bankruptcy Code. (R. at 7.) The Plan also included a $66 million pro rata distribution to all creditors, including Under My Thumb. *Id.* Accordingly, Under My Thumb's share of the distribution more than covered the $6 million that Tumbling Dice still owed. *Id.* With their debt paid and the Agreement to be re-instated, Under My Thumb viewed the plan favorably. (R. at 7.) The Plan had universal support from all creditors, and it appeared as though business would carry on as for Tumbling Dice. (R. at 7–8.) However, after initially viewing the Plan favorably, Under My Thumb's feelings about the Plan began to sour. *Id.*

### III. Under My Thumb rejects the Plan and the matter goes to court, where Tumbling Dice, Inc. seeks to confirm the Plan, as was initially accepted by all creditors.

Under My Thumb became concerned about the Plan when they discovered that Start Me Up was only funding $31 million of the pro-rata distribution to the unsecured creditors. *Id.* The remaining $35 million was to be paid by Sympathy for the Devil, LP ("SFD"), a private equity group who would receive 51% of the voting shares and several seats on the board of the newly reorganized Tumbling Dice. (R. at 7–8.) SFD's portfolio of companies "includes a direct competitor of Under My Thumb who had, for several years, tried to replicate the Software." (R. at 8.) Out of concern that SFD would gain access to the Software, Under My Thumb voted to reject the Plan despite its support from all other creditors. *Id.* Each of Tumbling Dice and its debtor-subsidiaries had at least one impaired accepting class of creditors. *Id.* However, because Under My Thumb had rejected the Plan, and because their only relationship to Tumbling Dice was the

Agreement held by Development, Development was suddenly left without an impaired accepting class of creditors. (R. at 4–5, 8.)

Under My Thumb argued that, relying on the so-called "hypothetical test", Tumbling Dice was barred from assuming the Agreement pursuant to section 365(c)(1). (R. at 8.) Under my Thumb reasoned that, because intellectual property law excused them from having to render performance of the Agreement to a third-party, the newly reorganized Tumbling Dice cannot "assume" the prior Agreement unless Under My Thumb consents, which they do not. *Id.*; 11 U.S.C. § 365(c)(1). Under My Thumb also argued that, relying on the "per-debtor" approach, the Plan is not confirmable under section 1129(a)(10) because one of the debtors (Development) has not obtained acceptance from an impaired class of creditors. (R. at 8.); 11. U.S.C. § 1129(a)(10).

The bankruptcy court ruled for Tumbling Dice on both counts and confirmed the Plan. (R. at 8.) Regarding their first claim, the court held that under the "actual test," section 365 permits a debtor-in-possession such as Tumbling Dice to assume the original contract. *Id.* The bankruptcy court reasoned that section 365 contemplates a case-by-case inquiry to determine whether the creditor is *actually* being forced to render performance to a party other than the one they originally contracted with–here, Tumbling Dice. (R. at 8–9.) Concluding that "Under My Thumb was being asked to do nothing more than honor its existing contractual obligation with Development", the bankruptcy court permitted Tumbling Dice to assume the Agreement. (R. at 9.) In regard to the second claim, the bankruptcy court held that "section 1129(a)(10) is satisfied where at least one impaired class in a joint, multi-debtor plan accepts the plan." *Id.* Because every other impaired class of creditors voted to accept the Plan, the court found that Tumbling Dice had satisfied the conditions of section 1129(a)(10). The Bankruptcy Appellate Panel for the Thirteenth Circuit

affirmed these rulings, and Under My Thumb appealed to the Court of Appeals for the Thirteenth Circuit.

The Thirteenth Circuit reversed on both issues. (R. at 3.) In regard to the first issue, the circuit court found that the disjunctive "or" in section 365(c)(1) mandates that a debtor-in-possession such as Tumbling Dice cannot "assume or assign" an executory contract. (R. at 10.); 11 U.S.C. § 365(c)(1). In regard to the second issue, the court found that, based on the plain language of section 1129(a)(10), the statute must be analyzed on a per debtor basis and not a per plan basis. (R. at 17.) The circuit court reasoned, "[b]ecause no impaired class of Development's creditors voted in favor of the Plan, the bankruptcy court's order confirming the Plan must be reversed notwithstanding the broad creditor support that exists for the Plan." *Id.*

Now, Tumbling Dice petitions this Court to reverse the decision of the Court of Appeals for the Thirteenth Circuit and confirm the Plan.

## SUMMARY OF THE ARGUMENT

The Thirteenth Circuit Court of Appeals erred when it held that section 365(c)(1) precludes the assumption of a non-exclusive license over the objection of the licensor and that section 1129(a)(10) requires acceptance from an impaired class of claims of each debtor for a plan to be confirmable.

First, the Court should permit Development to assume the software license agreement with Under My Thumb pursuant to section 365(a), because the limitation in section 365(c) does not excuse Under My Thumb from rendering performance to Development. Contrary to the view adopted by the circuit court below, section 365(c) contemplates an inquiry into whether the non-debtor is actually being compelled to render performance to a third party. The plain-meaning of the statutory language corroborates adoption of the actual test, although the language is ambiguous.

This ambiguity is further evidenced by the fact that some courts question whether section 365(c) even applies to debtors-in-possession at all, but rather, to the separate legal entity "the trustee." Despite these competing interpretations, the actual test is preferable, because when the language of section 365(c) is read in the context of the entire section, the hypothetical test violates the canon against surplusage.

Additionally, the legislative history favors adoption of the actual test, because Congress was concerned with whether the non-debtor actually received the full benefit of their bargain, not whether it could hypothetically be affected by assignment to a third party. As long as the non-debtor remains unharmed by the debtor-in-possession's assumption of the contract, Congress would be happy. But from that premise, it follows that courts must permit assumption where the debtor-in-possession has no intention to harm the non-debtor via assignment to a third party.

Finally, the actual test furthers the policy goal of section 365 and Chapter 11, which is to keep the debtor's business afloat while they reorganize their debts. The actual test maintains substantial protections to debtors, because Congress contemplated that the courts would need to be sensitive to the rights of the non-debtor, and the non-debtor suffers no harm if the debtor-in-possession never assigns the contract to a third party. The actual test offers further protections to debtors-in-possession, who, in their vulnerable state, live or die by their ability to maintain favorable contracts. Therefore, the actual test strikes the appropriate public policy balance by saving debtors-in-possession from ruin while ensuring that non-debtors suffer no harm.

Next, the Court should find that the Chapter 11 Plan in this case was confirmable because at least one impaired class of creditors under the plan had voted to accept it. As one of the requirements for a plan to be confirmable, section 1129(a)(10) requires: "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." 11 U.S.C. § 1129(a)(10). The statute's plain language only requires that "at least one" class of impaired claims accept the plan. It does not articulate different requirements based on the structure of the plan, nor does it differentiate between situations with different numbers of debtors and creditors. Its plain language is unambiguous and simple, and therefore should be applied in the same manner. Moreover, the Bankruptcy Code's rules of statutory construction do not change this interpretation. Thus, a per plan approach to enacting section 1129(a)(10) is appropriate and correct.

Additionally, the statutory context of section 1129(a)(10) supports a per plan approach. This section acts as one of sixteen requirements for a plan to be confirmable under Chapter 11 reorganization. As such, it serves as a technical requirement rather than an indication of substantive rights for Chapter 11 parties. It ensures that there is *some*—as opposed to *no*—willingness to accept the proposed plan. Instead, the cramdown provisions under section 1129(b) provide some protection of creditors' rights by ensuring that there is no unfair discrimination and that the plan is fair and equitable to them.

Further, a majority of case law correctly interprets section 1129 by focusing on the plain language and statutory context of this section. The few cases that have interpreted section 1129(a)(10) on a per debtor, instead of a per plan, basis have written additional provisions into the Code in order to do so. By trying to differentiate between joint plans and substantively consolidated plans—matters that are clearly not contemplated under section 1129(a)(10)—these cases erred in their holdings.

Finally, both the policy and the legislative history behind section 1129(a)(10) support per plan approach. The per plan approach better supports the Bankruptcy Code's policy objectives. In particular, it allows for greater balance between the rights of debtors and creditors, and it respects

Chapter 11's goal of encouraging and supporting business plans for restructuring (as opposed to liquidation). Likewise, section 1129(a)(10)'s legislative history further supports a per plan approach by showing that the primary concern with including and updating this section was to ensure that proposed plans could not be crammed down in cases where there was no single accepting impaired class of claims.

## ARGUMENT

This Court reviews questions of bankruptcy law *de novo*, owing no deference to the reasoning of the lower courts. *Zingale v. Rabin (In re Zingale)*, 693 F.3d 704, 707 (6th Cir. 2012). The questions presented in this case are strictly questions of law. Accordingly, *de novo* review is proper.

### I. 11 U.S.C. § 365 allows a debtor in possession to assume an executory contract even when non-bankruptcy law excuses the non-debtor from rendering performance to a third party.

Development may assume the Agreement under section 365(a), because section 365(c) permits assumption of an executory contract when the non-debtor is not actually compelled to render performance to a third party. 11 U.S.C. § 365(a), (c); *see also Olah v. Baird (In re Baird)*, 567 F.3d 1207, 1211 (10th Cir. 2009) (defining "executory contracts" as those in which "the obligation[s] of both the bankrupt and the other party are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other."). Section 365(a) provides that executory contracts can be assigned to a third party, with all the performance obligations attached, "even without [non-debtor] consent, and… notwithstanding any provisions in the leases that prohibit, restrict, or condition the assignment…" *In re Ames Dep't Stores*, 287 B.R. 112, 118–19 (Bankr. S.D.N.Y. 2002). This mechanism allows the debtor-in-possession to continue to benefit from (i.e. assume) favorable contracts, or conversely, to get out

of (i.e. reject) unprofitable contracts, while they reorganize their finances. 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).

> The exception to this general rule is found in subsection (c), which provides that–
>
> "the trustee [i.e. debtor-in-possession] may not *assume or assign* any executory contract or unexpired lease of the debtor… 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."

11 U.S.C. § 365(c)(1)(A) (emphasis added); *see also, In re W. Elecs. Inc.*, 852 F.2d 79 (3d Cir. 1998) (interpreting statue's use of "trustee" to mean "debtor-in-possession may not assume or assign"). In other words, subsection (c) limits the debtor-in-possession's ability to assume or assign the contract when other applicable non-bankruptcy law excuses the non-debtor from performing its contractual obligations for a third party. 11 U.S.C. § 365(c).

Traditionally, this limitation was interpreted to apply to "personal service contracts", where the services required by the contract were so specifically tailored to a certain party that assigning the contract to another party would materially undermine the purpose of the contract. *E.g., In re Raby*, 139 B.R. 833, 835–36 (Bankr. N.D. Ohio 1991); *see also Taylor v. Palmer*, 31 Cal. 240, 248 (1866) ("All painters do not paint portraits like Sir Joshua Reynolds, nor . . . do all writers write dramas like Shakespeare . . . Rare genius and extraordinary skill are not transferrable, and contracts for their employment are therefore personal, and cannot be assigned."). However today, courts interpret section 365(c) to apply to other types of contracts where the identity of the licensee is material, such as software licensing agreements. *E.g., RCI Tech Corp. v. Sunterra Corp.* (*In re Sunterra Corp.*), 361 F.3d 257 (4th Cir. 2004).

The United States Circuit Courts are split as to how section 365(c) should be applied to the assumption and assignment of software license agreements. A majority of Circuits have adopted a "hypothetical test" whereby debtors-in-possession are prohibited from assuming an executory contract if non-bankruptcy law precluded them from assigning that contract to a third party. *In re Sunterra Corp.*, 361 F.3d at 257; *In re O'Connor*, 258 F.3d 392 (5th Cir. 2001); *In re Catapult Entm't, Inc.*, 165 F.3d 747 (9th Cir. 1999); *In re W. Elecs. Inc.*, 852 F.2d at 79; *but see Bonneville Power Administration v. Mirant Corp.* (*In re Mirant Corp.*), 440 F.3d 238 (5th Cir. 2006) (adopting actual test for application of § 365(e)(2)). Conversely, the First Circuit adopted the "actual test", whereby a debtor-in-possession is permitted to assume the executory contract unless they *actually intended* to assign the contract to a third party. *See Summit Inv. & Dev. Corp. v. Lerouox*, 69 F.3d 608 (1st Cir. 1995). Because of the disagreement among the Circuits as to how section 365(c) should be applied, a statutory interpretation analysis is required to determine which test best reflects the meaning of section 365(c).

The actual test best comports with the statutory language, the legislative intent, and the policy goals underlying section 365. Pursuant to judicially recognized procedures of statutory interpretation, *see POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102 (2014), the analysis will begin by interpreting the literal language of § 365(c) to show that its meaning is ambiguous, and that consultation of the surrounding text disfavors the hypothetical test. Then, investigation into the legislative history of section 365(c) will elucidate that Congress intended this statute to provide for assumption of executory contracts absent intent to assign. Finally, the actual test best effectuates the policy goals underlying section 365: providing the debtor a "fresh start" with which to forge a path to success under a new financial structure. *BFP v. Resolution Trust Corp.*, 511 U.S.

531 (1994). Each of these analyses confirms the actual test to be the most preferable manifestation of the statute's meaning and purpose, while still providing sufficient protections to non-debtors.

**A. Because a literal interpretation of section 365(c) may corroborate both the hypothetical and the actual tests, subsection (c) must be read in the context of the whole section. Reading subsection (c) in this context favors adoption of the actual test.**

Section 365(c) is ambiguous, and therefore, the subsection must be read in the context of the full section to determine its true meaning. Statutory interpretation must properly start with a determination of the plain meaning of the statutory language. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). Where the plain meaning yields a clear answer, the analysis must stop there. *Id.* However, where the plain language is subject to two or more distinct, logical interpretations–that is, when the plain meaning is ambiguous–then the Court must "read the words 'in their context and with a view to their place in the overall statutory scheme.'" *King v. Burwell*, 135 S. Ct. 2480, 2483 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). Section 365(c) is ambiguous because the plain meaning could support either the hypothetical test or the actual test.

***i. Section 365(c) is ambiguous, because two distinct interpretations of section 365(c)'s plain meaning favor adoption of the hypothetical test and the actual test respectively.***

The statute is ambiguous because two interpretations have arisen in the circuit courts: the hypothetical test due to the use of the "disjunctive or" in the terms "[cannot] assume or assign", and the actual test, which posits that when no intent to assign exists, there is no "applicable law" imposed that bars assignment, so therefore, an intent to assign is required to trigger section 365(c).

Adopters of the hypothetical test were convinced that the statute's use of the disjunctive "or" must be interpreted as mandating that the debtor-in-possession can "neither assume nor assign" an executory contract if non-bankruptcy law excuses the non-debtor from rendering performance to a third party. *In re Sunterra Corp.*, 361 F.3d at 260. Specifically, the statute reads:

> the trustee may *not assume or assign* any executory contract or unexpired lease of the debtor… 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.

11. U.S.C. § 365(c)(1)(A) (emphasis added). Thus, a majority of courts have paid substantial deference to the "or," interpreting it to mean that the debtor-in-possession cannot "assume or assign" the contract, rather than cannot "assume and assign". *See In re Sunterra Corp.*, 361 F.3d at 265. While the hypothetical test results from a straightforward application of the phrase "assume or assign", the actual test follows from an analysis of the phrase "applicable law excuses."

An alternative interpretation could reasonably suggest that a showing of the debtor-in-possession's actual intent to assign the contract is required to trigger section 365(c), because absent that intent, there is no "applicable law" that "excuses" the non-debtor from rendering performance. Under United States Supreme Court precedent, no assignment occurs during the solvent debtor's metamorphosis into an insolvent debtor-in-possession; "debtors" and "debtors-in-possession" are considered to be the same legal entity having the same right to the contract as existed prior to insolvency. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). Thus section 365(c) is only triggered by assignment from the debtor-in-possession to a third party.

Further, the statute does not bar "assum[ption] or assign[ment]" unless "applicable law excuses [the non-debtor] from accepting performance from or rendering performance to… [a third party]." 11 U.S.C. § 365(c)(1)(A). Importantly, the statute is not triggered until the non-debtor becomes legally "excused" from performance. *Id.* For example, in *Intuit Pasteur v. Cambridge Biotech Corp.*, the parties negotiated a non-exclusive cross-license patent agreement, whereby the debtor was permitted to share the license with its affiliates. 104 F.3d 489 (1st Cir. 1997) (relying on actual test). When a substantial portion of the debtor's stock was bought by a competitor, the non-debtor challenged assumption, arguing that applicable patent law excused them from

rendering performance. *Id.* However, the Court of Appeals for the First Circuit pointed out that the non-exclusive cross-license "contain[ed] no provision either limiting or terminating [debtor's] rights in the event its stock ownership were to change hands." *Id.* at 494. Therefore, the court reasoned, there was no applicable law excusing them from rendering performance to the reorganized debtor-in-possession, and thus assumption was proper. *Id.* at 495.

Under the First Circuit's reasoning, it follows that if the debtor-in-possession has no actual intent to assign the contract, but instead plans to abide by the terms of the contract, then no violation of "applicable law" has occurred. *Id.* Thus the non-debtor is not "excused" from rendering performance, and the provision barring assumption in section 365(c) is not triggered. *Id.* Conversely, a showing of intent to assign in violation of the applicable intellectual property law *would* excuse the non-debtor from performance and would therefore trigger section 365(c). Thus, it is reasonable to conclude that section 365(c) requires a showing of actual intent to violate applicable law (assigning the contract).

Because section 365(c) could be interpreted to either 1) prohibit "assumption or assignment" under the hypothetical test, or 2) require actual intent to trigger the prohibition on assumption or assignment, its plain language is ambiguous. Therefore, the judicial procedure of statutory interpretation requires the statutory language to be read in the context of the whole section to determine section 365(c)'s true meaning.

### *ii. A novel approach articulated in the case of In re Footstar offers another plausible plain meaning interpretation of section 365(c).*

Section 365(c)'s use of the term "trustee" could mean that the statutory limitation does not even apply to debtors-in-possession, but rather, only to third-party trustees. Most courts reflexively applied section 365(c) to preventing *debtors-in-possession* from "assuming or assigning" executory contracts, despite the fact that the statutory language actually reads "the *trustee* may not

assume or assign." *See, e.g.*, *In re W. Elecs. Inc.*, 852 F.2d at 79; *In re Catapult Entm't, Inc.*, 165 F.3d at 750 ("[I]t is well-established that § 365(c)'s use of the term 'trustee' includes Chapter 11 debtors in possession."). This is because of the oft-repeated principle among bankruptcy courts that "[t]he terms 'trustee' and 'debtor-in-possession,' as used in the Bankruptcy Code, are… essentially interchangeable." *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery (In re Cybergenics Corp.)*, 226 F.3d 237, 243 (3d Cir. 2000). However, the United States Bankruptcy Court for the Southern District of New York pointed out in *In re Foodstar, Inc.*, that "when the Bankruptcy Code refers to both 'trustee' and 'debtor' (or 'debtor in possession') in the same statutory provisions, the two terms are invariably invested with quite different meanings." 323 B.R. 566, 571 (Bankr. S.D.N.Y. 2005). Therefore, the terms "trustee" and "debtor-in-possession" must be interpreted differently to give section 365(c) its proper meaning.

The statutory language of section 365 subsections (c), (e), and (f) employs the terms "debtor-in-possession" and "trustee" carefully. *Id.* When a debtor files for reorganization under Chapter 11, their assets and property rights are succeeded by a third-party trustee. *Id.* When this occurs, "the debtor is no longer a debtor 'in possession.'" *Id.* Rather, the debtor only becomes a debtor-in-possession when they regain control of the company from the trustee. *Id.* Therefore, the trustee and the debtor-in-possession are distinct entities. *Id.* citing *Honigman v. Comerica Bank (In re Van Dresser Corp.)*, 128 F.3d 945, 947 (6th Cir. 1997) ("A debtor's appointed trustee has the *exclusive* right to assert the debtor's claim.") (emphasis original). Because these entities are functionally different in regards to their relation to the non-debtor, interpreting them as distinct identities would properly produce a new interpretation of section 365(c).

Treating the trustee and debtor-in-possession as distinct entities, one could interpret section 365(c) to read that "*only* the trustee may not assume or assign" but the debtor-in-possession may.

This interpretation would follow from a legislative goal to protect the non-debtor from being forced to business with a party whom they did not contract with, as would be the case "were [the non-debtor] forced to accept performance—under a 'nonassignable' executory contract—from the chapter 11 *trustee* of an individual (i.e., non-corporate) chapter 11 debtor, rather than from the debtor himself." *Summit Inv. & Dev. Corp.*, 69 F.3d at 612 (emphasis original). Therefore, it is plausible to construe section 365(c) as applying only to trustees as opposed to debtors-in-possession.

The soundness of the *Footstar* court's reasoning warrants further skepticism as to the plain-meaning interpretation of section 365(c) advanced by the Respondent. (R. at 8.) If "trustee" is to be interpreted as wholly distinct from the "debtor-in-possession," then the hypothetical test utterly fails, because nothing prevents the debtor-in-possession from "assuming or assigning." Therefore, the *Footstar* court's plausible interpretation of section 365(c) heightens the ambiguity of the statute's plain language and increases the need to consult other canons of construction to interpret section 365(c), namely, the canon against surplusage. *In re Lucarelli*, 517 B.R. 42, 49 (Bankr. D. Conn. 2014) ("Only if a court finds a statute ambiguous should it then resort first to canons of statutory construction and, if the meaning remains ambiguous, then to legislative history to resolve said ambiguity.").

***iii. Because the hypothetical test violates the rule against surplusage, the plain meaning alone is insufficient to interpret section 365(c), and the court must consult the statute's legislative history.***

Because the hypothetical test would render the term "or assign" mere surplusage, it stands to reason that the legislature must not have drafted the statute with the hypothetical test in mind, because otherwise there would be no reason to include "or assign." Courts generally presume that the legislature, when drafting a statute, would not deign to include language that is redundant or

superfluous. *Arlington Central School Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 299 n.1 (2006). Thus, in interpreting the plain language of a statute, the Court must "give effect, if possible, to every clause and word of a quote" to avoid rendering the statutory language "insignificant, if not wholly superfluous." *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal citations and quotations omitted).

The hypothetical test violates the canon against surplusage when subsection (c) is interpreted in light of the greater context of section 365, as is required to interpret an ambiguous statute. Under section 365(f), an executory contract cannot be assigned unless it is first assumed. 11 U.S.C. § 365(f). Therefore, if the function of subsection (c) was really to prohibit the debtor-in-possession from "assum[ing] or assign[ing]" the contract–as posited by advocates of the hypothetical test–then there would be no need to include "or assign", because assignment is impossible without a prior assumption. *Id.* Congress could have left out "or assign," and instead drafted the statute as "may not assume." This draft would have the same legal effect as the hypothetical test, yet Congress chose not to write it that way. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.").Therefore, pursuant to the canon against surplusage, the hypothetical test must be rejected as an incomplete interpretation of the legislative language.

Even if the plain language and the framework of section 365 do not present a sufficiently clear interpretation of section 365(c), judicially recognized methods of statutory interpretation suggest consulting the statute's legislative history to elucidate the controlling law. *In re Lucarelli*, 517 B.R. at 49.

**B. The legislative history preceding the passage of section 365 indicates that Congress intended for debtors-in-possession to have the same assumption rights as solvent debtors.**

Documents from the legislative sessions from 1978 to 1984 reveal that Congress rejected the hypothetical test, and only intended to prevent debtors-in-possession from assigning executory contracts. Section 365 was passed as part of the Bankruptcy Reform Act of 1978. Pub. L. No. 95-598, § 365(c), 92 Stat. 2549, 2575 (1978). Initially, the Act read that the trustee could not "assume or assign an executory contract" if "applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to *the trustee*…." *Id.* (emphasis added). Essentially, this iteration of the Act was focused on preventing harm to the non-debtor that would arise from an unlawful continuation of the contractual obligations with the debtor-in-possession; it did not include any language regarding the potential dangers of assignment to third parties. *Summit Inv. & Dev. Corp.*, 69 F.3d at 612. Thus, this early language suggests that Congress was not concerned with the *hypothetical* consequences of assignment to a third party, but the *actual* consequences of the debtor-in-possession's assumption of the executory contract. *Id.* at 613. As long as the non-debtor received the full benefit of their bargain, regardless of whether the debtor-in-possession *could* assign the contract, Congress was happy with the result. S. Rep No. 989, 95th Cong., 2d Sess. 59 (1978) ("[T]he court will have to ensure that the trustee's performance under the contract . . . gives the other contracting party the full benefit of his bargain.").

As indicated by the subsequent 1984 amendment, Congress recognized that the non-debtor's receipt of full benefits was contingent on the debtor-in-possession choosing not to assign the contract. This amendment created the current language sourcing the non-debtor's power to deny assumption when "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*." Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 362, 98 Stat. 333, 362 (1984) (emphasis added). In accordance with this change of focus towards discouraging assignment, Congress intended to

> make [ ] clear that the prohibition against the 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.

*Summit Inv. & Dev. Corp.*, 69 F.3d at 613 (quoting H.R. Rep. No. 1195, 96th Cong., 2d Sess. § 27(b) (1980)) (emphasis added). Thus, Congress was not concerned with possibility that the debtor-in-possession *might* assign the contract to a third-party, but rather, Congress was concerned with whether the bargain was functionally the same: the debtor-in-possession assuming the prior contract with no intention of assigning it away. Therefore, the legislative history shows that the hypothetical test is not based on the rationale of Congress because section 365(c) was not to apply to bargains that stayed the same. Further, Congress would prefer the actual test because its primary metric is whether the bargain is actually at risk of changing via an assignment.

### C. Adopting the hypothetical test would undermine the debtor's ability to remain operational, thus running contrary to the goals of section 365 and Chapter 11 reorganization.

The actual test comports with the primary purpose of bankruptcy law and should therefore be favored over a hypothetical test which is "highly technical… [and] furthers no bankruptcy goal whatsoever." *Texaco Inc. v. La. Land & Exploration Co.*, 136 B.R. 658, 671 (Bankr. M.D. La. 1992). The purpose of accepting and rejecting certain executory contracts under § 365 is "to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." *Bildisco & Bildisco*, 465 U.S. at 528. Therefore, precluding debtors-in-possession from assuming a pre-existing executory contract, even when they have no actual intention to assign it to a third-party or harm the non-debtor in any way, runs afoul of the goals of

this section. Further, executory contracts can often be crucial components of the existing financial structure (as is the case here). Due to the importance of these contracts, "prevent[ing] the estate from assuming an executory contract which potentially is its most valuable asset"–as Respondent would have this Court do–cuts against the clear purpose of both section 365 and Chapter 11 Reorganization. *In re Cardinal Industries, Inc.*, 116 B.R. 964, 981 (Bankr. S.D. Ohio 1990). The only rationale for such a counter-productive interpretation of section 365(c) is to protect non-debtors. *See In re CFLC, Inc.*, 89 F.3d 673 (9th Cir. 1996) (adopting hypothetical test because debtor-in-possession was entirely different entity than non-debtor had contracted with). However, non-debtors are still protected under the actual test, which only heightens the impetus to adopt it.

The actual test maintains a sufficient level of protection for non-debtors while also allowing non-debtors to enjoy the benefits of the original contract. As discussed in part "b" of this brief, Congress wanted to ensure that, in passing section 365(c), the non-debtor would still enjoy the full benefits of their bargain. *Summit Inv. & Dev. Corp.*, 69 F.3d at 613. Under the actual test, there is no imposition on the non-debtor's enjoyment of the bargain, because the non-debtor is still guaranteed the same rights and obligations as existed under the original contract. *Intuit Pasteur*, 104 F.3d at 494 ("Pasteur was free to negotiate restriction on CBC's continuing rights under the cross-licenses based on changes in its stock ownership or corporate control. Nevertheless, these cross-license contain no [such] provision."). Since the actual test requires the court to be "sensitive to the rights of the nondebtor party," the only unforeseeable harm that could befall a non-debtor is a potential violation of an exclusive license as a result of assignment to a third-party by the debtor-in-possession. *Bildisco & Bildisco*, 465 U.S. at 528. However, if no actual intent to make such an assignment exists, then there is no reason to believe the non-debtor should ever experience harm as a result of such an assignment.

In this case, the Respondent-creditor, Under My Thumb, urges that it will be harmed if the insolvent Tumbling Dice is acquired by an adverse party, (R. at 10), however, the possibility that a third party would acquire Tumbling Dice is too attenuated to warrant attacking the rights of all future debtors-in-possession. Rather, the Petitioner urges this court to adopt the actual test which 1) furthers the goal of bankruptcy law by protecting debtors, 2) allows non-debtors to continue to enjoy the full benefit of the bargain, and 3) accounts for the fact that no harm will befall the non-debtor absent the actual intent of the debtor-in-possession to assign the contract to a third-party.

## II. Under 11 U.S.C. § 1129(a)(10), the requirement that a plan must be accepted by at least one impaired class is correctly interpreted on a per plan basis.

Because at least one impaired class of creditors of the Operating Debtors had voted to accept it and section 1129(a)(10) applies on a per plan basis, the Chapter 11 Plan was confirmable in this case. Chapter 11 of the Bankruptcy Code requires that a plan arrange similar claims against a debtor into classes. 11 U.S.C. §§ 1122–1123. Only classes of claims that are impaired under the plan may vote to accept or reject a Chapter 11 plan, because unimpaired classes are already deemed to have accepted the plan. 11 U.S.C. § 1126. A class of claims is considered to be impaired if the plan alters "the legal, equitable, or contractual rights [of the] claim[s]." 11 U.S.C. § 1124.

To be confirmed, a Chapter 11 plan must either: (A) be approved by "two-thirds in amount and more than one-half in number" of each impaired class, 11 U.S.C. §§ 1126(c), 1129(a)(8); or (B) have at least one non-insider, impaired class approve the plan, and then successfully meet the "cramdown" requirements for non-consensual plan confirmation. 11 U.S.C. §§ 1129(a)(10), 1129(b). Therefore, when the plan has been rejected by one or more impaired classes section 1129(a)(10) acts as the gatekeeper to whether debtors may attempt to cramdown a plan. The question presented in this case is whether section 1129(a)(10) requires acceptance from at least one impaired class of claims of each debtor (a per debtor approach) or, alternatively, acceptance

from one impaired class of claims of any one debtor (a per plan approach). A per plan approach is the correct application because the statute only requires the acceptance of a single impaired class of claims.

**A. The plain language of section 1129(a)(10) supports the per plan approach because section 1129(a)(10) only requires a single class of impaired claims to vote in favor of the plan.**

***i. The language of section 1129(a)(10) is plain and unambiguous.***

The analysis of section 1129(a)(10) begins with the plain language of the Bankruptcy Code. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). Courts are to presume "that Congress says what means and means in a statute what it says there." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13 (2000) (citation and internal quotations omitted). Where the language of the statute is plain, courts must simply "enforce it according to its terms." *Id*. (citation omitted). Moreover, even though a statute may be interpreted in more than one way, this does not make it ambiguous. *Credit Agricole Corporate & Inv. Bank v. American Home Mortgage Holdings, Inc. (In re American Home Mortgage Holdings, Inc.)*, 637 F.3d 246, 256 (3d Cir. 2011) ("The fact that the parties proffer different interpretations of the statutory language does not make the language ambiguous. It just makes the court's role difficult in deciding which interpretation is persuasive.").

In order for a plan to be confirmed, section 1129(a)(10) requires: "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." 11 U.S.C. § 1129(a)(10). This language is clear and unambiguous: "*at least one class* of [impaired] claims" must accept the plan. *Id*. (emphasis added). Taken plainly, the phrase "at least one" can only mean what it says: zero accepting impaired classes would be too few, and two or more would go beyond the listed requirement. For the Respondent to request this Court to change the required number of

accepting classes or to add a per debtor requirement to section 1129(a)(10) is to impermissibly ask it to rewrite the Code. *Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004); *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017) (noting that the "proper role of the judiciary [is] to apply, not amend, the work of the People's representatives."). As it stands, the plain language of section 1129(a)(10) is unambiguous and should be enforced as such.

Based upon this plain language, the requirement was satisfied by Tumbling Dice, Inc.'s and Operating Debtors' classes of impaired creditors, which voted for the plan. (R. at 8.) As such, Under My Thumb's argument that the Plan was not confirmable because no impaired class of Development voted to accept it, fails.

#### *ii. The Bankruptcy Code's rules of statutory construction do not change the outcome of Section 1129(a)(10).*

The Bankruptcy Code's rules of statutory construction provide that "the singular includes the plural." 11 U.S.C. § 102(7). Although at least one court has used this rule of statutory construction to argue that this changes the meaning of the statute in cases involving multiple debtors, it does no such thing. *See In re Tribune Co.*, 464 B.R. 126, 182 (Bankr. D. Del. 2011). A plural reading of section 1129(a)(10) would contemplate "classes" of claims and "plans," but the critical language of "*at least one* [of the] class[es] of claims" would remain unchanged. *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props. Inc. (In re Transwest Resort Props. Inc.)*, 881 F.3d 724, 729–30 (9th Cir. 2018). Proponents of a per debtor approach therefore overemphasize the difference that pluralization makes in interpreting this requirement, even though it does not ultimately change the outcome.

### B. The statutory context of 11 U.S.C. § 1129(a)(10) supports a per plan approach.

A Court must also evaluate a statute's plain language in light of its "context and with a view to their place in the overall statutory scheme." *Burwell*, 135 S. Ct. at 2489 (citing *FDA v.*

*Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). Section 1129(a) contains a list of sixteen requirements that must be met before a court can confirm a plan. 11 U.S.C. § 1129(a). As a whole, these provisions attempt to strike a balance between the rights of debtors and creditors, but no one provision bears the weight of doing this alone. *Compare* 11 U.S.C. § 1129(a)(7) (requiring that a plan be in the best interest of the creditors) *with* 11 U.S.C. § 1129(a)(11) (protecting the debtor from unplanned liquidation after confirmation of the plan); *see also* 11 U.S.C. § 1129(a)(3) (requiring that the plan be proposed in good faith). Additionally, either a debtor *or* a creditor can introduce a Chapter 11 plan to be voted upon; therefore, it will not *always* be a debtor that is trying to affect the rights of a creditor by employing section 1129(a)(10). 11 U.S.C. § 1121(c) (listing the requirements for allowing any party in interest—including both the debtor and the creditor(s)—to file a Chapter 11 plan and thus be a "plan proponent").

Contrary to the Thirteenth Circuit's opinion, section 1129(a)(10) is not a "powerful and important safeguard for impaired, objecting creditors" (R. at 16.) Rather, section 1129(a)(10) is simply one of several confirmation requirements that provides a bare minimum standard for plan proponents to attain. *See* 11 U.S.C. § 1129(a); *In re 431 W. Ponce De Leon, LLC*, 515 B.R. 660, 669 (Bankr. N.D. Ga. 2014). In particular, section 1129(a)(10) serves as a threshold for determining whether debtors can access the Code's cramdown provisions—nothing more and nothing less.[1] Congress "does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Associations*, 531 U.S. 457, 468 (2001). That is, the Court should be hard

[1] Notably, this harmonizes with the fact that several courts have classified section 1129(a)(10) as a mere "technical requirement," and have noted that it does not contain any substantive rights for creditors. *In re Rhead*, 179 B.R. 169, 177 (Bankr. D. Ariz. 1995); *accord In re 7th Street & Beardsley Partnership*, 181 B.R. 426, 431 (Bankr. D. Ariz. 1994); *In re Bataa/Kierland, LLC*, 476 B.R. 558, 579 (Bankr. D. Ariz. 2012); *cf. In re Greystone III Joint Venture*, 102 B.R. 560, 566 (Bankr. W.D. Tex. 1989) (discussing creditor classification and good faith and stating that "the ultimate confrontation [between debtors and creditors] will take place over whether the plan can satisfy the stringent requirements of cram-down imposed by Section 1129(b), not whether it can satisfy the hyper-technical (and largely impractical) requirements of Section 1129(a)(10)"), *aff'd sub nom. Matter of Greystone III Joint Venture*, 127 B.R. 138 (W.D. Tex. 1990), *rev'd*, 995 F.2d 1274 (5th Cir. 1991), *on reh'g* (Feb. 27, 1992).

pressed to find cryptic, substantive creditor rights in a technical—and minimal—Code requirement. *See In re Combustion Eng'g, Inc.*, 391 F.3d 190, 235–36 (3d Cir. 2004), *as amended* (Feb. 23, 2005) (noting that equitable powers of the courts under the Bankruptcy Code do not "give the court the power to create substantive rights that would otherwise be unavailable under the Code.") (citation omitted). Here, Under My Thumb argues for a substantive right that does not exist in order to hamstring acceptance of the plan and bring about a result that would only be favorable to them.

Moreover, within its statutory context section 1129(a)(10) serves as a gatekeeper to the cramdown provisions, so that where plan proponents meet this requirement, they can access nonconsensual confirmation of a plan under section 1129(b). The protections for creditors embodied in section 1129(b)—the cramdown provision—apply only to impaired classes that have rejected the plan. Further, section 1129(b) preserves and protects the rights of dissenting impaired creditors by ensuring that there is no unfair discrimination and that the plan is fair and equitable to them. 11 U.S.C. § 1129(b); H.R. Rep. 95-595, 5 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6543. However, if a plan meets these requirements, a court must confirm the plan, "notwithstanding the failure of an impaired class to accept the plan." H.R. Rep. 95-595, 5 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6543. Accordingly, if section 1129(a)(10) was an insurmountable standard, as the Respondent argues, the cramdown provisions in section 1129(b) would be largely inaccessible and potentially ineffectual.

The additional requirements of section 1129(b) ensure that courts look deeper into the plan to protect nonconsenting impaired classes of claims. Yet, as noted, if these requirements are met the Code still allows the plan to be confirmed. Satisfying this requirement by having at least one impaired class of claims vote in favor of the plan is not "gloss[ing] over" the requirement (R. at

21.); rather, it is fully meeting that requirement and fulfilling the intent of the Code. Neither are the "statutory voting rights of objecting impaired creditors . . . abrogated," as the majority laments. *Id.* Under this scheme, creditor rights are exactly where they are supposed to be—in balance with debtors' rights and acquiescent to the reorganization process.

### C. A majority of case law correctly interprets Section 1129 and supports a per plan approach; opposing case law inappropriately adds requirements to the statute.

In *In re Tribune Co.*, the United States Bankruptcy Court of the District of Delaware held that Section 1129(a)(10), "absent substantive consolidation or consent, must be satisfied by each debtor in a joint plan." *In re Tribune Co.*, 464 B.R. at 183. This assertion is unsupportable under section 1129(a), as the statute contains no such requirement. *See* 11 U.S.C. § 1129(a)(10). Again, the clear, unambiguous language of the statute simply requires "at least one class of [impaired] claims"—it does not require "at least one class of [impaired] claims *of each debtor*"—to vote in favor of the plan. *In re Transwest Resort Props. Inc.*, 881 F.3d at 729. If Congress had intended to include the phrase "of each debtor" in the statute, it presumably would have done so, but it did not. *Id.* Thus, courts cannot write this language into the statute.

The relatively sparse case law that supports a per debtor approach does not go much further in its reasoning. *In re Tribune Co.*, 464 B.R. at 126; *In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293 (Bankr. D. Del. 2011) (accepting a per debtor approach in dicta during a motion to dismiss ruling and citing *Tribune* for support); *In re Woodbridge Grp. of Cos., LLC*, 592 B.R. 761 (Bankr. D. Del. 2018) (accepting a per debtor approach).[2] Each of these cases shows concern for the number of debtors at play and whether those debtors entered into a joint plan or were substantively consolidated. Trying to differentiate between joint plans and substantively

[2] Notably, all three of the main cases that support the per debtor approach came from the United States Bankruptcy Court of the District of Delaware. In fact, *Woodbridge* was decided seven years later by Bankruptcy Judge Kevin Carey—the exact Judge who handed down the original per debtor ruling in *In re Tribune Co.*

consolidated plans is writing in an additional provision to the statute that is not there. If Congress wants this differentiation, this is up to Congress to decide. The cases that have decided this go too far. *See In re Tribune Co.*, 464 B.R. at 126.

**D. Because both the policy and the legislative history behind section 1129(a)(10) support a per plan approach, a per plan approach is preferable to a per debtor approach.**

After analyzing the plain meaning and statutory context of a statute, courts are also encouraged to "look to the provisions of the whole law, and to its object and policy." *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) (quotations omitted).

***i. The per plan approach supports the Bankruptcy Code's policy objectives of balance between debtors and creditors and economic efficiency through business reorganization.***

**1. The Bankruptcy Code favors balancing and protecting the interests of both debtors and creditors.**

As noted above, the Code's provisions seek to balance the rights of the plan's debtors and creditors, while encouraging reorganization of a business. 1978 amendments to the Bankruptcy Code "modernize[d] bankruptcy law in its interaction with commercial financing, in the areas of *preferences and protection of both the debtor and secured creditors* during a bankruptcy case." H.R. Rep. 95-595, 5 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 5966 (emphasis added). Although adequately protecting the rights of both the debtor and creditors can be a difficult task, courts should look maintain this balance when applying the Code.

Because the Code otherwise requires that all impaired classes accept the plan for it to be confirmed, section 1129(a)(10) only becomes relevant when a debtor is invoking the cramdown provisions of section 1129(b). *See* 11 U.S.C. §§ 1129(a)(8), 1126(c). If a plan has absolutely no support (i.e., there is not "at least one" impaired class of claims that accepts it), then a debtor is disallowed from pushing this plan forward under Section 1129(b). *In re Barrington Oaks General Partnership*, 15 B.R. 952, 970 (Bankr. D. Utah 1981); *In re Polytherm Indus., Inc.*, 33 B.R. 823,

838 (W.D. Wisc. 1983) (failing to confirm a plan where no impaired class affirmatively accepted the plan); s*ee also In re Windsor on the River Assocs., Ltd.*, 7 F.3d 127, 131 (8th Cir. 1993) ("The purpose of [Section 1129(a)(10)] is to provide some indicia of support by affected creditors and prevent confirmation where such support is lacking.") (citation omitted).

Effectively, failing to meet section 1129(a)(10) indicates to the Court that the debtor has failed to actively convince *any* impaired creditors that this plan is acceptable, and therefore the debtor should not be allowed to assert its plan over creditors, *even if* it were able to establish that the plan "does not discriminate unfairly" and "is fair and equitable." 11 U.S.C. § 1129(b); *see In re Polytherm Indus., Inc.*, 33 B.R. at 835 ("[I]f no class of creditors agrees to the plan, it would not be equitable to impose acceptance of the plan upon the creditors by enforcing the debtor's interest in confirmation of the plan through the cramdown authority. The point is, if no impaired class accepts the plan, the debtor has failed to negotiate effectively with its creditors in devising a reorganization plan."). The requirement of "at least one" accepting impaired class, and the application of section 1129(a)(10) on a per plan basis, strikes the desired balance between creditors and debtors rights by making certain that there is some, minimal indicia of support for the plan. *See In re Windsor on the River Assocs., Ltd.*, 7 F.3d at 131.

In this case, writing an overly broad and explicit dissenting creditor-protection mechanism into Section 1129(a)(10)—through using a per debtor approach—would substantively change its articulated requirement. *See In re SGPA, Inc.*, 2001 WL 34750646 (Bankr. M.D. Pa. Sept. 28, 2001) ("An overly broad reading of [section 1129(a)(10)]—arguably barred and certainly not supported by its plain language—would inappropriately complicate multi-debtor cases by exalting form over substance and would, in some cases, potentially make a negotiated plan unworkable.").

**2. Reorganization under Chapter 11 is meant to help troubled companies, preserve jobs, and continue the production of goods and services; employing the "per plan" approach supports these goals.**

The primary goal of Chapter 11 reorganization is to promote the restructuring of a troubled company. *Bildisco & Bildisco,* 465 U.S. at 528. In Chapter 11, specifically, Congress recognized that the continuation of a debtor's business as a viable entity benefits the national economy through the preservation of jobs, the ability to pay its creditors and produce a return for its stockholders, and the continued production of goods and services. H.R. Rep. 95-595, 5 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6179; *see also Bildisco & Bildisco,* 465 U.S. at 528 ("The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources.").

A per debtor approach overinflates the power of a dissenting impaired class of claims and allows that class of claims to derail an entire plan for self-serving purposes. No interpretation of section 1129(a)(10) supports the high level of veto power that Respondents are demanding through a per debtor approach. This inordinate amount of power for one creditor would take a plan that "enjoyed near universal support from all creditor groups" (R. at 8.) and shatter it. Not only does this grate against the very purpose of Chapter 11 as a means to encourage reorganization of a business, but it also unjustly empowers a singular creditor to hijack this plan, to the detriment of all other creditors in this case. When the court considers creditor rights, it is appropriate and just to remember that Under My Thumb is only one of the creditors in the current case, and their vandalization of section 1129(a)(10) puts the futures of all other creditors in this case at risk.

***ii. The legislative history of Section 1129(a)(10), which shows a concern for the use of cramdown where there were no accepting impaired classes of claims, supports a "per plan" approach.***

Prior to the amendment of section 1129(a)(10) there was an ongoing debate about whether deemed acceptance under sections 1126(f) and 1129(a)(8) (under which unimpaired classes of

claims are presumed to have accepted the plan) would be sufficient to satisfy section 1129(a)(10). *See In re Bel Air Associates, Ltd.*, 4 B.R. 168, 176 (Bankr. W.D. Okla. 1980); *In re Marston Enterprises, Inc., Spring Run Apartments*, 13 B.R. 514, 519–21 (Bankr. E.D.N.Y. 1981); *In re Landau Boat Company*, 13 B.R. 788, 790 (Bankr. W.D. Mo. 1981). When the language of Section 1129(a)(10) was subsequently updated to its current form, the accompanying Senate Report provided the clarification that: "this amendment makes clear the intent of section 1129(a)(10) *that one 'real' class of creditors* must vote for the plan of reorganization. A class that is deemed to have accepted the plan because it is unimpaired or acceptance of a small class of claims permitted to be created for administrative convenience will not satisfy this requirement." *In re Barrington*, 15 B.R. at 970 n.40 (citing Sen. Rep. No. 96-305, 96th Cong., 1st Sess. 15 (1979)) (emphasis added). Again, the plain language of the legislative history of Section 1129(a)(10) supports a per plan approach.

## CONCLUSION

As this Court's precedent will dictate the rights of all future debtors, it is crucial that this Court reverse the Thirteenth Circuit. First, holding for the Petitioner strikes the ideal balance between protecting debtors' business operations, while simultaneously ensuring non-debtors receive the full benefit of their bargain. Fortunately, the actual test strikes such a balance, and ultimately furthers the legislative policies underpinning section 365. First, the plain meaning of section 365(c)read in light of its surrounding statutory context, requires actual intent of the debtor-in possession to assign the contract in order to trigger the prohibition articulated in the statute. This interpretation is even more preferable in light of the fact that the hypothetical test reduces the statutory language to mere surplusage. Further, the actual test reflects congressional intent: maintaining the parties' original bargain as opposed to sacrificing these rights for the mere risk

that they may be assigned in the future. Finally, the actual test favors the policy objectives of Chapter 11 by permitting the insolvent debtor to continue business operations. Indeed, the actual test not only benefits vulnerable debtors-in-possession, but also reciprocates those benefits for the non-debtor and reduces the non-debtor's risk of harm by preventing assumption by a mutinous debtor-in-possession. Ultimately, the Court must not remove the lifeboats from a water-logged ship; this Court must act as a life preserve and allow debtors-in-possession the full contractual rights they were entitled to while solvent.

Second, based upon the plain language of section 1129(a)(10)—which simply requires at least one class of impaired creditors under the plan to accept the plan—the requirement was satisfied by Tumbling Dice Inc.'s and Operating Debtors' classes of impaired creditors which voted for the plan. (R. at 8.) As such, the order of the United States Court of Appeals for the Thirteenth Circuit was incorrect as a matter of law and should be reversed.

## APPENDIX A

**11 U.S.C. § 102. Rules of construction.**

In this title–

**(1)** "after notice and a hearing", or a similar phrase–

**(A)** means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but

**(B)** authorizes an act without an actual hearing if such notice is given properly and if–

**(i)** such a hearing is not requested timely by a party in interest; or

**(ii)** there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act;

**(2)** "claim against the debtor" includes claim against property of the debtor;

**(3)** "includes" and "including" are not limiting;

**(4)** "may not" is prohibitive, and not permissive;

**(5)** "or" is not exclusive;

**(6)** "order for relief" means entry of an order for relief;

**(7)** the singular includes the plural;

**(8)** a definition, contained in a section of this title that refers to another section of this title, does not, for the purpose of such reference, affect the meaning of a term used in such other section; and

**(9)** "United States trustee" includes a designee of the United States trustee.

## APPENDIX B

**11 U.S.C. § 365. 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)(1)** If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee–

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

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

> **(A)** the insolvency or financial condition of the debtor at any time before the closing of the case;
>
> **(B)** the commencement of a case under this title;
>
> **(C)** the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or
>
> **(D)** the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

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

> **(A)** of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;
>
> **(B)** that any percentage rent due under such lease will not decline substantially;
>
> **(C)** that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity

provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

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

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

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

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

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

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

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

**(d)(1)** In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**(i)** if the rejection amounts to such a breach as would entitle the timeshare interest purchaser to treat the timeshare plan as terminated under its terms, applicable

nonbankruptcy law, or any agreement made by timeshare interest purchaser, the timeshare interest purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection; or

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

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

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

**(2)** If such purchaser remains in possession–

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

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

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

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

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

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

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

**(A)** to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated

by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

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

**(i)** the duration of such contract; and

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

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

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

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

**(C)** the licensee shall be deemed to waive–

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

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

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

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

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

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

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

**(i)** perform such contract; or

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

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

**(o)** In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or

predecessor to such agency) to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

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

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

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

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

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

## APPENDIX C

**11 U.S.C. § 1121. Who may file a plan.**

**(a)** The debtor may file a plan with a petition commencing a voluntary case, or at any time in a voluntary case or an involuntary case.
**(b)** Except as otherwise provided in this section, only the debtor may file a plan until after 120 days after the date of the order for relief under this chapter.
**(c)** Any party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may file a plan if and only if–

**(1)** a trustee has been appointed under this chapter;
**(2)** the debtor has not filed a plan before 120 days after the date of the order for relief under this chapter; or
**(3)** the debtor has not filed a plan that has been accepted, before 180 days after the date of the order for relief under this chapter, by each class of claims or interests that is impaired under the plan.

**(d)(1)** Subject to paragraph (2), on request of a party in interest made within the respective periods specified in subsections (b) and (c) of this section and after notice and a hearing, the court may for cause reduce or increase the 120-day period or the 180-day period referred to in this section.
**(2)(A)** The 120-day period specified in paragraph (1) may not be extended beyond a date that is 18 months after the date of the order for relief under this chapter.
**(B)** The 180-day period specified in paragraph (1) may not be extended beyond a date that is 20 months after the date of the order for relief under this chapter.
**(e)** In a small business case–
**(1)** only the debtor may file a plan until after 180 days after the date of the order for relief, unless that period is–
**(A)** extended as provided by this subsection, after notice and a hearing; or
**(B)** the court, for cause, orders otherwise;
**(2)** the plan and a disclosure statement (if any) shall be filed not later than 300 days after the date of the order for relief; and
**(3)** the time periods specified in paragraphs (1) and (2), and the time fixed in section 1129(e) within which the plan shall be confirmed, may be extended only if–
**(A)** the debtor, after providing notice to parties in interest (including the United States trustee), demonstrates by a preponderance of the evidence that it is more likely than not that the court will confirm a plan within a reasonable period of time;
**(B)** a new deadline is imposed at the time the extension is granted; and
**(C)** the order extending time is signed before the existing deadline has expired.

## APPENDIX D

**11 U.S.C. § 1122. Classification of claims or interests.**

**(a)** Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.
**(b)** A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

## APPENDIX E

**11 U.S.C. § 1123. Contents of plan.**

**(a)** Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall–

**(1)** designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(2), 507(a)(3), or 507(a)(8) of this title, and classes of interests;

**(2)** specify any class of claims or interests that is not impaired under the plan;

**(3)** specify the treatment of any class of claims or interests that is impaired under the plan;

**(4)** provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

**(5)** provide adequate means for the plan's implementation, such as–

**(A)** retention by the debtor of all or any part of the property of the estate;

**(B)** transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

**(C)** merger or consolidation of the debtor with one or more persons;

**(D)** sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;

**(E)** satisfaction or modification of any lien;

**(F)** cancellation or modification of any indenture or similar instrument;

**(G)** curing or waiving of any default;

**(H)** extension of a maturity date or a change in an interest rate or other term of outstanding securities;

**(I)** amendment of the debtor's charter; or

**(J)** issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;

**(6)** provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of any corporation referred to in paragraph (5)(B) or (5)(C) of this subsection, of a provision prohibiting the issuance of nonvoting equity securities, and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends;

**(7)** contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee; and

**(8)** in a case in which the debtor is an individual, provide for the payment to creditors under the plan of all or such portion of earnings from personal services performed by the debtor after the commencement of the case or other future income of the debtor as is necessary for the execution of the plan.

**(b)** Subject to subsection (a) of this section, a plan may–

**(1)** impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

**(2)** subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

**(3)** provide for–

**(A)** the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

**(B)** the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

**(4)** provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;

**(5)** modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and

**(6)** include any other appropriate provision not inconsistent with the applicable provisions of this title.

**(c)** In a case concerning an individual, a plan proposed by an entity other than the debtor may not provide for the use, sale, or lease of property exempted under section 522 of this title, unless the debtor consents to such use, sale, or lease.

**(d)** Notwithstanding subsection (a) of this section and sections 506(b), 1129(a)(7), and 1129(b) of this title, if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

## APPENDIX F

**11 U.S.C. § 1124. Impairment of claims or interests.**

Except as provided in section 1123(a)(4) of this title, a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan–

**(1)** leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest; or

**(2)** notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default–

**(A)** cures any such default that occurred before or after the commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title or of a kind that section 365(b)(2) expressly does not require to be cured;

**(B)** reinstates the maturity of such claim or interest as such maturity existed before such default;

**(C)** compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law;

**(D)** if such claim or such interest arises from any failure to perform a nonmonetary obligation, other than a default arising from failure to operate a nonresidential real property lease subject to section 365(b)(1)(A), compensates the holder of such claim or such interest (other than the debtor or an insider) for any actual pecuniary loss incurred by such holder as a result of such failure; and

**(E)** does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest.

## APPENDIX G

### 11 U.S.C. § 1126. Acceptance of plan.

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

**(b)** For the purposes of subsections (c) and (d) of this section, a holder of a claim or interest that has accepted or rejected the plan before the commencement of the case under this title is deemed to have accepted or rejected such plan, as the case may be, if–

> **(1)** the solicitation of such acceptance or rejection was in compliance with any applicable nonbankruptcy law, rule, or regulation governing the adequacy of disclosure in connection with such solicitation; or
>
> **(2)** if there is not any such law, rule, or regulation, such acceptance or rejection was solicited after disclosure to such holder of adequate information, as defined in section 1125(a) of this title.

**(c)** A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

**(d)** A class of interests has accepted a plan if such plan has been accepted by holders of such interests, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount of the allowed interests of such class held by holders of such interests, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

**(e)** On request of a party in interest, and after notice and a hearing, the court may designate any entity whose acceptance or rejection of such plan was not in good faith,or was not solicited or procured in good faith or in accordance with the provisions of this title.

**(f)** Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.

**(g)** Notwithstanding any other provision of this section, a class is deemed not to have accepted a plan if such plan provides that the claims or interests of such class do not entitle the holders of such claims or interests to receive or retain any property under the plan on account of such claims or interests.

## APPENDIX H

**11 U.S.C. § 1129. 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)** Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

**(5)(A)(i)** The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

**(ii)** the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

**(B)** the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

**(6)** Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

**(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)** Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that–

**(A)** with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

**(B)** with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive–

**(i)** if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

**(ii)** if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;

**(C)** with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim regular installment payments in cash-

**(i)** of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;

**(ii)** over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and

**(iii)** in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)); and

**(D)** with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

**(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.

**(11)** Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

**(12)** All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

**(13)** The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

**(14)** If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.

**(15)** In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan–

**(A)** the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

**(B)** the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be

received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

**(16)** All transfers of property under the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

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

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

**(A)** With respect to a class of secured claims, the plan provides–

**(i)(I)** that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

**(II)** that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

**(ii)** for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

**(iii)** for the realization by such holders of the indubitable equivalent of such claims.

**(B)** With respect to a class of unsecured claims–

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

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

**(C)** With respect to a class of interests–

**(i)** the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

**(ii)** the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

**(c)** Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127(b) of this title, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this title. If the requirements of subsections (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.

**(d)** Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. In any hearing under this subsection, the governmental unit has the burden of proof on the issue of avoidance.

**(e)** In a small business case, the court shall confirm a plan that complies with the applicable provisions of this title and that is filed in accordance with section 1121(e) not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3).