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 RESPONDENT

ORAL ARGUMENT REQUESTED

Team R. 23
Counsel for Respondent

QUESTIONS PRESENTED

1. Under 11 U.S.C. § 365(c)(1), which excuses a non-debtor party from accepting performance from a debtor in possession when applicable non-bankruptcy law excuses the non-debtor party from accepting performance, can a debtor in possession still assume the contract when they do not intend on assigning it.
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 when the debtors failed to seek substantive consolidation?

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OPINIONS BELOW

The United States Bankruptcy Court for the District of Moot held in favor of the Petitioner. The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court on both issues. On March 4, 2019, the United States Court of Appeal for the Thirteenth Circuit reversed the judgment of the Bankruptcy Appellate Panel in favor of the Respondent in finding that (1) the "hypothetical test" applies under 11 U.S.C. § 365(c), thus, barring Development from assuming the Agreement absent the consent of Under My Thumb, and (2) 11 U.S.C. § 1129(a)(10) should be read, as § 102(7) allows it, to require the use of the *per debtor* approach. R. at 15, 21. The Thirteenth Circuit Court of Appeal's opinion is reproduced as the record in this appeal.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

The relevant statutory provisions in this case are: 11 U.S.C. §§ 102, 362, 365, 522, 548, 1107, 1123, 1129, as well as U.S. CONST. art. I, § 8, cl. 8, which are reproduced in the Appendices.

STATEMENT OF THE CASE

Respondent, Under My Thumb, Inc. ("Under My Thumb"), is a leading software designer that specializes in customer loyalty and reservation information systems designed to incentivize and reward members who frequently use the client's services. R. at 4. The complex software, tailor-made for each specific client, is not only difficult to create—but also expensive. *Id*. The software typically tracks all consumer data, in order for the client to better understand their customers; in turn, this software creates an entirely new dynamic by logging valuable information the company uses to increase brand loyalty and revenue. *Id*. Under My Thumb has designed and implemented variations of this complex software for several other casinos to track and reward all players from the high rollers to the "lone crap shooters." *Id*. (quoting THE ROLLING STONES, TUMBLING DICE (Rolling Stones Records 1972).

Petitioner, Tumbling Dice, Inc. ("TDI"), was formed to operate as a parent holding company of nine wholly-owned debtor-subsidiaries. Eight of TDI's subsidiaries operate as a luxury casino and resort (each an "Operating Debtor" and, collectively, the "Operating Debtors"), while TDI's ninth subsidiary, Tumbling Dice Development, LLC ("Development"), was formed to serve a limited purpose in the overall corporate structure by acting as a licensee under the non-exclusive software license agreement with Under My Thumb in 2008. *Id*. This software was designed to modernize Club Satisfaction, the casino loyalty program used by each Operating Debtor. *Id*.

After a year of research and development, Under My Thumb incurred approximately $10 million in costs to create the Club Satisfaction software (the "Software"). *Id*. Development agreed to reimburse Under My Thumb for a portion of these costs pursuant to an unsecured $7 million promissory note (the "R&D Note"). *Id*. In addition, Under My Thumb entered into a

license agreement (the "Agreement") with Development that gave Development a non-exclusive license to use its copyrighted and patented Software, and in turn Development would pay Under My Thumb a monthly fee that was calculated based on the amount of spending activity of Club Satisfaction members. R. at 4-5. Further, this Agreement permitted Development to "extend the benefits of the Agreement to its affiliated entities only," even though these affiliated entities were not the ones to enter into the Agreement with Under My Thumb. R. at 5. Although the affiliated entities could use the benefits of this valuable software, the Agreement prohibited the Debtors from assigning or sublicensing their rights to others without first obtaining Under My Thumb's express written consent. *Id*. The Software was a huge success—Club Satisfaction membership and spending tripled in size, and the Debtors now had access to information, such as what type of games and purchases each member made. *Id*. This data gave the Debtors the information they needed to track all members' habits in order to entice them to return more often, play longer, and ultimately spend more. *Id*. This software quickly became an essential part of the Debtors' ongoing business model, as the casinos would not be able to operate efficiently without such information. *Id*. Under My Thumb used similar versions of the Software to contract with other third parties. *Id*.

Start Me Up, Inc., a hedge fund, acquired TDI's stock in December 2011 through a leveraged buy-out. R. at 6. As part of the buy-out agreement, TDI and Operating Debtors granted first priority liens on their assets to a syndicated group of lenders (the "Lenders") in exchange for a $3 billion loan. *Id*. Due to Development's limited purpose in the corporate structure as an entirely separate entity, the Lenders did not require Development to act as a borrower or guarantor in the loan agreement. *Id*.

The Debtors filed for Chapter 11 bankruptcy in January 2016. *Id*. The Debtors jointly and severally owed nearly $3 billion to several creditors. *Id*. The Debtors then began negotiations with Start Me Up, the Lenders, the unsecured creditor's committee and other stakeholders, and ultimately came up with a plan support agreement (the "Plan"). R. at 6-7. Surprisingly, Under My Thumb was in no way included in this negotiation process. R. at 6.

The Plan, proposed by the Debtors, was a jointly-administered plan, and had absolutely no effect on the overall corporate structure. R. at 7. The Plan expressly stated, "the Debtors' estates are *not* being substantively consolidated and no Debtor is to become liable for the obligation of another." *Id*. (emphasis added). Additionally, the Plan proposed to assume the Agreement pursuant to §§ 365(c) and 1123(b)(2). R. at 8. Initially, Under My Thumb viewed the Plan on its face as beneficial for all parties, but they soon realized that a direct competitor, Sympathy for the Devil, LP ("SFD"), would gain access and control of Under My Thumb's coveted Software. R. at 7. If the Plan were to be confirmed, SFD would receive 51% of the voting shares of the reorganized TDI, including several seats on the board of directors. *Id*. SFD's subsidiary has been attempting to replicate the Software, and now, under the Plan, would have access to the Software created by Under My Thumb. *Id*. Under My Thumb could not afford to allow the possibility a competitor gain access to its valuable creation, and thus cannot approve of the Plan.

Under My Thumb, as Development's only impaired class of creditors, objected to the Plan on numerous grounds—two of which are at issue in this case. R. at 8. The bankruptcy court below overruled both of these objections and ruled in favor of the Petitioner. R. at 9. The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court on both

issues. *Id*. The United States Court of Appeals for the Thirteenth Circuit reversed the decision and held for the Respondent regarding both issues. *Id*. This appeal follows.

SUMMARY OF ARGUMENT

As to the first issue, § 365(c) should first be interpreted according to the language Congress used when enacted. A debtor in possession is prohibited from assuming or assigning an executory contract without the consent of the non-debtor party if applicable law would bar the assignment of the contract to a third party. Section 365(c)(1) of the Code should be given a straightforward application because of its unambiguous language.

Congress uses precise language in the drafting of a statute, and courts should look first to the literal language. In § 365(c), Congress explicitly states a "trustee may not assume or assign" an executory contract over a non-debtor's objection if applicable law would bar the assignment. There is nothing that suggests Congress meant anything other than the plain language of the statute; therefore, without Under My Thumb's approval, the Plan would be barred from assuming Development's contract. Further, it is anticipated Petitioner will argue the terms "trustee" and "debtor in possession" are ascribed different meanings. However, § 1107(a) states the two terms are interchangeable with one another.

Absent ambiguous language in the statute, the statute should be read literally—without consulting legislative history. Courts should only depart from the plain meaning of a statute when Congress *clearly* meant something other than what it said. Additionally, courts may only look past the plain meaning of the statute when a literal interpretation would lead to a result that is absurd or demonstrably at odds with the Code. In rare cases, there is a significant reason presented as to why Congress would have intended anything other than the statute's plain meaning. The literal application of the statute would have to shock the general or moral

common sense. Here, without substantive legislative history, there is no authoritative history for this Court to examine in an attempt to find anything other than the plain meaning of § 365(c).

Further, §§ 365(c) and 365(f) serve distinct and separate purposes that do not conflict with each other. A literal reading would not deem § 365(c) inoperative because it is a narrow exception to the general provision, § 365(f). This "conflict" between the two sections is only illusory, and are intended by Congress to co-exist. Additionally, the "hypothetical test" is the proper test because the language of § 365(c) is clearly written in order to preserve the rights of non-debtor parties. Without a change in the statute, this Court should not judicially rewrite the statute—this is something for Congress to decide. For the foregoing reasons, this Court should find the plain meaning of §365(c) is unambiguous and should be interpreted as such.

As to the second issue, the Plan is not confirmable because the 11 U.S.C. § 1129(a)(10) acceptance requirement mandates at least one class of impaired creditors' favorable vote of each individual plan that comprises the joint Plan. In looking at the statutory context of §1129(a)(10), this Court should employ the *per debtor* approach. When reading §1129(a)(10) in conjunction with §102(7), the Code's very own rule of construction, it is clear the singular terminology, "plan," does not support the contention that numerous debtors must accept the plan in a multi-debtor case. When looking at the statutory context, "plan" should be interpreted as "plans" in a multi-debtor case. Here, the Debtors' cases were jointly administered, and without substantive consolidation, each Debtor has its own, separate plan, rather than one singular plan of reorganization. Under 1129(a)(10), each of the Debtors must have at least one class of impaired creditors accept each of the collective plans. The word "plan" in subsection (a)(10) is not simply a lone pebble in alien juxtaposition. The statutory scheme must be read in conjunction with all of the subsections in order to protect the rights of unimpaired creditors—the very purpose of why

these subsections exist. It is generally understood that the purpose behind §1229(a)(10) is to ensure creditor consensus with the plan, as well as prohibit a plan from being acceptance absent support by affected creditors.

Further, absent substantive consolidation, the *per debtor* approach is the best way to ensure entity separateness and protect the rights of creditors. Here, the Debtors combine their related cases under joint administration. Unlike substantive consolidation, joint administration does not alter the requirements set forth in the Code in any way, and the estates of the debtors are to remain separate—only creditors with a valid claim may reach the assets from that debtor. If this Court were to apply the *per plan* approach, it would create an improper substantive consolidation, thus eliminating Under My Thumb's ability to safeguard itself from a cramdown. To avoid de facto substantive consolidation and maintain entity separateness, this Court should affirm the Thirteenth Circuits adoption of the *per debtor* approach.

Additionally, adopting a *per debtor* approach under Section 1129(a)(10) would protect the voting power of impaired creditor and fosters equitable fairness. Each class of impaired creditors have a voice in whether to accept a proposed plan or whether to further negotiate with the parties undergoing reorganization. If this Court were to adopt the *per plan* approach, it would bypass the acceptance requirement set forth in §1229(a)(10), as well as certain creditor safeguards enacted by Congress. For these reasons, this Court should find that all debtors must provide acceptance of a plan, and that the *per debtor* approach is proper.

ARGUMENT

The facts of this case are undisputed. R. at 3, n.3. Thus, the questions on certiorari are questions of law and are reviewed de novo. *Cui Yan Lin v. Holder*, 365 Fed. App'x 311, 312 (2d Cir. 2010).

I. The Thirteenth Circuit correctly applied the "hypothetical test" under 11 U.S.C. § 365(c) based upon the express, unambiguous language which preserves the rights of the non-debtors.

This Court should affirm the decision of the United States Court of Appeals for the Thirteenth Circuit because it correctly determined that § 365(c) should be interpreted according to the language Congress used when it enacted the statute. This means that a debtor in possession is prohibited from assuming or assigning an executory contract without the consent of the non-debtor party if applicable non-bankruptcy law bars the assignment of the contract to a third party. *See* 11 U.S.C. § 365(c). In doing so, the Thirteenth Circuit joined the majority of its sister circuits by holding that a literal interpretation of § 365(c)'s unambiguous plain language establishes the use of the "hypothetical test." R. at 11. Because of this, this Court would be prohibited from looking further into legislative history. *Id.*

The Thirteenth Circuit was correct in determining that the application of the "hypothetical test" should be applied in order to preserve the rights of the non-debtor parties. *Id.* at 14. Although general bankruptcy policy typically favors debtors, there are provisions in the Code specifically in place to preserve the rights of non-debtor parties. *Id.* In fact, one of the focuses of bankruptcy reorganization is the protection of non-debtor rights. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984) (citing H. R. Rep. No. 95-595, p. 5 (1977)).

Under My Thumb developed and licensed successful software used throughout the casino industry. R. at 4-5. If the Plan were to be approved, SFD's involvement would lead to a direct

competitor of Under My Thumb gaining access to this coveted software; the very competitor that has attempted to replicate this valuable software for years in order to gain a competitive advantage. *Id*. at 8. This is precisely the type of non-debtor party that § 365(c) of the Code is set up to protect, and precisely why Under My Thumb objected to the Plan. *Id.* For these reasons this Court should affirm the decision of the United States Court of Appeals for the Thirteenth Circuit.

A. The plain language of § 365(c)(1) is unambiguous and clearly establishes the use of the "hypothetical test" because there is no clear indication that Congress meant for the statute to be applied contrary to how it was written.

The Thirteenth Circuit was correct in holding that § 365(c)(1) of the Code should be given a straightforward application because of its unambiguous language. In the Thirteenth Circuit's opinion, it cited to this Court which has repeatedly emphasized the first step in statute interpretation. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (citing *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985)) ("the starting point in every case involving construction of a statute is the language itself").

When a statute's plain language is unambiguous, the function of the court is to enforce the statute exactly how it is written. *Ron Pair*, 489 U.S. at 241. That interpretation must begin with the presumption that the legislature "means what it says and says what it means." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). Accordingly, § 365(c)(1)'s unambiguous language should be read literally and this Court should not look beyond the plain language of the statute to consult legislative history. *See In re W. Elecs.*, Inc., 852 F.2d 79, 83 (3d Cir. 1988).

1. A literal reading of § 365(c)(1) establishes the use of the "hypothetical test" because the statute is written with the disjunctive "or" and not the conjunctive "and."

The Thirteenth Circuit was correct in holding that the plain language of § 365(c)(1) should be given a straightforward application because the language is unambiguous. The first step this Court should take in statutory interpretation is to start with the precise language that Congress used when they drafted the statute. *Ardestani v. INS*, 502 U.S. 129, 135 (1991).

The words that Congress used drafting § 365(c)(1) literally state that a "trustee *may not* assume *or* assign" an executory contract over the non-debtor's objection if applicable law would bar the assignment. 11 U.S.C. § 365(c)(1) (emphasis added). The definition of "may not" and "or" are clearly defined in the Code under § 102. *See* 11 U.S.C. § 102(4)-(5). Section 102(4) defines "may not" as prohibitive, and not permissive; while § 102(5) defines "or" as not exclusive. *Id.* This Court held that terms connected by the disjunctive "or" be given separate, normal meanings and that it should be assumed that this was Congress's intention when enacting the statute. *Garcia v. United States*, 469 U.S. 70, 73 (1984). To that end, the word "or" in § 365(c)(1) should be given its plain and ordinary meaning as defined by statute because there is nothing "on the face of the statute [to] suggest Congress meant otherwise." *Id.* A direct application of § 365(c)(1), according to this Courts standard for interpreting a statute, means that without the Under My Thumb's permission, Development is barred from assuming an executory contract *or* from assigning an executory contract—as long as the contract could not be assigned under non-bankruptcy law. *See W. Elecs.*, 852 F.2d at 83.

The dissent posits that interchanging the word "trustee" with "debtor in possession" is at odds with a plain language interpretation of § 365(c). R. at 23. In the dissent, Judge Jones argues that "when the [Code] refers to the trustee and the debtor in possession in the same statutory provision, as it does in 365(c), (e) and (f), the two terms are ascribed different meanings." *Id.* However, this Court clearly held to the contrary when it found that § 1107 is applicable to § 365,

finding the terms in the statute may be used interchangeably. *See Mission Prod. Holdings v. Tempnology, LLC*, 139 S. Ct. 1652, 1658 (2019).

In fact, the Code specifically addresses the interchangeability of the terms in 11 U.S.C. § 1107. R. at 10. Section 1107(a) states that "[s]ubject to any limitations on a trustee serving in a case under this chapter . . . a debtor in possession shall have all the rights . . . and powers, and shall perform all the functions and duties . . . of a trustee serving in a case under this chapter." 11 U.S.C. § 1107(a). Accordingly, the word "trustee" in § 365(c)(1) is interchangeable with "debtor in possession." *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery (In re Cybergenics Corp.)*, 226 F.3d 237, 243 (3d Cir. 2000).

The Third, Fourth, Ninth, and Eleventh Circuits have all held that the literal language in § 365(c) establishes a "hypothetical test." *See W. Elecs.,* 852 F.2d at 83.; *see also Perlman v. Catapult Entm't (In re Catapult Entm't)*, 165 F.3d 747, 750 (9th Cir. 1999), *RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257 (4th Cir. 2004). Each of these Circuits agree that § 365(c)(1) makes no reference as to whether a debtor in possession actually intends to assign the executory contract—it simply limits a debtor from assuming the contract if applicable non-bankruptcy law bars assignment to a third party. *In re Trump Entm't Resorts, Inc.*, 526 B.R. 116, 123 (Bankr. D. Del. 2015). It is not disputed that federal intellectual property law would excuse Under My Thumb under the original contract from accepting performance from any entity other than Development. R. at 12. Accordingly, absent Under My Thumb's permission under § 365(c), Development is barred from assuming the Agreement.

2. This Court is barred from looking to the legislative history of § 365(c)(1) because there is no ambiguity in the plain language that Congress chose when they enacted it.

The Court should not turn to the legislative history of § 365(c)(1) because it is written in plain language that is unambiguous and should be interpreted as such. When the words of statute

are unambiguous, the "judicial inquiry is complete." *See Conn. Nat'l Bank v. Germain*, 503 U.S. at 253; *see also Ron Pair Enters.,* 489 U.S. at 241. This court made it clear that when no ambiguity exists, and it is the debtor's analysis that actually creates the ambiguity, there is no reason to look past its plain meaning to legislative history. *Garcia v. United States*, 469 U.S. 70, 74; *see also Hillman v. IRS*, 263 F.3d 338, 342 (4th Cir. 2001) (when the language of a statute is unambiguous, the general rule is that the court must end with the plain language of that statue).

This rule should only be departed from when legislative history *clearly* indicates that Congress meant something other than what it said. *Catapult Entm't*, 165 F.3d at 753 (emphasis added). The Respondent agrees with the Thirteenth Circuit in that § 365(c) is unambiguous and should be afforded a straightforward application—exactly how it is written. *See* R. at 12. Accordingly, there is no reason for this Court to look further to legislative history.

B. Adopting the "hypothetical test" would not deem § 365(f)(1) inoperative because the conflict with § 365(c)(1) is illusory and application of each section has a distinct purpose that does not lead to "absurd" results.

1. A literal application of § 365(c)(1)'s plain language would not satisfy the "absurdity" exception.

The Thirteenth Circuit correctly held that a straightforward application of § 365(c)(1) would not lead to a result that is absurd or demonstrably at odds with the Code. This Court held that a narrow exception to the application of a statute's plain language is premised on whether a literal application would produce a result demonstrably at odds with the intentions of the drafters. *Ron Pair Enters.*, 489 U.S. at 242. Additionally, this Court has repeatedly emphasized that only in rare cases would that exception be recognized, and there must be a significant reason presented as to why Congress would have intended any policy reason to the contrary of a statute's literal application. *See Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991); *see also RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257, 265 (4th Cir. 2004). A

literal application would have to be such that its result shocks the general or moral common sense. *Id.*

A search for substantive legislative history of § 365(c) would be inconclusive. *In re Cardinal Indus.*, 116 B.R. 964, 978 (Bankr. S.D. Ohio 1990). The current language in § 365(c)(1) was added to the Code in the Bankruptcy Amendments and Federal Judgeship Act ("BAFJA") of 1984. *Id.* Although not the primary purpose of BAFJA, Congress used it to make other changes to the Code that had been pending. *Id.* One such change was to § 365(c)(1)(A), in which the phrase "an entity other than the debtor or the debtor in possession" was replaced with the words "the trustee." *Id.* at 979. The change in language was actually initiated under the Technical Amendments Act of 1980 and never enacted into law. *Id.* at 978. BAFJA was passed so quickly that its legislative history [pertaining to § 365(c)(1)(A)] is comprised solely of statements inserted rather than actually read into the Congressional Record. *Id.* Therefore, there is no authoritative history for this Court to examine regarding § 365(c). *Id.* Various courts that have adopted the "actual test," have cited to a report that came from the failed Technical Amendments Act of 1980. *See Summit Inv. & Dev. Corp. v. Leroux*, 69 F.3d 608, 613 (1st Cir. 1995). Judge Jones actually cites to the same report in the dissent. R. at 25.

Courts are not free to replace a statute's plain meaning with un-enacted legislative intent. *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 453 (1987) (Scalia, J. concurring)) ("Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent"). Further, this Court also held that it would not allow small pieces of legislative history to replace the plain meaning of a statute and without substantial

ambiguity it would not narrow a statute's plain meaning because of what Congress "probably intended." *Garcia*, 469 U.S. at 76-78.

With no conclusive, substantive, or authoritative history, we must apply the plain language of the statute. The question to ask is will a literal application of § 365(c) lead to an absurd result that would "shock general and moral common sense" and is "demonstrably at odds" with the Code? The Respondent agrees that Code typically favors the debtor; however, there are statements made by Congress as well as provisions in the Code to protect non-debtors. *See, e.g.*, 11 U.S.C. § 362(b);

Accordingly, it is not inconceivable that § 365(c) was enacted by Congress, in part, to protect a non-debtor party. It does not shock general or moral common sense that Congress would enact a section to protect a company like Under My Thumb that has a business model predicated upon keeping their intellectual property under their control.

2.There is a clear and distinct difference between the underlying purpose behind § 365(f) and § 365(c).

The Thirteenth Circuit correctly held § 365(c) and § 365(f) have distinct purposes that do not conflict with each other. R. at 13. The Petitioner argues a literal reading of § 365(c) would render "inoperative and superfluous" § 365(f). R. at 13. The Sixth Circuit defined the important differences between §§ 365(c) and 365(f). *In re Magness*, 972 F.2d 689 (6th Cir. 1992). It explained §§ 365(c) and 365(f) have very distinct purposes in the Code and carefully differentiated each statute important differentiation being that "applicable law" in each statute is of "markedly different scope." *Id* at 695. In § 365(f)(1) the applicable law is a general provision while § 365(c)(1) looks to the applicable law that is in place to protect non-debtors, such as Under My Thumb. *Id.* The applicable law in § 365(c)(1) refers to specific laws that *excuse* a

party, other than the debtor, to [such executory contract] from accepting or rendering performance to an entity other than debtor in possession. *Id.*

Therefore, § 365(f) is the broad rule while § 365(c) is an exception to that broad rule. *Id.* The language in § 365(f)(1) specifically says, "applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease." 11 U.S.C. § 365(f)(1). The words that Congress used in § 365(c)(1)(A) are, "applicable law *excuses* a party." 11 U.S.C. § 365(c)(1)(A) (emphasis added). The Sixth Circuit refers to § 365(c) as "a carefully crafted exception to the broad rule made necessary by general principles of the common law and our constitutions." *Magness*, 972 F.2d at 695. The court's definition of §§ 365(c)(1) and 365(f)(1) has also been adopted in other sister circuits and bankruptcy courts. *See Catapult Entm't*, 165 F.3d 750; *see also Trump Entm't Resorts*, 526 B.R. at 122.

The Respondent agrees with the Thirteenth Circuit that the conflict between the two statutes is "illusory." R. at 13. In § 365(f)(1) the "applicable law" is the common law default rule that a patent licensee's rights are nontransferable unless the patent licensor expressly authorizes the transfer of the license. *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 187 (1933). In § 365(c)(1) the "applicable law" is federal common law that excuses Under My Thumb from the possibility of excepting performance from, or rendering performance to, any entity other than one originally contracted with. *See In re Patient Educ. Media, Inc.*, 210 B.R. 237, 242-43 (Bankr. S.D.N.Y. 1997); *see also Everex Sys. v. Cadtrak Corp. (In re CFLC, Inc.)*, 89 F.3d 673, 677 (9th Cir. 1996).

This Court has stated, "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535 (1974). Therefore, with clear and distinct

differences in the underlying purpose behind each statute, the application of § 365(c) does not render "inoperative and superfluous" § 365(f).

C. The "hypothetical test" should be applied because protecting the rights of non-debtor parties is a goal of bankruptcy reorganization.

The Thirteenth Circuit's decision to adopt the "hypothetical test" was correct because the language in § 365(c) is clearly written in order to preserve the rights of non-debtor parties. The Bankruptcy Act of 1938 consolidated three reorganization chapters into one, single business reorganization chapter. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984) (citing H. R. Rep. No. 95-595, p. 5 (1977)). One of Congress's focuses was to provide greater protection to the debtor, creditors, and the public interest. *Id.* This language makes it clear that debtors rights are not the only focus. *Id*. In fact, the Code has existing provisions in place to protect non-debtor parties. *See, e.g.*, 11 U.S.C. § 362(b).

The Petitioner argues that adopting the "actual test" would provide for results that better fit general bankruptcy policy. R. at 14. In response, the Thirteenth Circuit pointed to the holding in *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.* (R. at 14). This Court made it clear that it has "repeatedly emphasized that achieving a better policy outcome is a task for Congress, not the courts." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13 (2000). The Ninth Circuit expressly held that "[p]olicy arguments cannot displace the plain language of the statute." *Catapult Entm't*, 165 F.3d at 750. Additionally, the court held that even if § 365(c) is determined to be bad policy, it would not justify a "judicial rewrite." *Id.*

Under My Thumb is a leading software designer that specializes in customer loyalty programs. R. at 4. The agreement between Under My Thumb and Development resulted in a successful version of this type of software that was extremely beneficial for both companies. *Id*. at 5. The Plan exposes Under My Thumb to the possibility that their proprietary software may

be accessible by a direct competitor and this is precisely why Under My Thumb voted to reject the Plan. *Id.* at 8. Minority circuits advocate the "actual test" is more appropriate because when the debtor does not intend to assign the contract, the non-debtor is still receiving "the full benefit of its bargain." *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997).

However, this is simply not the case here because the Plan introduces a scenario that certainly does not benefit Under My Thumb. Part of the Agreement was that Development was permitted to extend its benefits to affiliated entities. R. at 5. Although Development may have no intention of assigning the Agreement to a third party, the Plan would affiliate a direct competitor of Under My Thumb that could gain access to their software. Section 365(c) offers protection for Under My Thumb to keep that from happening. Congress has enacted intellectual property laws in order to protect companies like Under My Thumb from losing control of who uses their intellectual property. *Id*. at 11. In fact, property rights, some of which can be found in the Constitution, are among the most coveted rights that United States citizens have. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 8. As stated previously, the Code currently has provisions in place to protect non-debtor parties. R. at 14. The language in § 365(c) affords non-debtor parties another one of those protections. However unfavorable or contrary to general bankruptcy policy as application of the "hypothetical test" may be to the Petitioner, it is Congress that should make the change, not this Court.

II. The Thirteenth Circuit correctly found in favor of the *per debtor* approach because such approach is consistent with the statutory context and, ultimately, the protections set forth to safeguard the voting rights of impaired creditors.

In addition to the first issue addressed above, this Court should also affirm the Thirteenth Circuit's finding that the Plan is not confirmable based on the 11 U.S.C. § 1229(a)(10) acceptance requirement that mandates at least one class of impaired creditors vote favorably on

each individual plan that comprises the joint plan." Because Under My Thumb is the sole class of impaired creditors of Development, the ninth debtor-subsidiary, the language of § 1129(a)(10) supports the *per debtor* approach requiring Under My Thumb's acceptance of the Plan. In order to avoid the creation of a de facto substantively consolidated plan and maintain corporate structure, absent substantive consolidation, this Court should adopt the *per debtor* approach. By affirming the Thirteenth Circuit's holding, this Court will uphold the purpose of the Chapter 11 reorganization and the safeguards that it affords creditors.

A. The Thirteenth Circuit properly applied the *per debtor* approach under § 1129(a)(10) because such application comports with the plain meaning of the statute as a whole.

A look to the statutory context of § 1129(a)(10) makes is clear this Court should employ the *per debtor* approach. Under the Code's very own rule of construction, § 102(7), it is evident that the language within § 1129(a)(10) includes its plural form when applicable. When read in conjuncture with the other requirements for plan confirmation set forth in § 1129(a), this Court should find that the term "plan" includes "plans" in a joint plan such as this. Even looking to the intent of Congress, it is clear that the *per debtor* approach is in line with Congress's objective to protect the voting power of impaired creditors in a joint plan of reorganization.

1. The wording, "under the plan," of § 1129(a)(10) does not give reason to surmise, in a multi-debtor case, that only one debtor may satisfy the requirement.

The Thirteenth Circuit correctly held that the proposed plan of reorganization was not confirmable because § 1129(a)(10) mandates acceptance from an impaired class of *each debtor*. (emphasis added). When read in conjunction with the entirety of the statute, as well the rules of construction set forth in § 102(7), it is clear that the singular terminology, "plan," does not support the contention that in a multi-debtor case only one of the numerous debtors must accept the plan. As Justice Duberstein articulated in *In re Marston Enterprises, Inc.*, § 1129 "sets the

criteria for confirmation." 13 B.R. 514, 516 (Bankr. E.D.N.Y. 1981). As one of the sixteen requirements set forth in § 1129, this subsection must be satisfied to ensure plan confirmation. *Id*. Section 1129(a)(10) mandates that in order to achieve confirmation, it must be evident that ". . . 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." Under My Thumb, as the sole impaired class of creditors of Development, did not extend the requisite acceptance, the statute is not satisfied and, thus, the Plan cannot be confirmed.

The Petitioner asserts that the wording "under the plan" in § 1129(a)(10) indicates that only the singular "plan" allows for only one impaired class of creditors to accept the plan. R. at 17. In doing so, the Petitioner relies heavily upon a case decided by the Ninth Circuit Court of Appeals, *In re Transwest Resort Properties, Inc.*, where the court found the text of the statute was clear and only one impaired class must accept the plan for confirmation. 801 F.3d 1161 (9th Cir. 2015). The Ninth Circuit, however, failed to view § 1129(a)(10) in light of its statutory context. The *Transwest court* disregarded the jurisprudence set forth from this Court, encouraging the judiciary to use a statutory analysis in conjuncture with rules of construction.

This Court has held in cases of statutory construction, one must look to the language of the statute to determine whether it is plain or unambiguous with respect to the dispute of the case before it. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002). Once the Court determines that the language of a statute is ambiguous, the Court must then look to rules of construction to alleviate the ambiguity. *Id.* The Code itself contain a distinctive statutory rule of construction under 11 U.S.C. § 102(7) providing that "the singular includes the plural." Applying this rule in unification with § 1129(a)(10) demonstrates that "plan" includes, when the situation merits, "plans," to account for a joint multi-debtor plan. While the Debtors did pursue a

joint plan of reorganization, the Debtors were not substantively consolidated and, thus, in actuality, the Plan consists of ten distinct plans rather than one singular plan of reorganization. Under § 1129(a)(10), each of the ten Debtors must have at least one class of impaired creditors that accepts each of these ten plans. Development, having its sole class of impaired creditors, Under My Thumb, failed to satisfy this requirement when Under My Thumb rejected the Plan.

Perhaps the clearest evidence that "plans" must be read into § 1129(a)(10) lies in the language provided by the Debtors themselves. The Plan filed by the Debtors alongside a disclosure statement specifically included that "the Debtors' estates are not being substantively consolidated and no Debtor is to become liable for the obligations of another." R. at 7. If the Debtors intended to merge their estates into one joint plan of reorganization, then they should have sought substantive consolidation at the onset of the filing. Instead, they actively stated that their estates are not to be substantively consolidated. The inclusion of this non-substantive consolidation provision within the Plan clearly lays out that each of the joined plans consists of separate, distinct plans for each respective Debtor. Assigning the plural form to "plan" in § 1129(a)(10) is, therefore, practical in both the application of § 102(7) and in the language of the statute itself.

In re Tribune Co. supports the argument that in a multi-debtor case, all debtors must satisfy the requirement set forth in § 1129(a)(10). 464 B.R. 126 (Bankr. D. Del. 2011). The court found it is not an uncommon occurrence in Chapter 11 reorganization where a plan contains a non-substantive consolidation provision similar to the one in the Plan at issue, reasoning the essential effect of these specific provisions is that each joint plan consists of a separate plan for each Debtor. *Id*. at 182. Upon applying the rule, "the singular includes the plural" found in §

102(7), the court opined that "ascribing the plural to the meaning of 'plan' in § 1129(a)(10) is entirely logical and consistent with such a scheme." *Id.*

In terms of statutory construction, many courts have included the plural form in conjuncture with its singular tense when analyzing other bankruptcy statutes. For example, in *In re Territo*, the United States Bankruptcy Court for the Eastern District of New York looked to 11 U.S.C. § 522(d)(11)(D) to resolve a dispute regarding exemption of payments by the debtor due to personal injury. 36 B.R. 667 (Bankr. E.D.N.Y. 1984). The court specifically looked to the terms "injury" to determine whether the debtor could be exempt due to personal injuries not including pain and suffering. Justice Duberstein acknowledged "that the bankruptcy court must look first to its own definitions and interpretations." *Id.* at 670. Further, in finding that the intent of Congress was unclear, Justice Duberstein quoted the *Wilson* court's reasoning that when Congress' intent is not clear, a liberal interpretation of the law is favored. *Id. see* 22 B.R. 146 (Bankr. D. Or. 1982). Ultimately, the court found that the injuries o merited exemption despite the fact that § 522(d)(11)(D) did not explicitly define any other type of injury. *Id.*

In a trustee's motion to forbid a co-debtor from claiming exemptions, the same payment exemption statute was analyzed by the Bankruptcy Court for the Eastern District of New York. *In re Phillips*, No 12-72379-ast (Bankr. E.D.N.Y 2012) (order denying motion to disallow debtor from claiming personal injury exemptions). In this motion, the term "payment" was disputed by the debtors and trustee involved. *Id.* The debtors argued that the term "payment," while singular in the statute, may also include its plural form, "payments." *Id.* The *Phillips* court opined that the statute was indeed ambiguous and thus applied rules of construction during its analysis. *Id.* Looking to § 102(7), the court found the rule, "the singular includes the plural," allows for "payment" to includes "payments" within § 522(d)(11)(D). *Id*. The Second Circuit in *Universal*

Church was faced with whether "transfer" may be used in its plural form under § 548(a)(2)(A). *Id. see Universal Church v. Geltzer.* Indeed, the Second Circuit applied §102(7) and found that "transfer" may mean multiple transfers. *Id.* In doing so it denied the trustee's motion. *Id.*

In heeding this advice, the Thirteenth Circuit correctly looked first to the Code's own rule of construction, § 102(7), and determined that the singular "plan" terminology in § 1129(a)(10) includes its plural form in multi-debtor cases. Albeit the fact that the term "plan" does not contain an "s" at its end, it no way means that a joint plan containing multiple plans within it does not qualify under the statute.

2. Reading § 1129(a) in its entirety requires this Court to employ the *per debtor* approach under § 1129(a)(10).

This Court has emphasized though its jurisprudence that when interpreting a statute, one should always turn to the plain meaning of the statute as a canon before all others. In fact, in its own words, "it is [this Court's] duty to give effect, if possible, to every clause and word of a statute." *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883). When applying the plain meaning canon, a court should consider the context in which the statutory words are used because courts do not construe statutory phrases in isolation, but read statutes as a whole. *U.S. v. Morton*, 467 U.S. 822, 828 (1984); *see Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). The Thirteenth Circuit correctly gave effect to the statute as a whole, and thus, looked to the context of § 1129(a)(10) as but one requirement necessary to satisfy § 1129(a). When reading the statute schematically, it is evident that a *per debtor* approach coincides with § 1129(a)(10). In considering the rights of unimpaired creditors, § 1129(a)(10) must be read in conjunction with the other subsections of § 1129(a).

In *King v. St. Vincent's Hospital*, this Court looked beyond a single word in a subsection of a statute and read the statute in its entirety in order to determine the meaning behind that

particular subsection. 502 U.S. 215 (1991). This Court was tasked with determining whether a provision of a veterans' reemployment rights statute, 38 U.S.C. § 2024(d), implicitly limited the length of military service after a member of the Armed Forces possesses a right to civilian reemployment. *Id.* at 571. This Court stated that "statute[s are] to be read as a whole, because meaning of statutory language, plain or not, depends on context." *Id.* This Court looked not merely to subsection (d), which did not specify a durational limit, but also to the other subsections of the statute that expressly provided a length of time. *Id*. at 573. This Court found it must be inferred that the vague nature of subsection (d)'s protection was deliberate because the other subsections expressly limit the period of protection. *Id.* at 574. Further, Justice Souter quoted Judge Learned Hand of the Second Circuit, stating that "[w]ords are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . . ." *Id.* (quoting *NLRB v. Federbush Co.,* 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.)).

The word "plan" in subsection (a)(10) is not simply a lone pebble in alien juxtaposition. It is a part of the statutory scheme that must be read in conjunction with all of the subsections in order to adequately protect the rights of unimpaired creditors—the very purpose of why these subsections exist. The Petitioner claims that no conflict exists between § 1129(a)(10) and the other subsections. This Court held when statutes are capable of co-existence, it is the duty of the courts, absent any clear congressional intent to the contrary, to regard each as effective. *Pittsburg & Lake Erie R.R. Co. v. Railway Labor Executives Ass'n*, 491 U.S. 490 (1989). The Petitioners fails, however, to note that the other subsections of the statute evince that absent substantive consolidation or consent, each debtor must accept the plan to condition its satisfaction. Looking

to other provisions of the statute, subsection (a)(1) provides that a plan must comply with the applicable provisions of the of the Code, and subsection (a)(3) mandates that a plan be "proposed in good faith and not by any means forbidden by law." Both provisions cannot be satisfied if only some, and not all, of the debtors to a joint plan met the requirement. Kyu Y. Paek, *The Impaired Accepting Class Rule and the Reorganization of the Business Enterprise*, 28 No. 1 J. Bankr. L. & Prac. NL Art. 2 (2019); *see In re Tribune Co.*, 464 B.R. 126, 183 (Bankr. D. Del. 2011). Similarly, § 1129(a)(8) demands that either class acceptance or non-impairment "applies to *each* class of claims or interests." (emphasis added)

The Petitioner weightily relies on the Ninth Circuit's ruling that a *per plan* approach is necessary to satisfy § 1129(a)(10). *See In re Transwest Resort Properties, Inc.*, 801 F.3d 1161 (9th Cir. 2015). The current jurisprudence skews marginally in favor of the *per plan* approach. This majority, however, is limited to a mere seven decisions, and there remains a resilient preference for the *per debtor* approach in multiple bankruptcy courts throughout the United States. Courts in Delaware remain fixed that in order to satisfy § 1129(a)(10), all debtors must provide acceptance of the plan. The Bankruptcy Court for the Northern District Georgia, too, found in *In re 431 W Ponce de Leon LLC* that the *per debtor* approach is the favored method. 515 B.R. 660 (Bankr. N. D. Ga. 2014). The Thirteenth Circuit reasonably relied not on the slight majority, but on the many decisions that advocate for the *per debtor* approach and thus, the protection of all impaired creditors.

3. The legislative history of § 1129(a)(10) supports the *per debtor* approach.

Even if this Court puts aside the statutory context of § 1129(a)(10) and the Code's own rules of construction in § 102(7), the legislative history renders support for the *per debtor* approach. Assuming both the context and rules of statutory construction were unavailing, this

Court may resort to legislative history to aid in its interpretation of § 1129(a)(10). *U.S. v. Colasuonno*, 697 F.3d 164, 173 (2d Cir. 2012); *see In re Aiello*, 428 B.R. 296, 300 (Bankr. E.D.N.Y. 2010). It is generally understood that the purpose behind § 1129(a)(10) is to ensure creditor consensus with the plan, and likewise, to prevent a lack of support by affected creditors. *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 243-244 (3d Cir. 2004). The section guarantees that even in a cram down situation each debtor has attained at least a minimal amount of support from its impaired creditors in order to have plan confirmation. *Id.*

After § 1129(a)(10) was enacted, courts were confused as to whether an unimpaired class deemed to have accepted a plan satisfied the accepting-class requirement. Suzanne T. Brindise, *Choosing the "Per-Debtor" Approach to Plan Confirmation in Multi-Debtor Chapter 11 Proceedings*, 108 NW. U. L. Rev. 1355, 1364 (2014). Congress added "impaired" to the statute in 1984 in order to clarify that only an impaired accepting class would be sufficient. *Id*. Congress made this modification to reverse the cases that were decided prior to the 1978 Code in which cramdowns were accepted without the approval of any creditor. *Id.* The amendment by Congress evinces that the consent of creditors, specifically impaired creditors, is a pivotal component of Chapter 11 reorganization. *Id*. at 1376. For the reasons stated above, this Court should find that adopting the *per debtor* approach to a § 1129(a)(10) interpretation is better than the *per plan* approach because it aligns with the statutory context, the Code's rules of construction, and the intent of Congress.

B. The Thirteenth Circuit correctly employed a *per debtor* approach under § 1129(a)(10) because it maintains multi-debtors' corporate structure and prevents a de facto substantive consolidation.

Absent substantive consolidation, the *per debtor* approach is the way to ensure entity separateness, while preventing an improper consolidation that impedes upon the substantive

rights of the creditors involved in the reorganization. The *per plan* approach merges elements of joint administration and substantive consolidation, enabling classes of claims for one debtor to speak on behalf of another debtor's impaired class of claims who may be entirely contradictory to the classes of claims in its interests or situation. This Court should hold that in a joint plan such as this, the *per debtor* approach is favorable in preserving the distinction of each entity.

1. Joint administration versus substantive consolidation: a brief overview of both doctrines and noteworthy distinctions

This Court should affirm the Thirteenth Circuit's finding that the *per debtor* approach maintains entity separateness and protects the rights of creditors. It is essential to note the distinction between joint administration and substantive consolidation for two reasons. First, bankruptcy courts rely on these methods of consolidation to apply § 1129(a)(10) in multi-debtor cases such as the one at hand, and second, because the accurate interpretation of § 1129(a)(10) is dependent upon which method is being employed in the bankruptcy proceeding. *Id.* at 1366. Fostering convenience in complex Chapter 11 cases, joint administration is a tool used to combine multiple related cases. *Id.* at 1365. Unlike substantive consolidation, joint administration does not substantively abridge the requirements set forth in the Code in any way. *Id.* Importantly, the estates of the debtors remain separate, and creditors are only able to reach assets from the debtor with which they have a claim. *Id.* at 1366.

Substantive consolidation, on the other hand, allows a court to merge the estates of numerous debtors, despite the fact that they are indeed separate legal entities, to group together the debtors' assets and the force each of the debtors' creditors to become creditors in the consolidated estate. *Id.* "Consolidation, as distinguished from joint administration, is neither authorized nor prohibited by [Rule 1015 of the Federal Rules of Bankruptcy Procedure] since the

propriety of consolidation depends on substantive considerations and affects the substantive rights of the creditors of the different estates." FED. R. BANKR. P. 1015 Advisory Committee's Notes; *see In re I.R.C.C., Inc.*, 105 B.R. 237, 238 (Bankr. S.D.N.Y. 1989) ("Joint administration is distinguished from substantive consolidation because it is simply a procedural consolidation designed for administrative convenience and does not affect the substantive rights of the creditors of the different estates."). Employing substantive consolidation is divisive because it infringes upon a vital foundation of corporate law—that individual legal entities are to be treated as distinct, with each accountable for their own assets and liabilities. *Skidmore, Owings & Merrill v. Canada Life Assurance Co.*, 907 F.2d 1026, 1027 (10th Cir. 1990). With that being said, courts are extremely hesitant to use this doctrine and rightfully so.

2. A joint administration of multi-debtors' bankruptcies is permitted.

This Court should apply the *per debtor* approach to be used in the jointly administered case at hand, absent substantive consolidation, because it ensures that the corporate form is respected. The *per debtor* approach is the only way that the substantive rights of the parties in this bankruptcy proceeding can remain intact. It is a way to safeguard that at least one impaired creditor of each debtor retains meaningful protection as well as a voice in how the proposed plan apportions and dispenses assets. The Thirteenth Circuit properly found in favor of the *per debtor* approach, and thus, protected the rights of Under My Thumb, the impaired creditor.

The Petitioner argues that § 1129(a)(10) is merely a technical requirement for confirmation; that it is only an obligation for the proponent of a plan to fulfill, and not a substantive right of objecting creditors. Absent substantive consolidation, however, a *per plan* interpretation of § 1129(a)(10) would essentially conflate the two principles of joint administration and substantive consolidation. Suzanne T. Brindise, *Choosing the "Per-Debtor"*

Approach to Plan Confirmation in Multi-Debtor Chapter 11 Proceedings," 108 NW. U. L. Rev. 1355 at 1381 (2014). It would enable an impaired class of claims for one debtor to speak for the creditors of another debtor who may be entirely contradictory in its interests or situation. *Id.* Further, it would blatantly ignore both the substantive rights of the creditors and corporate separateness because it effectively combines separate creditor entities from multiple closely related debtors. *Id.* at 1380. A *per plan* approach would require precedent to be unheeded and the difference between joint administration and substantive consolidation to be discounted. *Id.*

The Second Circuit standard, consolidated in *Augie/Restivo Baking Co., Ltd*, to determine whether substantive consolidation is equitable treatment hinges on two critical factors: (1) whether creditors dealt with the entities as a single economic unit and did not depend on their separate identify in extending credit; or (2) whether the affairs of the debtors are so entangled that consolidation will benefit all creditors. 860 F.2d 515, 518 (2d Cir. 1988). In *In re Bonham*, the Ninth Circuit expressed its hesitation to employ substantive consolidation. 229 F.3d 750, 762 (9th Cir. 2000). The *Bonham* court cautioned that "a substantive consolidation order seriously affects the substantive rights of the involved parties." *Id.*

The Third Circuit followed the Ninth Circuit in finding that the doctrine should be applied cautiously. *In re Owens Corning*, a case decided in 2005, advised that substantive consolidation should only be sparingly used as a last resort remedy. 419 F.3d 195, 211 (3d Cir. 2005). The doctrine should not be used offensively to modify creditor rights. *Id.* The Third Circuit emphasized that the fundamental goal of bankruptcy courts is to respect and preserve entity separateness, absent compelling circumstances. *Id.* The *Owens Corning* court found that it was "simply not the nearly 'perfect storm' needed to invoke it." *Id.*

In this case, the Debtors have not created that "perfect storm" necessary to invoke the doctrine that multiple Circuits have labeled a last resort remedy. This Court should apply a *per debtor* approach, due to the absence of substantive consolidation. Even if the result would be the same if substantive consolidation were imposed, as the Petitioner argues *In re SGPA, Inc.* and *In re Transwest Resort Properties, Inc.* indicated, this Court should not skip the analysis required for implementing substantive consolidation. 165 B.R. 773 (Bankr. S.D.N.Y 1994); 881 F.3d 724 (9th Cir. 2018). It is specifically designed to ensure that the creditors' and debtors' rights are considered and equitably balanced. 860 F.2d 515, 518 (2d Cir. 1988).

The Petitioner cites to *In re Enron*, a case decided by the Bankruptcy Court for the Southern District of New York. *In re Enron Corp.*, No. 01-16034, 2004 Bankr. LEXIS 2549 (Bankr. S.D.N.Y. July 15, 2004). The *Enron* court reasoned that § 1129(a)(10) could be satisfied under a *per plan* approach. *Id.* at 235. In its opinion, the court opined that the requirements of the statute were satisfied despite the Debtors lacking an accepting impaired creditor, because those Debtors were a part of the "global compromise" under the Plan. *Id*. *In re Enron* is distinct from the case at hand in a pivotal way: in *Enron*, the Debtors agreed to substantive consolidation beforehand. *Id.* at 234. Here, the Plan explicitly prohibits substantive consolidation and encourages separateness of the Debtors. R. at 7.

3. Applying a *per plan* approach creates a de facto substantive consolidation that impedes on creditors' rights.

This Court should apply the *per debtor* approach to avoid creating an improper substantive consolidation that would eliminate a dissenting impaired creditor's ability to safeguard itself from a cramdown. In *Transwest III*, the court deemed the *per plan* approach as favorable in terms of § 1129(a)(10). *Matter of Transwest Resort Properties, Inc.*, 881 F.3d 724 (9th Cir. 2018). In the concurring opinion, Circuit Judge Friedland agreed with the decision, but

noted something that was unaddressed in the majority opinion. *Id.* at 731 (Friedland, J., concurring). The judge pointed out the crux of the creditor's objection was not that the impaired accepting class rule was applied on a per plan approach, but that the plan went forward as a de facto substantive consolidation of the debtors' estates. *Id.* at 732-733. Regrettably, the creditor in *Transwest III* did not raise this argument in a timely manner, and thus waived it. *Id.* at 733.

Because joint Chapter 11 cases are typically large, most cases contain some portion of consolidation, such as consolidation for classification. This type of consolidation is treated as a "deemed" consolidation where the debtors maintain their entity separateness before and after the confirmation, but are combined only for plan purposes. Kyu Y. Paek, *The Impaired Accepting Class Rule and the Reorganization of the Business Enterprise*, 28 No. 1 J. Bankr. L. & Prac. NL Art. 2. (2019). When all creditors do not object to confirmation, bankruptcy courts will typically approve this type of consolidation. *Id.* However, when there is creditor disapproval, such as in the case at hand, this "deemed' consolidation should be heavily scrutinized. *Id.* The "deemed" consolidation could very well contain enough characteristics to be a de facto substantive consolidation of the debtors' estates, ultimately harming the substantive rights of the creditors opposing the confirmation. *Id.* The 2009 ruling from the District of Delaware serves as an example of the dangers of a de facto substantive consolidation, that is, a non-consensual plan with evidence of consolidation. In *In re New Century TRS Holdings, Inc.*, the debtors filed a joint plan that separated the debtors into three groups. 407 B.R. 576 at 581 (D. Del. 2009). The joint plan had support from all parties except a class of creditors belonging to one of the debtor groups. *Id.* at 585. The dissenting class of creditors argued that the plan constituted a de facto substantive consolidation. *Id.*

While the bankruptcy court dismissed the creditors' argument and confirmed the plan, the district court reversed the lower court's ruling upon appeal. *Id.* at 592. In doing so, the district court found that while the joint plan was not substantive consolidation, it was considered an improper consolidation of the estates that harmed the creditors. *Id.* at 591. Specifically, the court explained that under this de facto substantive consolidation, creditors had increased competition for the combined pool of assets and an altered claim that is less accurate than if the creditors dealt with the debtors individually. *Id.* Ultimately, the district court held that the plan could not be confirmed because the de facto substantive consolidation was the "rough justice" against which *Owens Corning* court warns. *Id*. (quoting *In re Owens Corning,* 419 F.3d at 210 (3d Cir. 2005)).

To be confirmable, a plan must "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." 11 U.S.C. § 1123(a)(4). Under My Thumb does not have the same treatment under the Plan as the classes of creditors that accept the Plan. Under My Thumb would now have to compete at an elevated level for a mere portion of the pool of assets. If this Court adopts a *per plan* approach when looking to the language of § 1129(a)(10), the same de facto substantive consolidation which occurred in *In re New Century TRS Holdings, Inc.* will render the Plan not confirmable. 407 B.R. 576 (D. Del. 2009). Indeed, the *per plan* approach would result in "rough justice" for Under My Thumb. To avoid de facto substantive consolidation and maintain entity separateness, This Court should affirm the Thirteenth Circuit's adoption of the *per debtor* approach.

C. Adopting a "per-debtor" approach under Section 1129(a)(10) is essential to protect the voting power of impaired creditor and fosters equitable fairness.

Section 1129(a)(10) should be read to apply to each debtor of the Chapter 11 reorganization plan. The policies and principles at the root of Chapter 11 are only safeguarded by the implementation of the *per debtor* approach. The adoption of the *per debtor* approach coincides with the goal of Chapter 11 as a whole, ensures confirmation of reorganization, and safeguards creditors while providing them the influence to which they are entitled.

1. The ultimate goal of Chapter 11 supports impaired creditors' voting power and fosters equitable negotiation between parties.

The Thirteenth Circuit correctly found that in accordance with the principles of Chapter 11, § 1129(a)(10) supports the *per debtor* approach. Bankruptcy courts are courts of equity. *In re O'Brien*, 328 B.R. 669 at 674 (Bankr. W.D.N.Y. 2005). Chapter 11 aims to provide the bankrupt with a renewed start while maximizing the value of the estate so that the highest value of assets goes to the creditor. *Id*. In doing so, Chapter 11 endeavors to "strike a balance between the need of a corporate debtor in financial hardship to be made economically sound and the desire to preserve creditors' and stockholders' existing legal rights to the greatest extent possible." 7 COLLIER ON BANKRUPTCY P1100.01, at 1100-4 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2013) (citation omitted). So, while attempting to confirm a successful reorganization, Chapter 11 puts great weight in the legal rights of creditors. Section 1129(a)(10) is one of the ways that Chapter 11 takes into account creditors' rights. It serves as a way to ensure consensus between parties, and that a debtor's plan has the requisite creditor support. If the goal of § 1129(a)(10) is to encourage consensus in the reorganization process, would ignoring the classes of impaired creditors that object to the plan not directly refute this guarantee? It would.

2. Section 1129(a)(10) provides safeguard for impaired, objecting creditors.

Adopting the *per plan* approach blatantly disregards this safeguard. It overlooks the impaired creditors who have not given their support to a debtor's plan. In the spirit of consensus, a debtor should not be allowed to force a plan on creditors without first satisfying the safeguards put in place for creditor protection. If the approval requirement in § 1129(a)(10) is interpreted as *per plan*, absent substantive consolidation, then the subsection's capacity to safeguard creditors involved in joint plans from a cramdown are eliminated. The *per plan approach* further leaves room for manipulation by parties. A party could alter the classification of claims in a way that would be beneficial to them: a guarantee that at least one impaired class from at least one debtor will vote in favor of the plan.

Voting plays a pivotal role in Chapter 11 proceedings, and an impaired creditor's vote is a powerful tool to force a debtor to negotiate. Despite the view of the Petitioner, each class of impaired creditors has a voice in whether to accept a proposed plan or whether to further negotiate with the other parties undergoing reorganization. The *per debtor* approach is the only way that the substantive rights of the parties, including the right exercise their voice through negotiation and vote, can be protected. At least one impaired creditor of each debtor must have a say in how the proposed plan distributes assets. There must be some system of checks and balances in reorganization, and § 1129(a)(10) is just that. The debtor, who already possesses many control advantages, must attain an acceptance of at least one of its impaired creditors.

Confirmation of a non-consensual plan under §1129(b) is commonly known "as a 'cramdown' because the plan is crammed down the throats of the [non-accepting] class(es) of creditors." *In re Trenton Ridge Investors, LLC*, 461 B.R. 440, 458 (Bankr. S.D. Ohio 2011) (quoting *In re Bonner Mall P'ship*, 2 F.3d 899, 906 (9th Cir. 1993)). A court may only confirm

non-consensual plans if it determines that it satisfies the requirements of both § 1129(a) and (b). *Id*. Bankruptcy courts have found that § 1129(a)(10) functions as a "statutory gatekeeper" barring access to cramdown where there is absent even one impaired class that accepts the plan. *Id*. (citations omitted). The policy underlying § 1129(a)(10) is that before traveling down the "tortuous path of cramdown" and compelling the target of cramdown to bear the risks of error accompanying a forced cramdown, there must be some other class of creditor that is also hurt and nonetheless favors the plan albeit its impaired status. *Id.* (quoting *In re One Times Square Assocs. Ltd. P'ship*), 165 B.R. 773, 776–77 (D. Ct. S.D.N.Y.), *aff'd*, 41 F.3d 1502 (2d Cir. 1994) (citations omitted).

In the case at hand, there was no other group that could have accepted the Plan aside from Under My Thumb. As the sole class of impaired creditors of Development, § 1129(a)(10) acts as the gatekeeper that prevents the Plan from being confirmed absent Under My Thumb's acceptance. The safeguard exists in the form of § 1129(a)(10), and the *per plan* approach renders this safeguard as meaningless. The Thirteenth Circuit accurately acknowledged this important safeguard put in place to prohibit an impaired creditor, Under My Thumb, Development's sole class of creditors who objects to the proposed Plan, from losing its voice in the reorganization.

The Petitioner argues that the purpose of Chapter 11 is to encourage reorganization and job preservation. *Toibb v. Radloff,* 501 U.S. 157 (1991) (H.R. Rep. No. 95-595, at 5 (1978) ("The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders." This is by no means incorrect. The encouragement of a successful reorganization cannot, however, supersede the goal of equity between parties. Such

encouragement cannot discard the importance of maintaining a separate corporate structure. And most importantly, the desire for a confirmation of reorganization cannot deprive creditors of their substantive rights. By bypassing the acceptance requirement in § 1129(a)(10), the Petitioner points to mere convenience, claiming a *per plan* approach would be simpler. The *Tribune* court aptly found, however, "that convenience alone is not sufficient reason to disturb the rights of impaired classes of creditors of a debtor not meeting confirmation standards." 464 B.R.126 at 183 (Bankr. D. Del. 2011). While convenience is the simple route to take, it does not support equity and it is certainly not the route this Court should take. Conversely, adopting a *per plan* approach would provide debtors with a procedural mechanisms to forum shop—flooding the courts in the Ninth Circuit—for a convenient plan confirmation. Anupama Yerramalli and Alexander Nicas, *"Per Plan" or "Per Debtor?*, 37-APR Am. Bankr. Inst. J. 30 (2018).

Either way, this very Court held "we cannot overrule Congress's judgment based on our own policy views." *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S.Ct. 954, 967 (2017). By enacting the safeguards within § 1129(a), it is clear Congress intended to prevent impaired creditors, like Under My Thumb, from losing their substantive right to vote on the plan. As a part of the impaired creditors affected by the Plan, having a voice is a necessity. This Court should affirm the Thirteenth's holding the *per debtor* approach should be applied to this joint Plan to ensure Under My Thumb maintains possession of its needed voice. As we all know, "you can't always get what you want but if you try sometimes, you get what you need." THE ROLLING STONES, YOU CAN'T ALWAYS GET WHAT YOU WANT (London Records 1969).

CONCLUSION

Tumbling Dice wishes to bypass Congress and alter the interpretation of §§ 365(c) and 1129(a)(10). Looking at the plain, unambiguous language of §365(c), this section should be

given a straightforward application. A literal reading of the Code establishes the use of the hypothetical test because the statute is written with the disjunctive "or" and not the conjunctive "and." Even if this Court were to look towards legislative history, without a clear showing Congress intended anything other than what it said, this Court shall have no other choice than to look at the plain meaning of the statute. Additionally, adopting the "hypothetical test" would not deem § 365(f)(1) inoperative as the two sections have distinct purposes; Section 365(c) acts as an exception to the broad rule under § 365(f). This conflict is only illusory, and if this Court were to apply the "actual test," it would ignore the plain language enacted to preserve the rights of non-debtor parties.

Under §1229(a)(10), the *per debtor* approach is proper when looking at the statutory context. Congress intended to protect the voting power of impaired creditors in a joint plan, and if this Court were to adopt the "actual test," it would bypass Congress and ultimately allow a de facto substantive consolidation of the entities' plans. To that end, the legislative history of § 1229(a)(10) support the *per debtor* approach. This court should affirm the Thirteenth Circuit's finding the *per debtor* approach is proper in order to prohibit de facto substantive consolidation.

Respectfully submitted,

Team R. 23
Counsel of Record for Respondent

APPENDIX

11 U.S.C. § 102

In this title--

(1)—(3) [omitted]

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

(5) "or" is not exclusive;

(6) [omitted]

(7) the singular includes the plural;

(8)—(9) [omitted]

11 U.S.C. § 362

(a) [omitted]

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay--

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a)--

(A) of the commencement or continuation of a civil action or proceeding--

i) for the establishment of paternity;

(ii) for the establishment or modification of an order for domestic support obligations;

(iii) concerning child custody or visitation;

(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or

(v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

(D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act;

(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;

(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or

(G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act;

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;
(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;
[(5) Repealed. Pub.L. 105-277, Div. I, Title VI, § 603(1), Oct. 21, 1998, 112 Stat. 2681-886]
(6) under subsection (a) of this section, of the exercise by a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency of any contractual right (as defined in section 555 or 556) under any security agreement or arrangement or other credit enhancement forming a part of or related to any commodity contract, forward contract or securities contract, or of any contractual right (as defined in section 555 or 556) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such contracts, including any master agreement for such contracts;
(7) under subsection (a) of this section, of the exercise by a repo participant or financial participant of any contractual right (as defined in section 559) under any security agreement or arrangement or other credit enhancement forming a part of or related to any repurchase agreement, or of any contractual right (as defined in section 559) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;
(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;
(9) under subsection (a), of--

> **(A)** an audit by a governmental unit to determine tax liability;
> **(B)** the issuance to the debtor by a governmental unit of a notice of tax deficiency;
> **(C)** a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46(including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under chapter 537 of title 46 or section 109(h) of title 49, or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under chapter 537 of title 46;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as in section 435(j) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the exercise by a swap participant or financial participant of any contractual right (as defined in section 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any swap agreement, or of any contractual right (as defined in section 560) to offset or net out

any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax, or a special tax or special assessment on real property whether or not ad valorem, imposed by a governmental unit, if such tax or assessment comes due after the date of the filing of the petition;

(19) under subsection (a), of withholding of income from a debtor's wages and collection of amounts withheld, under the debtor's agreement authorizing that withholding and collection for the benefit of a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, that is sponsored by the employer of the debtor, or an affiliate, successor, or predecessor of such employer--

> **(A)** to the extent that the amounts withheld and collected are used solely for payments relating to a loan from a plan under section 408(b)(1) of the Employee Retirement Income Security Act of 1974 or is subject to section 72(p) of the Internal Revenue Code of 1986; or
>
> **(B)** a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title; but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title;

(20) under subsection (a), of any act to enforce any lien against or security interest in real property following entry of the order under subsection (d)(4) as to such real property in any prior case under this title, for a period of 2 years after the date of the entry of such an order, except that the debtor, in a subsequent case under this title, may move for relief from such order based upon changed circumstances or for other good cause shown, after notice and a hearing;

(21) under subsection (a), of any act to enforce any lien against or security interest in real property--

> **(A)** if the debtor is ineligible under section 109(g) to be a debtor in a under this title; or
>
> **(B)** if the case under this title was filed in violation of a bankruptcy court order in a prior case under this title prohibiting the debtor from being a debtor in another case under this title;

(22) subject to subsection (l), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental

agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor;
(23) subject to subsection (m), under subsection (a)(3), of an eviction action that seeks possession of the residential property in which the debtor resides as a tenant under a lease or rental agreement based on endangerment of such property or the illegal use of controlled substances on such property, but only if the lessor files with the court, and serves upon the debtor, a certification under penalty of perjury that such an eviction action has been filed, or that the debtor, during the 30-day period preceding the date of the filing of the certification, has endangered property or illegally used or allowed to be used a controlled substance on the property;
24) under subsection (a), of any transfer that is not avoidable under section 544 and that is not avoidable under section 549;
(25) under subsection (a), of--

> **(A)** the commencement or continuation of an investigation or action by a securities self regulatory organization to enforce such organization's regulatory power;
> **(B)** the enforcement of an order or decision, other than for monetary sanctions, obtained in an action by such securities self regulatory organization to enforce such organization's regulatory power; or
> **(C)** any act taken by such securities self regulatory organization to delist, delete, or refuse to permit quotation of any stock that does not meet applicable regulatory requirements;

(26) under subsection (a), of the setoff under applicable nonbankruptcy law of an income tax refund, by a governmental unit, with respect to a taxable period that ended before the date of the order for relief against an income tax liability for a taxable period that also ended before the date of the order for relief, except that in any case in which the setoff of an income tax refund is not permitted under applicable nonbankruptcy law because of a pending action to determine the amount or legality of a tax liability, the governmental unit may hold the refund pending the resolution of the action, unless the court, on the motion of the trustee and after notice and a hearing, grants the taxing authority adequate protection (within the meaning of section 361) for the secured claim of such authority in the setoff under section 506(a);
(27) under subsection (a) of this section, of the exercise by a master netting agreement participant of any contractual right (as defined in section 555, 556, 559, or 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any master netting agreement, or of any contractual right (as defined in section 555, 556, 559, or 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such master netting agreements to the extent that such participant is eligible to exercise such rights

under paragraph (6), (7), or (17) for each individual contract covered by the master netting agreement in issue; and

(28) under subsection (a), of the exclusion by the Secretary of Health and Human Services of the debtor from participation in the medicare program or any other Federal health care program (as defined in section 1128B(f) of the Social Security Act pursuant to title XI or XVIII of such Act).

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c)—(o) [omitted]

11 U.S.C. § 365

(a)—(b) [omitted]

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

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

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

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

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

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

(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)—(p) [omitted]

11 U.S.C. § 522
(a) [omitted]
(b)(1) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (2) or, in the alternative, paragraph (3) of this subsection. In joint cases filed under section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Federal Rules of Bankruptcy Procedure, one debtor may not elect to exempt property listed in paragraph (2) and the other debtor elect to exempt property listed in paragraph (3) of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (2), where such election is permitted under the law of the jurisdiction where the case is filed.

(2) Property listed in this paragraph is property that is specified under subsection (d), unless the State law that is applicable to the debtor under paragraph (3)(A) specifically does not so authorize.

(c) [omitted]
(d) The following property may be exempted under subsection (b)(2) of this section:

(1)—(10) [omitted]
(11) The debtor's right to receive, or property that is traceable to--

(A) an award under a crime victim's reparation law;
(B) a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;
(C) a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;
(D) a payment, not to exceed $15,000,1 on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or
(E) a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

(12) [omitted]

(e)—(q) [omitted]

11 U.S.C.A. § 548
(a)(1) [omitted]

(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which--

(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or

(B) [omitted]

(b)—(e) [omitted]

11 U.S.C. § 1107

(a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

(b) Notwithstanding section 327(a) of this title, a person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case.

11 U.S.C. § 1123

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

(1)—(3) [omitted]

(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)—(8) [omitted]

(b)—(d) [omitted]

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 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 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).

U.S. CONST. art. I, § 8, cl. 8

The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;