**No. 19-1004**

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

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

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

V.

UNDER MY THUMB, INC.,
RESPONDENT.

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

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BRIEF FOR PETITIONER

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ORAL ARGUMENT REQUESTED

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## QUESTIONS PRESENETED

I. Whether 11 U.S.C. § 365(c)(1) of the Bankruptcy Code permits a debtor in possession to assume a non-exclusive software license notwithstanding the licensor's objection when the debtor does not actually intend to assign the license to a third party.

II. Whether acceptance from any one impaired class of claims under a joint, multi-debtor plan satisfies the procedural requirement for plan confirmation under 11 U.S.C. § 1129(a)(10).

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## OPINIONS BELOW

By order and decision, the United States Bankruptcy Court for the District of Moot held in favor of the Debtors on both issues. R. 3. The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court on both issues. *Id*. On March 4, 2019 the United States Court of Appeals for the Thirteenth Circuit reversed on both issues. *Id*.

## STATEMENT OF JURISDICTION

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

## STATUTORY PROVISIONS

The statutory provisions listed below are relevant to determine the present case, which are reproduced in Appendices.

11 U.S.C. § 323(a)

11 U.S.C § 365

11 U.S.C. § 1104

11 U.S.C. § 1129

## STATEMENT OF THE CASE

Petitioner, Tumbling Dice, Inc. ("TDI"), a holding company that owns the membership interests of its nine wholly-owned debtor-subsidiaries. R. at 4. The Debtor's in this case are comprised of nine wholly-owned debtor-subsidiaries whose membership interest are owned by TDI. *Id*. Eight of the debtor-subsidiaries each operate a luxury casino and resort. (each an "Operating Debtor" and, collectively, the "Operating Debtors"). *Id*. The remaining debtor-subsidiary is a development company, Tumbling Dice, LLC ("Development"). *Id*. Together, the Debtor's constitute one of the largest gaming operations in the country. *Id*.

The Debtors have worked hard to create a strong brand of quality customer service and loyalty with their frequent customers. *Id*. To promote this brand, The Debtors created Club Satisfaction nearly thirty years ago to give back to their customers. *Id*. Club Satisfaction provided their members with a wide-range of incentives and rewards to those who frequently engage in gaming and other activities on the properties. *Id*. Members were offered free and discounted nights at their hotels, complimentary meals at their in-house restaurants, VIP seating at their concert venues, along with other perks. *Id*.

Respondent, Under My Thumb, Inc. ("Under My Thumb"), is a software designer that specializes in customer loyalty and reservation programs for the hospitality industry. *Id*. The company's goal is to create tailor-made comprehensive, integrated software for their individualized clients. *Id*. In 2008, Development contracted with Under My Thumb to modernize their illustrious casino loyalty program, Club Satisfaction. *Id*.

Under a Research and Development Agreement, Under My Thumb created a comprehensive, integrated software system for Club Satisfaction that would modernize the loyalty program. *Id*. Under My Thumb incurred approximately $10 million in costs to create the

Club Satisfaction software ("Software"). *Id*. Development agreed to reimburse a portion of these costs pursuant to an unsecured $7 million promissory note ("R&D Note"). *Id*. Once the Software was complete, Under My Thumb and Development entered into a license agreement ("Agreement"), which allowed Development to extend the software to its affiliated entities. R. at 5.

The new changes to the loyalty program were successful for all parties. *Id*. The Debtors were able to tailor certain incentives and rewards for individual members due to the data collected by the Software. *Id*. The Software kept track of individual member's tendencies at their gaming machines, tables, and other properties in-house. *Id*. Membership in Club Satisfaction tripled and spending increased. *Id*. Building off of this success, Under My Thumb was permitted to, and did, license similar versions of the Software to third parties. *Id.* Additionally, they received higher than expected payments under the Agreement due to the overwhelming success – business was booming for everyone involved. *Id*. Additionally, the Debtors remained current under the R&D Note until June 2015. *Id*.

In December 2011, Start Me Up, Inc. acquired the stock of TDI through a leveraged buy-out. R. at 6. TDI and the Operating Debtors granted first priority liens on their assets to a syndicated group of lenders (the "Lenders") in exchange for a loan of $3 billion. *Id.* The Lenders did not require Development to act as a borrower or a guarantor under the credit facility. *Id*. Unfortunately, the debt load from the leveraged buy-out transaction resulted in the Debtors commencing these Chapter 11 cases in January 2016.

TDI and the Operating Debtors jointly and severally owed the Lenders approximately $2.8 billion. *Id*. The Debtors primary goal was to restructure and refinance the debt load through negotiations with the Lenders. *Id*. The Debtors also owed an estimated $120 million more to

their unsecured creditors, including Under My Thumb. *Id*. Further, it is undisputed that there has been no cause of action brought challenging this transaction as a fraudulent transfer. *Id*.

Following negotiations, including non-binding mediation ordered by the bankruptcy court involving the Debtors, Start Me Up, the Lenders, the unsecured creditor's committee and certain other stakeholders, the Debtors announced a plan support agreement that enjoyed universal support. *Id*. The Plan was a joint, multi-debtor plan, meaning that one plan was filed on behalf of all of the debtors. R. at 7. The Plan expressly stated that "the Debtors' estates are not being substantially consolidated and no Debtor is to become liable for the obligations of another." *Id*. Debtors would restructure substantially all of the secured indebtedness owed to the Lenders by agreeing to a lower interest rate and extending payments over a period of twenty years. *Id.* Start Me Up was required to inject new capital, which would fund a 55% distribution to unsecured creditors, including Under My Thumb; this greatly exceeds the liquidation value under chapter 7. *Id*. Start Me Up retained its equity interest in the Debtors. *Id*. Further, the Plan required for the cancellation of the existing shares and membership interests in the Debtors and the issuance of new shares and membership interests in the reorganized Debtors, without changing the overall corporate structure. *Id.*

The Plan was also beneficial to Under My Thumb, with respect to the original Agreement with Development. *Id*. Indeed, Under My Thumb initially had no issue with the proposed Plan. *Id*. The Plan proposed to assume the Agreement and Under My Thumb would continue to receive its monthly payments for the use of the Software. *Id*. The Plan also provided for a pro rata distribution of $66 million to the Debtors' unsecured creditors. *Id*. Additionally, Under My Thumb would receive the $6 million plus obligation Development owed under the R&D note. *Id*.

However, Under My Thumb flipped positions on their view of the plan after learning that Sympathy for the Devil, LP ("SFD"), a private equity group, was involved in the reorganization effort. R. at 8. Under My Thumb contends they were immediately suspicious of SFD's involvement because they were direct competitors. *Id*. Fortunately, the Plan enjoyed universal support from all creditor groups and each of TDI and the Operating Debtors had at least one impaired accepting class of creditors. *Id*. Under My Thumb subsequently voted to reject the Plan as Development's only class of creditors. *Id*.

By order and decision, the bankruptcy court held in favor of the Debtors on both issues. R. 3. The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court on both issues. *Id*. On March 4, 2019 the United States Court of Appeals for the Thirteenth Circuit reversed on both issues. *Id*.

## SUMMARY OF THE ARGUMENT

This case presents the Court with two issues: (1) whether a debtor in possession may assume a non-exclusive license agreement without the licensor's consent and (2) whether only one impaired class of claims is required to accept the plan.

The Bankruptcy Code does not support Thirteenth Circuit's interpretation of section 365(c)(1) because the term "trustee" is not synonymous with the term "debtor in possession." A plain reading of the statute indicates that the prohibitory language included within this section applies only to a trustee and not to a debtor in possession. Reading the statute as a whole confirms that the terms have two very different meanings. Furthermore, the legislative history of the Bankruptcy Code affirms that Congress did not intend for the two terms to be used interchangeably. Therefore, section 365(c)(1) does not preclude a debtor in possession from assuming non-assignable contracts.

Even if the term trustee is viewed synonymously with the term debtor in possession, section 365(c)(1) authorizes the assumption of Under My Thumb's license. A circuit split has emerged regarding how Court's should interpret the phrase "the trustee may not assume or assign any executory contract" in section 365(c)(1). Respondent urges this Court to apply the Hypothetical Test, which does not allow a debtor in possession to assign a contract or assume it if they lack consent regardless of the actual intention of assigning the contract to a third party. However, this plain meaning interpretation produces absurd results and is contrary to the legislative history and purpose of Chapter 11.

This Court should apply the Actual Test because it is consistent with the legislative goals of Chapter 11. The Actual Test allows a court to make a pragmatic, case-by-case inquiry into whether or not the debtor is actually seeking to assign the license to a third party. If the debtor in

possession only seeks to assume the license and continue to engage in business just as it had prior to filing bankruptcy, the court should allow assumption because there is no risk to the licensor; this rationale is reinforced by the 1984 amendment to section 365(c)(1).

Furthermore, the Hypothetical Test is contrary to public policy because it arbitrarily penalizes debtors by depriving them of the ability to reorganize. The purpose of Chapter 11 is to allow debtors to reorganize in order to avoid liquidation. Allowing Under My Thumb the right to rescind the original Agreement will have a vast range of consequences in future Chapter 11 cases.

Next, The Thirteenth Circuit's refusal to apply the "per-plan" approach under section 1129(a)(10) is inconsistent with the plain meaning of the statute, legislative history and violates public policy. Allowing one impaired class of creditors to hold up plan confirmation for whatever reason they like directly conflicts with the general purpose of section 1129(a)(10).

It is well established that a court should always turn to the plain meaning rule when interpreting a statute unless the text is ambiguous. Section 1129(a)(10) simply requires at least one class of impaired creditors under the plan to accept the plan; this requirement was satisfied when five classes of impaired creditors voted in favor of the plan. Therefore, this Court should apply the "per-plan" approach rather imposing additional requirements that Congress did not intend.

Even if this Court finds the text of section 1129(a)(10) to be ambiguous, application of a "per-debtor" approach is inconsistent with the legislative's intent for flexibility in Chapter 11 proceedings. It is generally understood that the intent and purpose behind section 1129(a)(10) was to promote consensus and require at least some kind of creditor support for the debtor's plan. Finally, applying the "per-debtor" approach would be inconsistent with the purpose and

policy of a business reorganization case by allowing the individual impaired creditors to hold the debtors and their stakeholders hostage.

## STANDARD OF REVIEW

A bankruptcy court's legal conclusions are reviewed by this Court *de novo*, while its findings of fact are reviewed for clear error. *In re Momentum Mfg. Corp.*, 25 F.3d 1132, 1136 (2d Cir. 1994). The facts of this case are undisputed therefore this appeal only presents questions of law, which must be reviewed *de novo*. *See Pierce v. Underwood*, 487 U.S. 552, 558 (1998).

## ARGUMENT

### I. The Bankruptcy Code does not support the Thirteenth Circuit's interpretation of section 365(c)(1) because the term "trustee" is not synonymous with the term "debtor in possession."

Section 365(a) provides that a trustee "subject to the Court's approval, may assume or reject any executory contract[1] or unexpired lease of the debtor." 11 U.S.C. § 365. However, that power is then expressly limited in section 365(c)(1) which states that "the trustee may not assume or assign any executory contract . . . of the debtor . . . if:

> (1)(A) applicable law excuses a party, other than the debtor, to such contract . . . from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession . . . and (B) such party does not consent to such assumption or assignment.

*Id*.

The threshold issue is a question of statutory interpretation to determine if the word "or" found within "assume or assign" in 365(c) should be read literally or construed as the functional equivalent of "and." *In re Footstar, Inc*., 323 B.R. 566, 569 (Bankr. S.D.N.Y. 2005). The issue

[1] It is generally accepted that contracts conveying non-exclusive licenses of intellectual property, such as the Agreement in question, are executory contracts. *See, e.g., In re Kmart Corp.*, 290 B.R. 614, 618 (Bankr. N.D. III. 2003).

only arises, as it does in this case, when the debtor does not intend to assign the contract to a third party but to assume it and, thus, continue performance under the agreement. *Id*. However, the central focus of judicial inquiry should not rest on the meaning of "assume or assign," but on the plain language of the statute which refers only to a "trustee" and not a "debtor in possession." While the majority opinion states that the two terms are synonymous, courts who rely on this erroneous conclusion do so without citing to the Bankruptcy Code. *See In re Catapult Entm't, Inc.*, 165 F.3d 747, 750 (9th Cir. 1999); *In re West Elecs., Inc.*, 852 F.2d 79, 82 (3rd Cir. 1988).

### A. A plain reading of section 365(c)(1) indicates that the prohibitory language included within this section of the Bankruptcy Code applies only to a trustee and not to a debtor in possession.

The prohibition found in section 365(c)(1) does not apply in this case because it is the debtor in possession who seeks to assume the agreement and not a trustee. R. at 7. A court has a duty to give effect to "every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). The "plain meaning" of language within a statute is controlling. *Laracuente v. Chase Manhattan Bank*, 891 F.2d 17, 21-22 (1st Cir. 1989). When a particular word is not defined within a statute, the court must construe it in accordance with its ordinary or natural meaning. *Perrin v. United States*, 444 U.S. 37, 42 (1979). However, the meaning of statutory language is to be gleaned from the statute as a whole. *Little People's Sch., Inc. v. United States*, 842 F.2d 570, 573 (1st Cir. 1988); *see Wilcox v. Ives*, 864 F.2d 915, 926 (1st Cir. 1988) (including the "policy and purpose" Congress sought to implement).

The Circuit Court erroneously interpreted the term "trustee" as synonymous with the term "debtor in possession" although a plain reading of the Bankruptcy Code dispels such an assertion. *In re Footstar, Inc*., 323 B.R. at 570. The Bankruptcy Code does not define, nor does it treat the two terms as one in the same. *Id*. at 571. On the contrary, when the two terms appear in the Bankruptcy Code in the same provisions, they clearly have two very different meanings and

are not used interchangeably. *Id.* Section 1104(a) of the Bankruptcy Code explicitly authorizes "the appointment of a trustee" by the court following notice to the parties and a hearing regarding the appointment. Although the trustee serves as a "representative of the estate" as explained in section 323(a), a trustee and a debtor in possession are entirely different entities and should not be treated as the same for interpretive purposes under 365(c)(1) which plainly applies only to trustees. Once a trustee is appointed, the debtor's directors retain "virtually no management powers" and play a role "most closely analogous to that of a solvent corporation's management." *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 353 (1985). Treating these two entities as the same is contrary to the holding in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) ("it is sensible to view the debtor-in-possession as the same 'entity' which existed before the filing of the bankruptcy petition . . ."). Because the appointment of a trustee effects the assignment of the debtor's property, including its contractual obligations, from the debtor to the trustee, it does not make logical sense to treat the two as one in the same.

### B. The legislative history of the Bankruptcy Code affirms that the terms "trustee" and "debtor in possession" are not intended to be used interchangeably.

Congress did not intend for section 365(c)(1) to be construed as precluding a debtor in possession from assuming non-assignable contracts and there is legislative history to support this conclusion. As originally passed in 1978, section 365(c)(1)(A) read "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 an assignee of such contract or lease*." (emphasis added) *In re Footstar, Inc*., 323 B.R. at 574. In 1980, a bill was proposed to amend the Bankruptcy Code known as the Bankruptcy Technical Correction Act of 1980. *Id*. (citing H.R. REP. NO. 1195, 96th Cong., 2d Sess. (1980)). While Congress ultimately decided that the addition of amendments two years after the passage of the statute would be premature, a report created by

the Committee on the Judiciary provides significant insight into the legislature's view of section 365(c)(1)(A) because it sought to replace the term "trustee" with "any entity other than the debtor or the debtor in possession." *Id*. In clarifying the proposed amendment, the report explained:

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

*Id*.

In 1984, Congress followed through with the proposed change to section 365(c)(1)(A), thus, the 1980 report supports the fact that the terms trustee and debtor in possession were never meant to be used interchangeably within the Bankruptcy Code. *Id*. (citing Pub.L. No. 98–353 (1984)). Additionally, the comment indicates that Congress never intended for 365(c)(1) to preclude assumption by the debtor in possession when performance under the contract "will be the same as if no petition had been filed." *In re Cardinal Indus., Inc.*, 116 B.R. 964, 979 (Bankr. S.D. Ohio 1990).

## II. Section 365(c)(1) allows a debtor in possession to assume a non-exclusive license agreement without the licensor's consent.

Not only is the assumption of Under My Thumb's license critical to the debtor's ability to reorganize, it is also authorized under section 365(c)(1) of the Bankruptcy Code even if trustee is viewed synonymously with the debtor in possession. Courts adopting the "Actual" or "Hypothetical" Test seek to determine the meaning of the phrase "assume or assign" in section 365(c)(1). *In re Footstar, Inc.*, 323 B.R. 566 at 570. Circuits following the Hypothetical Test have interpreted section 365(c)(1) to mean that a debtor in possession may assume an executory contract only if, hypothetically, they would be permitted to assign that contract to a third party

under applicable law. *In re West Elec., Inc.*, 852 F.2d at 83. On the contrary, the Actual Test allows a court to determine if the non-debtor party will *actually* be required to contract with an entity other than the debtor in possession. *In re Lil' Things, Inc.*, 220 B.R. 583, 586 (Bankr. N.D. Tex. 1998).

The majority opinion focused on the plain meaning of section 365(c)(1) to determine that Development could not assume the non-exclusive license agreement under the Hypothetical Test's "plain meaning" approach. R. at 12. However, two exceptions exist to the "plain meaning rule" recognized as a canon to statutory construction. *In re Sunterra Corp.*, 361 F.3d 257, 265 (4th Cir. 2004). The first such exception exists when a literal application of the language produces an absurd result. *Id*. "Literal interpretations which lead to absurd results are to be avoided." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989). The second is premised on legislative intent. *In re Sunterra Corp.*, 361 F.3d at 265. A court shall not apply a statute's plain language when the literal application will produce a result clearly at odds with the legislative intent of its drafters. *Id.*

### A. A literal reading of section 365(c)(1), as required by the Hypothetical Test, produces an absurd result when viewing the statutory language as a whole.

In order to achieve internal consistency, a court must interpret a statute to minimize discord so that "no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error." *In re Cardinal Indus., Inc.*, 116 B.R. 964, 979 (Bankr. S.D. Ohio 1990*).* However, a plain reading of section 365(c) would render section 365(f) inoperative and superfluous. *In re Catron*, 158 B.R. 629, 637 (4th Cir. 1994) ("A literal reading of the two sections simply cannot be reconciled"). The plain language of section 365(c)(1) bars assumption whenever "applicable

law" bars assignment. Section 365(f)(1) states that executory contracts may be assigned "notwithstanding a provision in . . . applicable law."

Thus, while subsection (c)(1) requires the court to consider whether "applicable law" prohibits the assignment of an executory contract to a third party, subsection (f)(1) just as explicitly asks the court to ignore the "applicable law." *In re Catron*, 158 B.R. at 637. The assumption of an executory contract is a prerequisite to its assignment under section 365. 11 U.S.C. § 365(f)(2)(A). Therefore, a literal reading of subsection (c)(1) would render subsection (f)(1) inoperative and superfluous.

### B. The Actual Test should be adopted because it is consistent with the legislative goals of chapter 11 bankruptcy.

The language of section 365(c)(1) is clearly ambiguous and open to more than one interpretation and, therefore, looking to its legislative history is particularly helpful in determining congressional intent. *Summit Inv. & Dev. Corp. v. Leroux*, 69 F.3d 608, 612 (1st Cir. 1995). According to one relevant congressional report:

> This section will require the courts to be sensitive to the rights of the non-debtor party to executory contracts and unexpired leases. If the trustee is to assume a contract or a lease, the court will have to ensure that the trustee's performance under the contract or lease gives the other contracting party the full benefit of his bargain.

S. Rep. No. 989 95th Cong., 2d Sess. 59 (1978), reprinted in 1980 U.S.C.C.A.N. 5787, 58445.

This passage suggests that, by enacting section 365, Congress contemplated a pragmatic, case-by-case inquiry into the actual consequences felt by the non-debtor party following chapter 11 bankruptcy. *Summit Inv. & Dev. Corp.*, 69 F.3d at 613. In applying the Actual Test, the First Circuit, along with a majority of lower courts, look to whether the debtor is actually seeking to assign the license to a third party. *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997), *cert. denied*, 521 U.S. 1120 (1997). When the debtor in possession seeks only to assume the license and continues to engage in business just as it had prior to filing

bankruptcy, the court should allow the debtor to assume the license agreement because there is no risk to the licensor, who continues to receive the full benefit of their bargain. *Id*. at 495 (when the licensee "remains in all material respects the legal entity with which [the licensor] freely contracted, [the licensor] has not made the required individualized showing that it is or will be deprived of 'the full benefit of [its] bargain"). Because Under My Thumb is only being asked to honor its existing contractual obligation with Development, it has not made the requisite showing that it is somehow being deprived of the full benefit of its bargain. R. at 7.

The historical evidence of legislative intent is reinforced by the 1984 amendment to section 365(c)(1). *Summit Inv. & Dev. Corp.*, 69 F.3d at 613. Prior to this amendment, section 365(c)(1)(A) read "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.*" (emphasis added). However, the 1984 amendment changed the highlighted language to "*an entity other than the debtor or the debtor in possession*." *Id*. In modifying this language, 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.

H.R.Rep. No. 1195, 96th Cong., 2d Sess. § 27(b) (1980).

Like the debtors in *Summit* who did not intend to assign the license agreement to a third party, Development only wishes to assume Under My Thumb's license agreement, thus Development fits squarely within the amended version of section 365(c)(1). R. at 7.

### C. The Hypothetical Test is contrary to public policy because it arbitrarily penalizes debtors by depriving them of the ability to reorganize.

A Bankruptcy Court is a court of equity that should focus on the ultimate goal of chapter 11 bankruptcy when considering how to balance the equities through careful judicial review.

*Bildisco & Bildisco*, 465 U.S. at 527. The Supreme Court has held that the purpose of chapter 11 bankruptcy is to allow debtors to reorganize in order to avoid liquidation. *Id.* at 528. Circuits following the Hypothetical Test have continued to deny licensees the right to benefit from contracts for which they have already paid and relied upon for their business, contrary to the fundamental goals of chapter 11 bankruptcy. Laura D. Steele, *Actual or Hypothetical: Determining the Proper Test for Trademark Licensee Rights in Bankruptcy*, 14 Marq. Intell. Prop. L. Rev. 411 (2010). Moreover, because courts applying the Hypothetical Test view the result as a rejection of the contract, the licensor is given an unfair advantage and placed in a position where he could negotiate for a new contract with a higher royalty rate. *Id.*

Several cases demonstrate that the Hypothetical Test allows a licensor to receive a windfall by evading a legally bargained for exchange. *See, e.g., In re Sunterra Corp.*, 361 F.3d at 261 (the Fourth Circuit used the Hypothetical Test to strip the debtor in possession of a significant portion of its estate); *see also In re Catapult Entm't, Inc.*, 165 F.3d 747 (9th Cir. 1999) (the licensor became unjustly enriched by refusing to agree to the licensee's assumption of the agreement). While the lower court in this case opined that questions of policy are reserved for the legislative branch, the Supreme Court has regularly referred to the "fresh start" policy as a central tenant in chapter 11 cases. *Grogan v. Garner*, 498 U.S. 279, 286 (1991) ("a central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy a new opportunity in life with a clear field for future effort").

When the debtor filed for bankruptcy, Development had never missed a payment or violated the license agreement in any way. R. at 26. Therefore, if this Court affirms the lower court and follows the Hypothetical Test, Development will be arbitrarily penalized and stripped

of the successful license agreement simply because it chose to file chapter 11 bankruptcy. Not only would this result give Under My Thumb unfair bargaining power, such a result stands in stark contrast to the fundamental goals of chapter 11 bankruptcy which is to allow the debtor to have a "fresh start." Moreover, the software license is essential to the debtor's business model and proved to be beneficial for both parties. R. at 6. Therefore, stripping development of the license agreement is contrary to the fundamental goals of chapter 11 bankruptcy.

## III. The Thirteenth Circuit's refusal to apply the "per-plan" approach under Section 1129(a)(10) is inconsistent with the plain meaning of the statute, legislative history and violates public policy.

### A. A plain reading of 11 U.S.C. § 1129(a)(10) requires a "per-plan" approach under a joint multi-debtor plan because the text is unambiguous.

The ultimate goal for chapter 11 debtors is confirmation of a reorganization plan. R. at 15. The proposed reorganization plan will divide creditors into different classes with "substantially similar" claims. *See* 11 U.S.C. § 1122 (2018). Creditors whose "legal, equitable or contractual rights" are altered under the reorganization plan are considered "impaired" and impaired classes are the only classes able to vote in favor of or against confirmation of a plan. *See* 11 U.S.C. § 1124 (2018).[2]

Courts will allow multiple debtors to combine related cases through "joint administration" for the convenience of all parties pursuant to Rule 1015(b). Joint administration is appropriate when large corporations have numerous affiliates or subsidiaries and consolidation of the cases will ease administrative and financial burdens. The different entities will be allowed to coordinate through joint bankruptcy petitions. Fed. R. Bankr. P. 1015. Although there is one plan and joint petitions, each debtor's estates and entity structure remain separate. *See In re Tribune Co.,* 464 B.R. at 181. Joint administration functions as "a procedural tool for

convenience" and does not alter the substantive rights of any creditors. 28 No. 1 J. Bankr. L. & Prac. NL Art. 2. This is different than the judicially created equitable remedy of substantive consolidation. Courts will allow multiple debtors to consolidate the assets and liabilities of distinct entities only in narrow circumstances. R. at 18.

The majority opinion states that the Debtors proceeded as if they had been substantially consolidated and this is factually inaccurate. *See* R. at 18. Substantive consolidation was not sought after, but specifically negated in the plan. R. at 7. Tumbling Dice and its' subsidiaries pursued a jointly administered plan consisting of ten debtors. *Id.* The plan expressly stated that "the Debtors' estates are not being substantially consolidated and no Debtor is to become liable for the obligations of another." *Id.* The majority opinion states that the Debtors proceeded as if they had been substantially consolidated and this is factually inaccurate. The Debtors proceeded to plan confirmation under joint administration and satisfied the procedural requirements in 1129(a).

In situations where all impaired classes don't consent to confirmation of the plan, the Bankruptcy Code allows for a forced confirmation, as long as certain requirements are met. *See* 11 U.S.C. § 1129 (2018). Section 1129(a) of the bankruptcy code sets out a list of requirements that all must be satisfied in order for the plan to be confirmed. *See id.* The provision in U.S.C. § 1129(a)(10) must always be satisfied in order for a plan to be confirmed. The provision requires that "[i]f 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) (2018).

Courts have interpreted what is actually required under section 1129(a)(10) differently. One approach, referred to as the "per-debtor" approach, interprets section 1129(a)(10) to require

that at least one impaired class of each debtor in a multi-debtor, jointly administered plan accepts the plan. In contrast, the "per-plan" approach, interprets section 1129(a)(10) to require that at least one impaired class of any debtor under the jointly administered plan accepts the plan. The majority of courts that have addressed this issue favor and apply the "per-plan" approach.. The only expressed condition for the application of 1129(a)(10) is that there is a class of impaired claims. *In re Smith*, 357 B.R. 60, 69 (Bankr. M.D.N.C. 2006).

Under My Thumb argues for the application of a "per-debtor" approach to 1129(a)(10), but in doing so ignores that plain language of the statute. When engaging in statutory interpretation, the court should look to the plain meaning of the statute. *See Coastal Federal Credit Union v. Hardiman*, 398 B.R. 161, 167 (E.D. NC 2008); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). The plain meaning rule is the "cardinal canon of statutory construction" and directs courts to consider the context in which the words are used. *Germain*, 503 U.S. at 253. This starts with looking at the plain language of the statute and, when unambiguous, interpreting it as it is written. *See id.* ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says.") Inquiry should cease "if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). When statutory language is unambiguous, "judicial inquiry is complete except in rare and exceptional circumstances."[3] *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991).

This Court has held that if the language in the statute is plain, "the sole function of the courts . . . is to enforce it according to its terms." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (internal quotations omitted). The procedural requirement in 1129(a)(10) simply reads to

require at least one class of impaired creditors under the plan to accept the plan. Nowhere in the statute does it distinguish this requirement in the case of a multi-debtor, jointly administered plan. Congress knows how to cross-reference different sections in a statute and failed to do so with respect to 1129(a)(10). *See In re Transwest Resorts Props., Inc*., 881 F.3d at 730.

Section 1129(a)(10) plainly requires that at least one impaired class under the plan accepts the plan. Judicial inquiry should stop there because the language of the statute is unambiguous and there is no clear intention that Congress intended it to be applied differently. Even if the court looks to the other subsections in 1129, application of "per-plan" approach to 1129(a)(10) is not inconsistent. When different statutes are "capable of co-existence" the court should treat each as effective, unless there is a clear and expressed intention from Congress otherwise. *Pittsburg & Lake Erie R.R. Co. v. Railway Labor Executives Ass'n*, 491 U.S. 490 (1989). The majority opinion stated that subsections 1129(a)(1),(3),(8) conflict with the application of a "per-plan" approach. In reality, no conflicts exist between any of the subsections in 1129 and 1129(a)(10). *See In Re LOOP 76, LLC*, 442 B.R. 713 (Bankr. D. Ariz. 2010) (finding that subsection (a)(1) does not conflict with (a)(10) when applying a "per-plan" approach).

The majority opinion attempts to modify the statute by expanding it to include a phrase that is not there. R. at 27. The majority opinion states that 1129(a)(10) is satisfied when "at least one class of claims 'of each debtor' that is impaired under the plan has accepted the plan." *Id.* Courts are tasked with interpreting the law as Congress has passed, not creating it. If Congress passed a law that doesn't coincide with their intent, it is up to Congress to amend the statute. *Lamie*, 540 U.S. at 534. Specifically, Congress amended 1129(a)(10) to include the phrase "at least one impaired class", when reorganization plans were being confirmed without any of the

impaired classes' acceptance. *In re Bataa/Kierland, LLC*, 476 B.R. 558, 577-78 (Bankr. D. Ariz. 2012). Congress used the requirements in 1129(a) to safeguard and protect the interests of impaired creditors by requiring that at least one impaired class under the plan accept the plan it. *Id*. As the majority opinion also points out, 1129(a)(10) was included to promote consensus in chapter 11 reorganization proceedings. *See* R. at 16. In this case, every impaired class accepted the plan except for Under My Thumb.[4] Allowing one impaired class of creditors to hold up plan confirmation for whatever reason they like directly conflicts with the general purpose of section 1129(a)(10).

Both the plain meaning and contextual scheme of 1129(a)(10) are unambiguous and consistent with the application of "per-plan" approach. The court's statutory analysis should cease and find that the procedural requirement for plan confirmation under 1129(a)(10) is satisfied so long as one impaired class under the jointly administered plan accepts the plan, which was the case here.

Even if the court were to look to exceptions to the plain meaning rule, there is no support for the application of a "per-debtor" approach to 1129(a)(10). There are two narrow exceptions to the plain meaning rule that have been recognized in the Fourth Circuit. *See In re Sunterra Corp.*, 361 F.3d 257 (4th Cir. 2004). The first exception applies when the literal application of the statute produces absurd results and these results are "so gross as to shock general or moral common sense." *Id.* The second exception applies when the plain language of the statute produces a result that directly conflicts with Congress' intent. *Id.* Neither of these narrow exceptions prohibit the application of the plain meaning rule in this case. Application of a "per-plan" approach to 1129(a)(10) results in plan confirmation when at least one impaired class

[4] Under My Thumb initially was in favor of the plan as written and only later rejected it after determining that by doing so would affect a direct competitor. *See* R. at 7.

accepts the plan. In fact, application of a "per-debtor" approach produces absurd results. Additionally, the second exception fails because legislative history regarding 1129(a)(10) supports application of a "per-plan" approach.

Despite the clear language and contextual scheme supporting a "per-plan" approach, the majority opinion points to a "handful" of Delaware courts that applied a "per-debtor" approach.[5] R. at 17. Under My Thumb and the majority opinion improperly rely on these cases based on the argument that Delaware is "one of the country's most influential business bankruptcy courts." *See id.* When in fact, the majority of courts and only circuit court to address the issue found that section 1129(a)(10) calls for a "per-plan" approach. *See JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (In re Transwest Resort Props., Inc.)*, 881 F.3d 724 (9th Cir. 2018); In re Charter Commc'ns, 419 B.R. 221, 266 (Bankr. S.D.N.Y. 2009); *In re Bataa/Kierland, LLC*, 476 B.R. 558 (Bankr. D. Ariz. 2012); *In re SGPA. J.P. Morgan Chase N.A. v. Charter Communications Operating, LLC (In re Charter Communications)*, 419 B.R. 221 (Bankr. S.D.N.Y. 2009); *In re Enron Corp.*, 2004 Bankr. LEXIS 2549, (Bankr. S.D.N.Y. July 15, 2004).

The majority opinion's reliance on section 102(7)'s rule of construction to infer that because the singular includes the plural, section 1129(a)(10) requires the application of a "per-debtor" approach is without merit. Changing the word plan to plans does not require a "per-debtor" approach. Section 1129(a)(10) would read "if classes of claims are impaired under the plans, at least one of the classes that are impaired under the plans has accepted the plans…."

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[5] The majority cites the following cases in support of a "per-debtor" approach: *In re Tribune Co.*, 464 B.R. 126 (Bankr. D. Del. 2011); *In re Woodbridge Grp. of Cos., LLC*, 592 B.R. 761 (Bankr. D. Del. 2018); *In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293 (Bankr. D. Del. 2011).

Even changing the singular to plural, the result remains the same. "[A]t least one" of the impaired classes of the Debtors' creditors has accepted the plans. *See* 11 U.S.C. § 1129(a)(10). The Ninth Circuit has expressly rejected this argument, finding that application of section 102(7) to section 1129(a)(10) still supports the application of a "per-plan" approach. *See In re Transwest Resort Props., Inc.,* 881 F.3d at 730.

In *In re Transwest Resort Props., Inc.*, five separate entities filed bankruptcy and the cases were jointly administered, but not substantially consolidated. 881 F.3d at 726. Under the plan, one of the debtors' impaired class of creditors voted to reject the plan because under it, their equity interest would be eliminated. *Id.* As a result, all the other impaired class of creditors voted to confirm the plan, leaving only one of the debtors without a confirming impaired class. *Id.* The bankruptcy court applied a "per-plan" approach to section 1129(a)(10) and confirmed the plan absent any accepting impaired class under one of the debtors. *Id.* On appeal, the Ninth Circuit focused on the language itself and held that the lack of distinction or reference to impaired creditors of different debtors under the one plan supported a "per-plan" approach. *Id.* at 727-28. The court also addressed and rejected the rejecting creditors' argument that section 102(7) states that "the singular includes the plural" and therefore section 1129(a)(10) should be read on a "per-debtor" basis. *Id.* at 729-30. Finally, the court rejected a de facto substantive consolidation argument because it was not argued on appeal and therefore, not subject to review. *Id.* at 30.

The facts in *In re Transwest Resort Props., Inc.* are directly comparable to this case. Like the debtors in *Transwest*, Tumbling Dice and the other nine debtors filed bankruptcy and jointly administered each case for the convenience of parties, without substantively consolidating. The Ninth Circuit held that even though there was one debtor without an accepting impaired class,

section 1129(a)(10) was satisfied because it only required that one impaired class under the plan accepts the plan. Just like in *Transwest*, that is the case there. Every impaired class under the other nine debtors have accepted the plan and the one impaired class under the Developer, Under My Thumb, rejected the plan. This Court should follow the same path of statutory interpretation that the Ninth Circuit followed and apply the same reasoning to the very similar facts at hand.

The plain meaning behind section 1129(a)(10) requires a "per-plan" approach and both Under My Thumb and the majority opinion's arguments for a "per-debtor" approach fail under the plain meaning rule and its' narrow exceptions.

### B. Application of a "per-debtor" approach to 11 U.S.C. § 1129(a)(10) is inconsistent with the legislative's intent for flexibility in chapter 11 bankruptcy proceedings.

As argued above, the language in section 1129(a)(10) is unambiguous and requires the court to apply a "per-plan" approach. Even if the court were to find some ambiguity, the legislative intent support's the application of a "per-plan" approach. When the language of the statute is ambiguous or the result produced by a literal application of the statute is inconsistent with Congress' intent, the court should look to the legislative history for guidance. *In re Sunterra Corp.*, 361 F.3d 257, 265 (4th Cir.2004).

It is generally understood that that intent and purpose behind section 1129(a)(10) was to promote consensus and require "some indicia of creditor support for the debtor's schemes." *In re Bataa/Kierland, LLC*, 476 B.R. 558, 578 (Bankr. D. Ariz. 2012). Congress amended section 1129(a)(10) to require acceptance by "at least one" impaired class of claims under the plan. *Id.* This amendment was a direct result of two cases confirming plans without the acceptance of any

impaired classes of creditors.[6] As opposed to other chapter bankruptcy proceedings, chapter 11 reorganizations have fewer requirements and allow for flexibility.

Congress could have distinguished multi-debtor jointly administered plans in section 1129(a)(10) if they intended the requirement to be applied differently, but they did not. *See Transwest*. It is up to Congress to amend a statute if the application of it does not reflect congressional intent and it is the court's job to interpret the statute how it is written despite and expressed and clear intention otherwise. *Barnhart*, 534 U. S. at 450.

### C. Application of a "per-plan" approach to 11 U.S.C. § 1129(a)(10) is consistent with the public policy and purpose behind chapter 11 business reorganization plans.

The central policy behind chapter 11 reorganization plans is to "permit successful rehabilitation of debtors." *N.L.R.B. v. Bildisco and Bildisco*, 465 U.S. 513, 527 (1984). Courts that have applied a "per-plan" approach have noted that this policy is so central, that it "prevails over the protection of creditor interests" because this Court has clearly stated that successful reorganization and maximizing the value of the debtor's estate are the primary concerns. *See* 28 No. 1 J. Bankr. L. & Prac. NL Art. 2; *In re Sunnyslope Housing Limited Partnership*, 859 F.3d 637, 646 (9th Cir. 2017).

Application of a "per-plan" approach, as a matter of policy, coincides with the goal of achieving successful reorganization. *See e.g. In re SGPA. J.P. Morgan Chase N.A. v. Charter Communications Operating, LLC (In re Charter Communications)*, 419 B.R. 221, 266 (Bankr. S.D.N.Y. 2009) (determining that the "per-plan" approach is more compatible in maintaining the

[6] *In re Hobson Pike Assocs., Ltd.,* 1977 WL 182364, at *7, 3 BCD 1205 (Bankr.N.D.Ga. Sept. 20, 1977); *In re Mass. Mut. Life Ins. Co. v. Marietta Cobb Apartments Co. (In re Marietta Cobb Apartments Co.),* 1977 WL 182365, 3 BCD 720 (Bankr.S.D.N.Y. Sept. 9, 1977).

focus on the value of debtors); *In re Enron Corp.*, 2004 Bankr. LEXIS 2549, at *234-235 (Bankr. S.D.N.Y. July 15, 2004) (stating that the per plan approach was consistent with the "inherent fundamental policy behind section 1129(a)(10)); *In re Charter Commc'ns*, 419 B.R. 221, 266 (Bankr. S.D.N.Y. 2009) (favoring the per plan approach because the [debtor's] enterprise was managed "on an integrated basis making it reasonable and administratively convenient to propose a joint plan.")

Although the majority opinion determined that the debtors proceeded as if they were substantially consolidated, the plan expressly negated that and the corporate structures remain separate. Even if there was an argument for de facto consolidation, that would fail because substantive objections of that nature are not appropriate on appeal if they have not been raised prior. *See Transwest Resort Props., Inc.*, 881 F.3d at 730.

The issue with the majority opinion's adoption of a "per-debtor" approach is inconsistent with the purpose and policy concerns regarding chapter 11 proceedings. In doing so, the majority essentially allowed, Under My Thumb, an impaired creditor to prevent a fair and equitable reorganization plan for its own reasons. Essentially, a "per-debtor" approach in cases like this allows a single impaired creditor to hold the entire jointly administered and multi-debtor plan hostage. This is in direct conflict with the purpose and goals of chapter 11 reorganization plans. In turn, if the a single impaired creditor felt the proposed plan was not in its best interest, the appropriate remedy would be to attack the substance of the plan and not the procedural requirement for plan confirmation.

## CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully prays that this Court reverse the judgment of the Court of Appeals for the Thirteenth Circuit and hold that (1) a debtor

in possession may assume a non-exclusive license agreement without the licensor's consent, and (2) only one impaired class of claims is required to accept a joint, multi debtor plan. Further, this Court should remand with instructions to confirm the reorganization plan as proposed.

Respectfully Submitted,

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TEAM P.22
COUNSEL FOR PETITIONER

# APPENDIX

## 11 U.S.C. 323

**(a)** The trustee in a case under this title is the representative of the estate.
**(b)** The trustee in a case under this title has capacity to sue and be sued.

## 11 U.S.C. § 365

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

**11 U.S.C. 1104**

**(a)** At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee--

**(1)** for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

**(2)** if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

**(b)(1)** Except as provided in section 1163 of this title, on the request of a party in interest made not later than 30 days after the court orders the appointment of a trustee under subsection (a), the United States trustee shall convene a meeting of creditors for the purpose of electing one disinterested person to serve as trustee in the case. The election of a trustee shall be conducted in the manner provided in subsections (a), (b), and (c) of section 702 of this title.

**(2)(A)** If an eligible, disinterested trustee is elected at a meeting of creditors under paragraph (1), the United States trustee shall file a report certifying that election.

**(B)** Upon the filing of a report under subparagraph (A)--

**(i)** the trustee elected under paragraph (1) shall be considered to have been selected and appointed for purposes of this section; and

**(ii)** the service of any trustee appointed under subsection (a) shall terminate.

**(C)** The court shall resolve any dispute arising out of an election described in subparagraph (A).

**(c)** If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor, if--

**(1)** such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or

**(2)** the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000.

**(d)** If the court orders the appointment of a trustee or an examiner, if a trustee or an examiner dies or resigns during the case or is removed under section 324 of this title, or if a trustee fails to qualify under section 322 of this title, then the United States trustee, after consultation with parties in interest, shall appoint, subject to the court's approval, one disinterested person other than the United States trustee to serve as trustee or examiner, as the case may be, in the case.

**(e)** The United States trustee shall move for the appointment of a trustee under subsection (a) if there are reasonable grounds to suspect that current members of the governing body of the debtor, the debtor's chief executive or chief financial officer, or members of the governing body who selected the debtor's chief executive or chief financial officer, participated in actual fraud, dishonesty, or criminal conduct in the management of the debtor or the debtor's public financial reporting.

**11 U.S.C. § 1122**

**(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.

**11 U.S.C. § 1124**

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.

**11 U.S.C. 1129**

**(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).