26 / P
Counsel for Petitioner

NO. 19-1004

IN THE

Supreme Court of the United States

OCTOBER TERM, 2019

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

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

v.

UNDER MY THUMB, INC., RESPONDENT.

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

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether 11 U.S.C. § 365(c)(1) permits a debtor in possession to assume its own executory contract over the objection of the non-debtor party when applicable non-bankruptcy law excuses the non-debtor party from accepting or rendering performance to an entity other than the debtor or the debtor in possession.
2. Whether the phrase "under the plan" in 11 U.S.C. § 1129(a)(10) should be interpreted to mean "per debtor" or "per plan" in a case where a class of claims is proposed to be impaired under a joint, multi-debtor plan.

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The decision of the Thirteenth Circuit Court of Appeals is reproduced in the record on appeal. The decisions of the Bankruptcy Appellate Panel for the Thirteenth Circuit and the United States Bankruptcy Court for the District of Moot are unreported.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

The relevant statutory provisions are listed below and their pertinent text are reproduced in Appendix A.

11 U.S.C. § 102(7)

11 U.S.C. § 365

11 U.S.C. § 1101

11 U.S.C. § 1107

11 U.S.C. § 1129(a)

11 U.S.C. § 1129(b)

STATEMENT OF THE CASE

Facts

Tumbling Dice, Inc. ("TDI") and its affiliated debtors (collectively the "Debtors") own and operate eight casino and resort properties located throughout the United States. R. at 2-3. On January 11, 2016, the Debtors commenced voluntary cases under Chapter 11 of the Bankruptcy Code. R. at 3. Pursuant to Bankruptcy Rule 1015(b), the cases were jointly administered for the convenience of the parties and the court. The lead case was filed by the holding company formed to own the membership interests of the nine wholly-owned debtor-subsidiaries. R. at 4. Of the subsidiaries, eight constitute operators of the Debtors' luxury casino and resort properties (each an "Operating Debtor" and, collectively, the "Operating Debtors"). R. at 4. The remaining subsidiary, Tumbling Dice Development, LLC ("Development") serves a limited purpose in the corporate structure as a licensee holder. R. at 4. Development holds a non-exclusive license agreement with Under My Thumb, Inc. ("UMTI"). R. at 4.

After nearly 30 years of operating a customer loyalty program called "Club Satisfaction," the Debtors sought to upgrade and integrate the software for the loyalty program. R. at 4. It contracted with UMTI in 2008. At the time, UMTI was a leading software designer that specialized in customer loyalty and reservation programs for the hospitality industry. R. at 4. The parties entered into an agreement, part of which was a $7 million unsecured promissory note (the "R&D Note") as reimbursement for UMTI's research and development costs. R. at 4.

Once the software was completed, UMTI granted Development a non-exclusive license (the "Agreement") for the software, and permitted Development to extend the software benefits to its affiliated entities. R. at 5. None of the affiliated entities were parties to the Agreement. R. at 5. The Agreement broadly prohibited the Debtors from assigning or sublicensing their right without

UMTI's express, written consent. R. at 5. The Agreement required Development pay UMTI a monthly fee, based on the amount of spending by Club Satisfaction members. R. at 5.

The revamped Club Satisfaction was a success and, over time, Membership in the program tripled. R. at 5. The Software is now an integral part of the Debtors' continuing business model. R. at 5. Under the Agreement, UMTI was permitted to license similar versions of the Software to other parties, and it did so. R. at 5. Due to the increase in membership of Club Satisfaction, UMTI also received larger payments from the Debtors than it originally anticipated. R. at 6. However, in June 2015, due to financial difficulties, payments on the R&D Note abruptly ceased. R. at 6.

Since the time of the R&D Note and the Agreement, the Debtors' structure has undergone some changes. In December 2011, the stock of TDI was acquired by Start Me Up, Inc., a hedge fund, through a leveraged buy-out.[1] R. at 6. Part of the transaction involved granting first priority liens on TDI's assets to a syndicated group of lenders (the "Lenders") in exchange for a $3 billion loan. R. at 6. The Lenders did not require Development to act as a borrower or guarantor under the credit transaction. R. at 6.

At the time of the bankruptcy petition, TDI and each of the Operating Debtors jointly and severally owed the Lenders approximately $2.8 billion. In the first day filings, the Debtors acknowledged that negotiation of a restructuring or refinancing of this debt was a primary goal of the bankruptcy case. R. at 6. The Debtors held an additional $120 million in debt to unsecured creditors, including more than $6 million owed to UMTI under the R&D Note. R. at 6.

After lengthy negotiations involving the Debtors, Start Me Up, the Lenders, the unsecured creditors' committee, and other stakeholders, the Debtors announced a deal had been reached. R. at 6-7. UMTI was not present at these negotiations, but was represented by the unsecured creditors'

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[1] As the Thirteenth Circuit noted, the applicable fraudulent transfer lookback period has expired. Whether this leveraged buy-out constitutes a fraudulent transfer is not at issue in this case. R. at 6, n.6.

committee. R. at 6. The deal contemplated a restructuring of the debt owed to the Lenders through a lowered interest rate and an extension of the payment period. R. at 7. Under the plan, Start Me Up would inject new capital to fund a fifty-five percent distribution to unsecured creditors in exchange for retention of its equity interest in the Debtors. R. at 7. The plan called for the issuance of new shares and membership interest in the reorganized Debtors without a change in the corporate structure. R. at 7. The Debtors filed the Plan and disclosure statement in August 2016. Since the plan was jointly administered, the Debtors filed one plan that provided the estates would not be substantively consolidated. R. at 7.

The Plan assumed the Agreement with UMTI under Sections 365 and 1123(b)(2). The monthly payments for use of the Software would continue, and a pro rate distribution of $66 million (fifty-five percent) would go the Debtors' unsecured creditors, including the $6 million obligation owed to UMTI under the R&D Note.

Originally, UMTI supported the Plan. R. at 7. Under the reorganized plan, Sympathy for the Devil, LP ("SFD"), a private equity group, would receive fifty-one percent of the voting shares of the reorganized TDI in return for a $35 million cash infusion to fund the distribution to unsecured creditors. R. at 7-8. Start Me Up would maintain the remaining forty-nine percent of the voting shares. R. at 8. The record indicates that SFD's portfolio includes companies that directly compete with UMTI, and has in the past tried to replicate the Software. R. at 8. This caused UMTI to do an about-face in its support of the proposed Plan. R. at 8. The plan had near universal support from creditors, and the Debtors moved to confirm the Plan. R. at 8.

Procedural History

UMTI objected to the plan on numerous grounds; two survive to this appeal. R. at 8.

First, UMTI asserts that Section 365(c)(1) permits it to assume its non-exclusive licensing agreement. R. at 8. The bankruptcy court adopted the "actual test" and held that Section 365(c)(1) requires a case-by-case inquiry into whether the non-debtor would actually be forced to accept performance under its executory contract from a party foreign to the original agreement. R. at 8-9. The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court's decision. R. at 9. On appeal, the Thirteenth Circuit held that upon objection by the licensor, Section 365(c)(1) precludes a debtor from assuming non-exclusive licenses of intellectual property.

Second, since Development had no other creditors, UMTI asserts that the Plan could not be confirmed under Section 1129(a)(10). R. at 9. The bankruptcy court held that Section 1129(a)(10) is satisfied when at least one impaired class in a joint, multi-debtor plan accepts the plan. R. at 9. The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court. R. at 9. On appeal, the Thirteenth Circuit overturned the BAP, ruling that Section 1129(a)(10) must be satisfied on a *per debtor* basis, not a *per plan* basis. R. at 20-21.

SUMMARY OF THE ARGUMENT

Section 365(c)(1) does not prohibit a debtor in possession from assuming, rather than assigning, its own executory contracts. The plain language of Section 365, coupled with the legislative history and overall purpose of the Bankruptcy Code, makes it clear that a debtor has the right to assume its executory contracts pursuant to its reorganization plan.

Additionally, TDI retains the same corporate identity it had pre-petition rendering its contract with UMTI unaltered by TDI's reorganization. Only ownership of TDI's stock has changed, thus requiring both TDI and UMTI to continue to perform under the original terms of the licensing agreement.

Section 1129(a) of the Bankruptcy Code provides the necessary requirements to confirm a plan in Chapter 11 Reorganizations. The Thirteenth Circuit incorrectly reads Section 1129(a)(10) to apply on a *per debtor* basis. This reading is not in accord with the plain language of the statute, or the applicable canons of statutory interpretation. Further, this reading does not accord with the policies and goals of the Bankruptcy Code.

In order for a plan to be confirmed, subsection (a)(10) requires that at least one impaired class accept the plan. In the current case, the proposed plan enjoys almost universal support from the creditors of the affiliated debtors. However, Development's only creditor objected to plan confirmation. Under the Thirteenth Circuit's flawed reading of subsection (a)(10), this objection acts as veto to plan confirmation. Instead, the Thirteenth Circuit should have recognized that subsection (a)(10) applies on a *per plan* basis, and confirmed the plan over Respondent's objection, pursuant to the cram down provision of 11 U.S.C. § 1129(b).

The plain language of Section 1129(a)(10) is clear: if an impaired class accepts the plan, then (a)(10) is satisfied. The applicable canons of statutory construction do not upset this reading, and, in fact, confirm that the *per plan* approach is the more appropriate reading of the statute.

The *per plan* approach better accords within the statutory scheme as a whole. The *per debtor* approach causes portions of Section 1129 to be superfluous or meaningless. When reading the statute together, it is clear that Congress intended for certain requirements of confirmation be applied to the plan, while others apply to proponents of the plan. The *per debtor* approach conflicts with this principle, and should therefore be rejected.

Moreover, the overarching goals of the Bankruptcy Code are inhibited by the *per debtor* approach. Chapter 11 reorganizations are meant to keep business from liquidation bankruptcy. If the *per debtor* approach is adopted, creditors like Under My Thumb will have an unchecked veto in joint plans similar to the plan submitted in this case. As such, some subsidiaries, like

Development, will be forced out of into liquidation, and possibly prevent parent companies from confirming a plan as well.

Creditors are still afforded other protections under the Bankruptcy Code. The *per plan* approach does not inhibit creditors from objecting to plan confirmation under the sixteen requirements laid out in Section 1129(a). Moreover, in cases like this where cram down is being utilized, a plan cannot be unfairly discriminatory, and must be fair and equitable. *See* 11 U.S.C. § 1129(b). Respondent did not bring these objections; it instead focused on the technical plan requirement contained in subsection (a)(10).

The *per plan* approach fits squarely within the appropriate canons of statutory construction, and better accords with the goals of Chapter 11 reorganizations. As such, the Court should reverse the Thirteenth Circuit's decision, and confirm the plan as submitted to the bankruptcy court below.

STANDARD OF REVIEW

The facts as stated in this brief are undisputed by the parties. The issues before this Court are questions of pure law. Therefore, the standard of review is *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

ARGUMENT

I. SECTION 365(c)(1) PERMITS A DEBTOR IN POSSESSION TO ASSUME NON-EXCLUSIVE INTELLECTUAL PROPERTY LICENSES.

Congress enacted Chapter 11 of the Bankruptcy Code to afford insolvent corporations the opportunity to reorganize while continuing to provide services, employment, and overall economic stimulation to all that are touched by its corporate arm. The Supreme Court has declared that "[t]he fundamental purpose of reorganization is to prevent a debtor from going into liquidation." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). A circuit split has resulted from the court's application of Section 365(c)(1) and has created two conflicting tests—the "actual test" and the "hypothetical test." The plain language, policy, and legislative history of Section 365 mandates that the Court apply the "actual test" and focus on the "actual performance" of the parties when determining whether the debtor may assume executory contracts. *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997), *abrogated on other grounds by Hardemon v. City of Bos.*, 144 F.3d 24, 25 (1st Cir. 1998).

First, the plain language of Section 365(c) permits TDI, as the debtor in possession, to assume its own executory contracts. Second, the Section 365, when read as a whole, permits TDI to assume contracts while still protecting the rights of UMTI by prohibiting assignment to parties wholly foreign to the original contract. Third, under TDI's reorganization plan, TDI retains its pre-petition identity, thus requiring both TDI and UMTI to render performance irrespective of the bankruptcy proceeding. Fourth, the legislative history, policy, and overall purpose of the Bankruptcy Code require the Court to determine the "actual performance" of TDI and UMTI. Permitting the debtor in possession to assume executory contracts *effectuates rather than frustrates* the overall goal of the Bankruptcy Code.

A. The Tumbling Dice, Inc. license is an executory contract.

Under the licensing agreement, both TDI and UMTI are contractually bound to perform "ongoing material obligations." *Olah v. Baird (In re Baird)*, 567 F.3d 1207, 1209 (10th Cir. 2009). The outstanding obligations here establish an executory contract which TDI may assume.

Section 365 of the Bankruptcy Code expressly permits assumption by stating, "the trustee, subject to the court's approval, may assume or reject any executory contract . . . of the debtor." 11 U.S.C. § 365(a). Additionally, Chapter 11 permits the debtor corporation to assume the position of the debtor in possession and retain its management authority throughout the reorganization process. *See* 11 U.S.C. § 1101. Further, the debtor in possession is granted the same powers, rights, and duties of a Chapter 11 trustee, even though they are distinct parties. 11 U.S.C. § 1107.

"Executory contract" is not defined by the Bankruptcy Code; however, the "Countryman" definition has long been construed by the courts to follow congressional intent. *See In re Evatt*, 112 B.R. 417, 419 (W.D. Okla. 1990) (collecting cases). The "Countryman" definition "looks to whether . . . the obligation of both the bankrupt and the other party are so far unperformed that the failure of either to complete performance would constitute a material breach." *Baird*, 567 F.3d at 1210 (citation omitted).

Contracts involving non-exclusive intellectual property licenses are executory contracts when both the licensor and licensee have ongoing material obligations. *See, e.g.*, *Mission Prod. Holdings v. Tempnology, LLC*, 139 S. Ct. 1652, 158 (2019); *In re Kmart Corp*., 290 B.R. 614, 618 (Bankr. N.D. Ill. 2003). In *In re Kmart*, the court determined that Kmart's continued use of licensed software and duty to retain consent before assignment, paired with the non-debtor's continuing obligation to provide and service the software, constituted an executory contract because "substantial obligations . . . remain[ed] incumbent on both parties." 290 B.R. at 619.

Further, non-exclusive patent and copyright licenses create an inherit, continuous, and material obligation on the parties not to sue for infringement. *See De Forest Radio Telephone Co. v. United States*, 273 U.S. 236, 242 (1927). The Ninth Circuit outlined this ongoing obligation when it found that parties who enter into non-exclusive patent licenses waive the right to sue for infringement. *Everex Sys. v. Cadtrak Corp. (In re CFLC, Inc.)*, 89 F.3d 673, 677 (9th Cir. 1996). The *CFLC* court explained that the inherent forbearance to sue constituted "significan[t] continued performance owed to the licensee," thus establishing an executory contract. *Id.*

Turning to TDI's case, the TDI licensing agreement is an executory contract for two main reasons. First, both UMTI and TDI, for nearly a decade, enjoyed the rewards of a mutually beneficial licensing contract where TDI not only agreed to reimburse UMTI for over seventy percent of the development cost, but also agreed to pay a monthly fee to use the software. R. at 5. TDI's unexpired license, much like in *Kmart*, is a textbook example of an executory contract. Both TDI and UMTI remain parties to the contract, cemented by the ongoing obligations of each party to perform. R. at 5. TDI, parallel to *Kmart*, continues to use the licensed software. R. at 5. Second, UMTI also remains obligated to perform under the TDI contract. Like in *Kmart*, UMTI must continue to maintain and service the software. Additionally, as outlined in *CFLC*, the non-exclusive license implicates a continuing obligation on both parties not to sue for infringement.

In summation, both TDI and UMTI maintain ongoing obligations under the agreement, thus creating an executory contract that TDI has the right to assume.

B. Section 365(c)(1) permits Tumbling Dice, Inc., to assume its executory contract as the debtor in possession.

As a function of TDI's commitment to reorganize and uphold the fiduciary duties it owes to its creditors, TDI remains in control of its bankruptcy proceeding by retaining its position as the "debtor in possession." Absent a court-appointed trustee, TDI is permitted to assume its contracts.

Although Section 365 generally permits assumption, the trustee's power to assume an executory contract is not absolute and is limited based on Section 365(c)(1), which states that:

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

11 U.S.C. § 365(c)(1). Inconsistent judicial interpretations of Section 365 have resulted in a circuit split based on the application of the "actual" and "hypothetical tests." *See RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.),* 361 F.3d 257, 263 (4th Cir. 2004).

Proponents of the "actual test" have held that the prohibition against assignment does not apply when the debtor merely assumes a contract because the non-debtor is not "actually" required to render performance to anyone other than whom they originally contracted. *See Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997). Courts that employ the "hypothetical test," however, proscribe assumption when applicable law prohibits assignment to a hypothetical third party irrespective of the debtor's actual performance or intention. *See Perlman v. Catapult Entm't (In re Catapult Entm't)*, 165 F.3d 747, 749 (9th Cir. 1999).

First, the courts' use of the two conflicting tests is outdated and should be rendered void based on the "plain language" in Section 365. It is well-established that a statute's plain language is the "cardinal canon" of statutory interpretation and must be considered "before all others." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). The plain language of Section 365 establishes that a "trustee" may not assume or assign an executory contract; however, it does not prohibit a "debtor in possession" from doing so. *See* 11 U.S.C. § 365(c).

Recently, the Southern District of New York, after careful consideration of the language, policy, and legislative history of the statute, proposed the correct solution to the two conflicting tests and offered an instructive interpretation of the plain language in Section 365(c). *See In re Footstar, Inc.*, 323 B.R. 566, 570 (Bankr. S.D.N.Y. 2005). *Footstar* explains that, when applying Section 365, "[t]he key word is 'trustee.'" *Id.* Section 365 "*does not* say that the debtor or debtor in possession may not assume or assign—the prohibition applies on its face to the 'trustee.'" *Id.* The *Footstar* court reasoned that Congress was "quite careful" to use the terms "trustee" and "debtor in possession" to refer to distinct, individual parties. *Id.* at 571.

Further, the *Footstar* court stressed that when the Bankruptcy Code uses the terms "trustee" and "debtor in possession" within the same provisions, "the two terms are invariably invested with quite different meanings." *Id. Footstar* explains that circuits applying the "hypothetical test" improperly construe "trustee" to mean "debtor in possession." *Id.* In reality, "[n]owhere does the Bankruptcy Code define 'trustee' as synonymous with 'debtor' or 'debtor in possession.'" *Id.* In short, if there is no court-appointed trustee, Section 365(c)'s prohibition does not apply. *Id.* at 570.

For example, in *In re West Electronics*, applying the "hypothetical test," the court referenced Section 1107 to support its assumption that "trustee" and "debtor in possession" are synonymous. *In re W. Elecs., Inc.*, 852 F.2d 79, 82 (3d Cir. 1988)*; see also Breeden v. Catron (In re Catron)*, 158 B.R. 629, 632 (E.D. Va. 1993). However, Section 1107(a) simply defines the "rights, powers, and duties of the debtor in possession" and does not state "in words or substance that 'trustee' means or includes 'debtor in possession.'" *Footstar*, 323 B.R. at 572. This misconception is highlighted in *Perlman v. Catapult Entertainment*, the leading authority prescribing the "hypothetical test." 165 F.3d 747, 750 (9th Cir. 1999). Without citation to the code, the *Perlman* court construed trustee to include debtor in possession. *Id.* By rendering "debtor in possession" and "trustee" interchangeable, the "hypothetical test" improperly prohibits assumption by the very party of whom the non-debtor contracted. *Footstar*, 323 B.R. at 573.

Next, Section 365 operates logically when one reads it "as written," in contrast to the ambiguity created by the "hypothetical test." *Id.* The exception to assumption or assignment provided in Section 365 *only* permits the creditor to deny performance to a party "*other than* the debtor or debtor in possession." 11 U.S.C. § 365(c)(1)(A) (emphasis added). In short, Congress did not intend, and nowhere in the Bankruptcy Code does it allude, that the terms "trustee" and "debtor in possession" can be read synonymously; in fact, doing so "render[s] the provision a virtual oxymoron, since mere assumption (without assignment) would *not* compel the counterparty to accept performance from . . . 'an entity other than' the debtor." *Footstar*, 323 B.R. at 573.

Further, *Footstar'*s careful consideration of the Bankruptcy Code's overarching goals, coupled with its sensical interpretation of Section 365's plain language, prompted two recent United States Bankruptcy Courts to follow its application. *See In re Adelphia Communs. Corp.*, 359 B.R. 65, 72 (Bankr. S.D.N.Y. 2007); *In re Aerobox Composite Structures*, 373 B.R. 135, 141 (Bankr. D.N.M. 2007). Relying on *Footstar*, *Adelphia* held that when "the assumption is to be effected by a debtor in possession . . . the right to object to *assignment* does not by itself affect the right to *assume*." *In re Adelphia Communs. Corp.*, 359 B.R. at 72. The *Aerobox* court similarly stated that *Footstar*'s interpretation makes "perfect sense," and held, that Section 365 permits a "debtor in possession" to *assume* executory contracts. *In re Aerobox Composite Structures*, 373 B.R. at 141.

In the context of TDI's case, by maintaining its status as the "debtor in possession," TDI is permitted to assume its executory contract. Like the debtor in *Footstar*, TDI is granted the power of a trustee, but does not lose its status as the "debtor in possession" absent a court-appointed trustee. As in *West* and *Perlman*, courts that apply the "hypothetical test" overlook the critical distinction between a trustee and a debtor which has been carefully drafted by Congress. Because no trustee has been appointed, TDI, being the debtor in possession, has the right to assume its executory contract under the plain language of Section 365.

C. Section 365 permits Tumbling Dice, Inc., to assume its executory contracts without offending the anti-assignment statutes provided by non-bankruptcy law.

Permitting TDI to assume its executory contract does not deny UMTI the protection it is due under the Bankruptcy Code for three dispositive reasons. First, when the provisions of Section 365 are read harmoniously, the statute permits TDI to assume contracts while also prohibiting third party performance. Second, the statute must be read in a way that gives effect to all of the statute's language. Third, under TDI's reorganization, TDI maintains the same identity it had pre-petition; thus, the agreement remains unaffected when TDI assumes the contract.

i. Section 365(c), when read harmoniously with its subsequent provisions, permits Tumbling Dice, Inc., to assume its executory contract.

When Section 365(c) is applied with respect to every provision in Section 365, the prohibition does not apply because TDI is not an entity "*other than the debtor in possession*."

First, general principals of statutory construction provide that applicable statutes and the "provisions relating to such statutes should be read harmoniously to achieve a consistent result." *In re Hartec Enterprises, Inc.*, 117 B.R. 865, 871 n.9 (Bankr. W.D.Tex. 1990), *vacated on other grounds by United States v. Hartec Enterp., Inc.*, 130 B.R. 929 (W.D.Tex. 1991). Accordingly, the "actual test" employed by the First and Fifth Circuits, as well as the majority of Federal Bankruptcy Courts, is wholly consistent with the provisions articulated throughout Section 365.[2]

Although distinct parties, if the court were to interpret the trustee and the debtor in possession to be synonymous entities, the subsequent text of Section 365 permits the debtor in possession to assume, without assigning, executory contracts. *See Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997). Section 365(c), provides that "the trustee may not assume or assign . . . if . . . applicable law excuses [the non-debtor] . . . from accepting . . . performance to any entity *other than the debtor or the debtor in possession*." 11 U.S.C. § 365(c)

[2] *See Summit Inv. & Dev. Corp. v. Leroux*, 69 F.3d 608, 612-14 (1st Cir. 1995) (developing the actual test); *see also Bonneville Power Admin. v. Mirant Corp. (In re Mirant Corp.)*, 440 F.3d 238, 249 (5th Cir. 2006) (actual test adopted for purposes of Section 365(e)(2)); cf. *Perlman v. Catapult Entm't (In re Catapult Entm't)*, 165 F.3d 747, 749 (9th Cir. 1999) (adopting the hypothetical test but noting that the "actual test" has been adopted by a clear majority of lower courts); *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997) (applying the actual test). The weight of lower court authority appears to favor the "actual test." *See, e.g.*, *Texaco Inc. v. Louisiana Land and Expl. Co.*, 136 B.R. 658, 668-71 (M.D. La. 1992); *In re GP Express Airlines, Inc.*, 200 B.R. 222, 231-33 (Bankr. D. Neb. 1996); *In re Am. Ship Bldg. Co.*, 164 B.R. 358, 362-63 (Bankr. M.D. Fla. 1994); *In re Fastrax*, 129 B.R. 274, 277 (Bankr. M.D. Fla. 1991); *In re Hartec Enters., Inc.*, 117 B.R. 865, 871-73 (Bankr. W.D. Tex. 1990), *vacated on other grounds by* 130 B.R. 929 (W.D. Tex 1991); *In re Cardinal Indus., Inc.*, 116 B.R. 964, 976-82 (Bankr. S.D. Ohio 1990) (rejecting hypothetical test in connection with similar statutory language of § 365(e)(2)(A)).

(emphasis added). Whether the non-debtor's rights are impinged, thus excusing performance under Section 365(c), hinges on the clauses: "applicable law" and "an entity *other than* the debtor or debtor in possession." *See Summit Inv. & Dev. Corp. v. Leroux*, 69 F.3d 608, 612 (1st Cir. 1995). When the debtor assumes a contract, the non-debtor is not required to render performance beyond the scope of its original contract, thus rendering prohibition against assumption moot. *Id.* at 613.

In short, when Congress included the statutory language "*other than* the debtor in possession" it created a means for the parties to preserve the original benefit of their bargain. *See Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997).[3] Section 365(c) only becomes dispositive if the debtor proposes to assign a contract to a third party. *Id*.

Turning to TDI's bankruptcy, the plain language of the statute permits TDI to assume the executory contracts because TDI continues to operate as the debtor in possession. As noted in *Pasteur*, Congress's inclusion of the language "*other than* the debtor in possession" means that the debtor may assume contracts so long as the contracts are not assigned to a third party. *Id.* TDI's reorganization plan calls for TDI to assume the licensing agreements. TDI remains the party with whom UMTI originally contracted, thus Section 365 permits TDI to assume the contracts it originally bargained for.

ii. The "hypothetical test" violates the rule against surplusage, a widely accepted canon of statutory interpretation.

Pursuant to the canons of statutory interpretation and the proper use of the "actual test," TDI may assume the contract because the "hypothetical test" renders part of Section 365 void.

First, the foundational rule against surplusage states that "a statute should be construed so that effect is given to all its provision, so no part will be . . . superfluous, void, or insignificant."

[3] In contrast to the distinctive identity of a trustee and a debtor in possession, the debtor in possession and the pre-petition debtor are one and the same for purposes of Chapter 11. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984).

Rubin v. Islamic Republic of Iran, 138 S. Ct. 816, 817 (2018). Well-established canons of statutory interpretation provide that when a statute's literal application would produce an "absurd result," that interpretation must be avoided. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 515 (1989).

In the context of a Chapter 11 reorganization plan, a contract cannot be assigned without first being assumed. 11 U.S.C. § 365(f)(2)(A). The conflicting language of subsections (c)(1) and (f)(1) renders them wholly at odds with one another in respect to their treatment of applicable law. *See* 11 U.S.C. §§ 365(c)(1), (f)(1). In short, subsection (f)(1) permits assignment irrespective of applicable law, where (c)(1) prohibits assignment when applicable law bars assignment. *See In re Cardinal Indus.*, 116 B.R. 964, 976 (Bankr. S.D. Ohio 1990). A literal interpretation of the language in Section 365(c) would render Section 365(f) wholly useless. *Id.*

Clearly, Congress's inclusion of the words "or assign" in Section 365(c)(1) refers specifically to assumption *and* assignment; if applicable law which proscribes assignment were sufficient to prohibit assumption then there would be no reason for Congress to provide that the trustee "may not assume *or assign*." *Id.* at 977. Accordingly, "the inclusion of the words 'or assign' . . . serves the function of clarifying that the debtor . . . may be able to *assume* but not *assign* an executory contract. Further, this interpretation . . . is consistent with other provisions of the Bankruptcy Code." *Id.*; *see* 11 U.S.C. §§ 365(b)(1), (c)(1), (d), (e), & 1123(a)(5)(A), (G). Plainly stated, if Congress intended to prohibit both assumption and assignment the statute would simply read "may not assume."

Turning to TDI's case, based on the conflicting subsections (c)(1) and (f)(1), the Court must interpret Section 365 in a way that does not produce an absurd result. The only reasonable interpretation of the statute concludes that the language "or assign" permits assumption while also prohibiting assignment, thus solidifying TDI's right to assume its licensing agreements.

iii. TDI is the same party as the pre-petition debtor with whom UMTI originally contracted, thus permitting TDI to assume its contracts.

TDI's reorganization plan merely calls for the sale of stock. A change in ownership of stock alone does not render TDI a distinct corporation from that with whom UMTI contracted. Absent a material change to the contract, TDI is permitted to assume its licensing agreements.

For purposes of Section 365, the Supreme Court has established that the pre-petition debtor and the debtor in possession are "the same entity." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). Further, Section 1101(1) defines "debtor in possession" as "debtor," absent a court-appointed trustee. 11 U.S.C § 1101(1).

First, without a material change to the *identity* of the parties, Section 365 permits the debtor to assume its executory contracts. *See Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 494 (1st Cir. 1997). It is only when applicable law prohibits assignment "on the rationale that the identity of the contracting party is material to the agreement" that the prohibition in subsection (c)(1) become relevant. *Perlman v. Catapult Entm't (In re Catapult Entm't),* 165 F.3d 747, 752 (9th Cir. 1999).

When the debtor in possession continues to function "as the same corporate entity which functioned pre-petition" there is no change to the contracting parties' identities, thus permitting the debtor to assume executory contracts. *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 494 (1st Cir. 1997). Simply stated, the statute only protects the non-debtor from rendering performance to a third party, not a party to the original contract. *Summit Inv. & Dev. Corp. v. Leroux*, 69 F.3d 608, 612 (1st Cir. 1995).

In *Pasteur*, the court illustrated that a debtor retains the right to assume executory agreements irrespective of a change in corporate ownership. *See Pasteur*, 104 F.3d at 490. In *Pasteur*, the debtor's reorganization plan called for it to assume a patent license and sell *all* of its stock to a separate corporation—the licensor's "direct competitor." *Id.* The *Pasteur* court explained that once a reorganization plan is confirmed, the court "must focus on the performance actually to be rendered by the debtor-in-possession . . . ensur[ing] that the non-debtor . . . receive[s] the full benefit of its bargain." *Id.*

The *Pasteur* court rejected the "hypothetical test" and explained that Section 365 "contemplate[s] a case-by-case inquiry into whether the non-debtor . . . actually was being 'forced to accept performance . . . from someone other than the debtor . . . with whom it originally contracted.'" *Id.* (quoting *Summit*, 69 F.3d at 612). The *Pasteur* court held that a change in corporate ownership, even to a licensor's *direct* competitor, does not change the debtor's identity, and thus permits the debtor to assume its executory contracts. *Pasteur,* 104 F.3d at 495.

In the context of TDI's bankruptcy, the facts presented in *TDI* and *Pasteur* are essentially indistinguishable. Parallel to *Pasteur*, TDI's reorganization plan calls for a change in its corporate ownership—not its corporate identity. R. at 7-8. Next, the fact that TDI will effectively be owned by UMTI's direct competitor is immaterial to TDI's right to assume its executory contracts R. at 8. Regardless of TDI's distribution of new shares and interest, TDI will be reorganized "without changing . . . [its] overall corporate structure," and thus retains the same corporate identity it held pre-petition. R. at 7. In short, because TDI materially remains the same party with whom UMTI originally contracted, TDI's reorganization does not force UMTI to accept or render performance to a foreign entity. By permitting TDI to assume its licensing agreements, the Court will ensure that both TDI and UMTI receive the full benefit of their bargains.

Second, courts that apply the "hypothetical test" neglect to differentiate between, or alternatively acknowledge, the commensurate identity of the debtor in possession and the pre-petition debtor. *See Perlman,* 165 F.3d at 752. *Pasteur* provides an instructive contrast between an outright assignment and the mere assumption of a contract by distinguishing the facts in *CFLC* with the *Pasteur* reorganization plan. *Pasteur*, 104 F.3d at 490.

In *CFLC*, the debtor planned to *sell* “substantially all” of its assets, including its executory contracts, to entirely separate corporation rendering the reorganization plan an outright assignment. *See Everex Sys. v. Cadtrak Corp. (In re CFLC, Inc.)*, 89 F.3d 673, 674 (9th Cir. 1996). The *CFLC* court recognized that the debtor’s plan did not call for it to assume its contracts, thus prompting it to *solely* answer the question of assignment. *Id.* at 677. In contrast to the *CFLC* debtor, *Pasteur* explains that when the debtor “proposes to continue . . . as the same . . . entity which functioned pre-petition” it retains its original identity. *Pasteur*, 104 F.3d at 494.

Additionally, *Pasteur* notes that the sale of stock does not alone constitute a merger and explained that a corporation and its shareholders are “distinct” legal entities. *Id. Pasteur* establishes that a corporation retains its identity “notwithstanding repeated and even drastic changes in its ownership.” *Id.*; *see PPG Indus.* v. *Guardian Indus. Corp.*, 597 F.2d 1090, 1096 (6th Cir. 1979), *cert. denied*, 444 U.S. 930 (1979) (distinguishing the sale of stock from the transfer of a patent license in a merger where the licensee ends its corporate existence).

In another leading case, the Third Circuit failed to recognize the corresponding identity of the debtor and the debtor in possession when applying the “hypothetical test.” *See In re W. Elecs., Inc.*, 852 F.2d 79, 83 (3d Cir. 1988). Contrary to Section 1101’s plain language, *West* interpreted the debtor in possession and the pre-petition debtor to be “materially distinct entities.” *Id*. Under *West*’s separate entity theory, the debtor in possession would *never* be permitted to assume contracts which are non-assignable under applicable law, rendering its application wholly at odds to the statute’s purpose and the powers explicitly granted to the debtor by Chapter 11. *Id.* at 84.

Turning to the case at hand, TDI does not wish to assign its contracts to a third party. Similar to *Pasteur*, TDI will continue to exist as the same corporate entity it was pre-petition. TDI is distinct from *CFLC*. Where TDI merely seeks to assume its license, CFLC sought to *sell* its assets to a party wholly foreign to the original contracting parties. Although TDI's reorganization calls for a change in ownership, as outlined in *Pasteur*, TDI retains its corporate identity irrespective of changes in ownership, regardless of the magnitude of the change.

Third, when an assumption does not offend the personal nature of a contract, the debtor is permitted to assume its executory contracts. Unlike *Pasteur, In re Magness* involved a Chapter 7 debtor where the trustee sought to assume and assign the debtor's golf club membership. *In re Magness*, 972 F.2d 689, 692 (6th Cir. 1992). Upon the bankruptcy filing, the club had reached its maximum capacity of golf members; those wishing to join were placed on a wait list and contractually guaranteed membership once it became available. *Id.* The court placed substantial weight on the intimate relationship between the club's members and the effect that assignment would have on non-debtor parties. *Id.* at 693. Additionally, the court stressed that it was only addressing the validity of *assignment* and stated, "we are not dealing with the right to assume the membership." *Id.* at 692. Due to the personal nature of the club's membership and the adverse effect that assignment to a foreign party would have on those on the waiting list, the court prohibited assignment. *Id.* at 693.

Perlman, one of the leading authorities adopting the "hypothetical test," heavily relies on *Magness* in its conclusion that a debtor is prohibited from assuming a contract when applicable law precludes assignment. *Perlman*, 165 F.3d at 752. *Perlman*'s reliance on *Magness* improperly glosses over the intimate nature of the *Magness* contracts and the fact that the *Magness* court did not opine whether a debtor may assume executory contracts. *In re Magness*, 972 F.2d 689, 692 (6th Cir. 1992).

Turning to the case at hand, TDI's assumption of the agreement does not alter its contract with UMTI. As outlined in *Magness*, non-exclusive contacts are inherently personal, rendering the parties' identity a material facet to the contract. Simply put, *Magness* is distinguishable from TDI's position because the *Magness* debtor sought to assume *and* assign its membership—TDI only seeks to assume. Additionally, *Perlman* failed to address assumption where the debtor's identity remains unchanged. TDI merely seeks to maintain performance under the same terms provided in the original contract.

D. In accordance with Section 365's legislative history, TDI is permitted to assume its licensing agreements.

TDI's reorganization plan does not prescribe assignment nor does TDI intend to assign its contract to a third party. TDI simply seeks the benefit it originally bargained for it its contract.

The legislative history of Section 365 rejects the "hypothetical test." When a statute is subject to more than one interpretation, the court may look at the legislative history to reconcile the language with the statute's purpose and policy. *See Bd. of Educ. v. Mergens*, 496 U.S. 226, 238 (1990). Further, if the literal application of a statute would produce an outcome which is contrary to Congress's intent, "the intention of the drafters, rather than the strict language, controls." *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989). In 1978, when the Bankruptcy Code was initially established, Section 365(c) provided that assumption or assignment was prohibited if applicable law excused the non-debtor party from "accepting performance . . . or rendering performance *to the trustee*." Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, § 365(c)(1) (1978) (emphasis added). The statute was subsequently amended in 1984 by substituting "to the trustee" with "an entity other than the debtor or debtor in possession."

Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, § 362(a) (1984).

The change in Section 365(c)'s language was originally contemplated in 1980. Bankruptcy Technical Correction Act of 1980. H.R. Rep. No. 1195, 96th Cong., 2d Sess. (1980). In support of the language change, the Committee on the Judiciary published a report which provided that:

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

Id. The legislative history confirms that Congress has always intended for Section 365(c) to permit the debtor in possession to assume executory contracts undergoing reorganization.

Second, the legislative history of 365(e), when read in conjunction with 365(c), underscores Congress's intent to preserve the parties' right to benefit from their bargain by permitting assumption while also prohibiting assignment. *See Summit Inv. & Dev. Corp. v. Leroux*, 69 F.3d 608, 613 (1st Cir. 1995); S. Rep. No. 989, 95th Cong., 2d Sess. 59 (1978), *reprinted in* 1980 U.S.C.C.A.N. 5787, 5845. The First Circuit, in support of the "actual test," acknowledged that "Congress did not envision . . . [an] abstract analysis . . . but contemplated a case-by-case inquiry into the *actual* consequences" of the non-debtor. *Summit*, 69 F.3d at 613.

Third, the "actual test" ensures a result that is cohesive with the overall purpose and policy of Chapter 11. The Supreme Court noted that "[t]he fundamental purpose of reorganization is to prevent a debtor from going into liquidation." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). Likewise, the leading bankruptcy commentator recognizes that sound bankruptcy policy supports the "actual test." *See* 3 LAWRENCE P. KING, COLLIER ON BANKRUPTCY § 365.06[1][d][iii] (15th ed. rev.).

The "actual test" merely cements the parties' original obligations. In contrast, the "hypothetical test" all but guarantees a *terminal* result for both the debtor and non-objecting creditors. In a statement denying certiorari, Justice Kennedy recognized that the "hypothetical test" is flawed. *See N.C.P. Mktg. Grp., Inc. v. BG Star Prods.*, 556 U.S. 1145, 1147 (2009) (denying petition for certiorari). First, Justice Kennedy acknowledged that the "hypothetical test" prevents the debtor in possession from continuing to exercise their rights under non-assignable contracts and noted that without these contracts, many debtors are unable to effect "the successful reorganization that Chapter 11 was designed to promote." *Id.* The trustee, in turn, has a duty to act "for the benefit of *all* creditors." *In re Footstar, Inc.*, 323 B.R. 566, 571 (Bankr. S.D.N.Y. 2005) (emphasis added) (internal citations and quotations omitted). Second, Justice Kennedy stated the "hypothetical test provides a windfall" to the objecting non-debtor by permitting it resell the very rights it already "sold to the debtor." *N.C.P. Mktg. Grp., Inc. v. BG Star Prods.*, 556 U.S. 1145, 1147 (2009) (denying petition for certiorari).

All the while, Section 365 provides that the court must "balance[] non-debtor rights with those of a debtor-in-possession." *RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.),* 361 F.3d 257, 268 (4th Cir. 2004). In *Whiting Pools*, the Supreme Court noted that reorganization "would have [a] small chance of success . . . if property essential to running the business were excluded from the estate." *United States v. Whiting Pools*, 462 U.S. 198, 203 (1983).

In conjunction with TDI's bankruptcy, congressional intent, and the overarching policy of the Bankruptcy Code demand that the Court consider whether the non-debtor's rights are *actually* offended when the debtor assumes an executory contract. Courts that employ the "hypothetical test" ignore Congress's purpose for amending the Bankruptcy Code. Further, the legislative history of Section 365 makes it clear that Congress intended to permit parties like TDI to assume executory contracts so long as it does not plan to assign the contracts to a third party.

The purpose of the Bankruptcy Code can only be fulfilled by permitting TDI to assume its critical contract with UMTI. If TDI is precluded for assuming the license agreement, it will render its reorganization a failure by causing TDI's ultimate liquidation. The Bankruptcy Code is also frustrated when debtors are prohibited from assuming contracts because the non-debtor is granted a windfall. The Bankruptcy Code provides for TDI's right to assume its executory contracts and ensures that both TDI and UMTI receive the full benefit of their bargains.

In conclusion, TDI is permitted to assume its licensing agreement because the agreement is an executory contract, the plain language of Section 365 permits assumption, and the overall purpose of the Bankruptcy Code can only be upheld by allowing TDI to assume the contract. The circuit split and conflicting tests can be resolved based on the plain language of Section 365; absent a court-appointed trustee, TDI has the right to assume the licensing agreements because the statute only prohibits assumption and assignment by a "trustee." Under Section 365, when read harmoniously, it is clear that Congress always intended to permit a debtor like TDI to assume executory contracts because TDI retains the same identity with whom UMTI originally contracted. Permitting the debtor in possession to assume its own executory contracts *effectuates rather than frustrates* the overall goal of the Bankruptcy Code.

II. THE THIRTEENTH CIRCUIT COURT OF APPEALS INCORRECTLY DETERMINED THAT 11 U.S.C. § 1129(a)(10) APPLIES ON A "PER DEBTOR" BASIS.

Section 1129(a) of the Bankruptcy Code contains the provisions necessary to confirm a plan in Chapter 11 Reorganizations. 11 U.S.C. § 1129(a). At issue in the case *sub judice* is the interpretation of subsection (a)(10), which reads:

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

11 U.S.C. § 1129(a)(10) (emphasis added). Specifically, the Court is asked to decide whether the statute's use of the phrase "under the plan" should be applied on a *per plan* basis or a *per debtor* basis. Since the debtors proceeded in a joint administration of their estates, one plan was presented to the bankruptcy court. With almost unanimous support from impaired creditor classes, a plain reading of the statute dictates that the plan submitted by the Debtors has met the requirement of subsection (a)(10). The Thirteenth Circuit incorrectly decided that this requirement can only be satisfied if it is applied *per debtor,* in direct conflict with the plain language of the statute.

Normally, a bankruptcy court can only confirm a Chapter 11 plan when all classes of impaired creditors accept the plan. 11 U.S.C. § 1129(a)(8). In some instances, plan proponents may utilize the "cram down" alternative to confirm a plan over the objections of creditors. *See* 11 U.S.C. § 1129(b); *see also RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 642 (2012). Even in cram down, however, creditors are afforded the protections of the confirmation requirements, namely the protection that the plan have support from at least one impaired class of creditors. 11 U.S.C. § 1129(a)(10).

A. A plain reading of the statute clearly leads to adoption of the "per plan" approach of Section 1129(a)(10).

The analysis of a question of statutory interpretation begins with the plain language of the statute. "If the statutory language is plain, we must enforce it according to its terms." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). This is especially true of the Bankruptcy Code, which "standardizes an expansive (and sometimes unruly) area of law, and it is [the Court's] obligation to interpret the Code clearly and predictably using well established principles of statutory construction." *RadLAX*, 566 U.S. at 649 (2012). The language of Section 1129(a)(10) is clear and unambiguous: the singular use of "plan" is dispositive – if one impaired class under the plan accepts, then the statutory imperative of Section 1129(a)(10) is satisfied. This is true, even in multi-debtor cases like the one presented to the court here. *See Grasslawn Lodging, LLC v. Transwest Resort Props. (In re Transwest Resort Props.)*, 881 F.3d 724, 729 (9th Cir. 2018) ("[Section 1129(a)(10) does [not] distinguish between single-debtor and multi-debtor plans."); *see also JPMorgan Chase Bank, N.A. v. Charter Communs. Operating, LLC (In re Charter Communs.*), 419 B.R. 221, 266 (Bankr. S.D.N.Y. 2009). This so-called *per plan* interpretation of §1129(a)(10) has been adopted by the only other federal circuit to hear the issue. *Transwest*, 881 F.3d at 724.

The Thirteenth Circuit states that the *per plan* reading of the §1129(a)(10) "cuts against the plain language of the statute," joining a handful of bankruptcy courts who have adopted the *per debtor* approach. R. at 17-19.[4] The statute clearly states that "one class" of impaired claims under the plan must "accept[] the plan." 11 U.S.C. § 1129(a)(10). Here, a single, joint plan was submitted to the bankruptcy court, and that plan was accepted by more than one class of impaired claims, thereby satisfying the statutory requirement. R. at 7. When a plan, like the one at issue here, is commenced under joint administration, it logically follows that confirmation of such a plan would also proceed in a joint manner.

The Thirteenth Circuit then pivots to say that the plan in this case is not one plan, but rather, "ten different plans, one for each of the Debtors." R. at 19. However, Section 1129(a)(10) makes no distinction between single-debtor or multi-debtor plans. *Transwest*, 881 F.3d at 729. Again, the Thirteenth Circuit imports its own reasoning into the statute. Congress could have easily required that an impaired class for *each debtor* accept the plan, or Congress could have made a distinction

[4] Prior to this case, the *per debtor* approach had only been adopted by the bankruptcy courts for the District of Delaware. *See In re Tribune*, 464 B.R. 126 (Bankr. D. Del. 2011); *In re Jer/Jameson Mezz Borrower II, LLC,* 461 B.R. 293 (Bankr. D. Del. 2011); *In re Woodbridge Grp. of Cos., LLC*, 592 B.R. 761 (Bankr. D. Del. 2018).

between single-debtor and multi-debtor plans. No such distinctions were made. Rather, the statute simply requires that one impaired class accept the plan.

When interpreting a statute, at times the Court may refer to the legislative history of the statute to resolve an ambiguity. *See Toibb v. Radloff*, 501 U.S. 157, 162 (1991). The legislative history of Section (a)(10) provides no insight into the intent of Congress in passing the statute. Though no guiding legislative history exists, the Court's precedent on conflicting legislative history is probative.

In cases where conflicting legislative history exists, the plain, unambiguous reading of the statute prevails. *See Toibb*, 501 U.S. at 162. If the history of legislation evidences that Congress considered two alternative interpretations of a statute, without clearly indicating in the record which interpretation should rule, the Court turns to the language of the statute. *Toibb*, 501 U.S. at 162. In *Toibb*, the Court considered two competing pieces of legislative history on the question of whether Chapter 11 reorganization was available to individual nonbusiness debtors. *Id*. Finding that the "scant history on this precise issue" did not illuminate an intent contrary to the plain language, the Court relied on that language in its decision. *Id*. The language of the statute at issue *sub judice* could not be more clear.

Nothing in the plain reading of the statute precludes a *per plan* interpretation. Likewise, nothing in the plain language compels a *per debtor* interpretation. Instead, the *per debtor* approach requires the Court to add words or phrases to the statute that do not exist. R. at 27 (Jones, J., dissenting) ("The majority essentially expands section 1129(a)(10) to include a prepositional phrase not found anywhere in the text."). Indeed, "Congress . . . does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Here, the Thirteenth Circuit not only found an elephant, it replaced the mousehole with a full-sized door. As the Court in *Toibb* stated, absent a "clearly expressed legislative intent contrary to the plain language" of the statute, the plain meaning prevails. *Toibb*, 501 U.S. at 162 (internal quotations and citations omitted).

B. The "per plan" reading of subsection (a)(10) fits within the statutory scheme Section 1129(a) and canons of the Bankruptcy Code.

The Thirteenth Circuit incorrectly relied on Section 102(7) in its interpretation of Section 1129(a)(10). Section 102(7) adopts the statutory canon "the singular includes the plural" for all portions of the Bankruptcy Code. As Justice Ginsburg has noted, it is a "rare occasion[]" to rely on this rule of statutory construction when interpreting a statute. *United States v. Hayes*, 555 U.S. 415, 422 n.5 (2009). Indeed, the rule should only be applied "where it is necessary to carry out the evident intent of the statute." *First Nat. Bank in St. Louis v. Missouri*, 263 U.S. 640, 657 (1924) (applying the same canon from the Dictionary Act).

In applying this canon to Section 1129(a)(10), the Thirteenth Circuit reasoned that the singular use of "plan" should be read to include all debtors. R. at 19 (citing *In re Tribune Co.*, 464 B.R. 126, 182 (Bankr. D. Del. 2011)). The court further opined that the singular plan in the case *sub judice* "actually consist[ed] of ten different plans, one for each of the Debtors." R. at 19. This does not align with the statute, nor does the canon contained in Section 102(7) support this reasoning. Section 102(7) does nothing to dispel the application of Section 1129(a)(10) on a *per plan* basis. The plural of "plan" is "plans," not "debtors." *See Transwest*, 881 F.3d at 730 ("[S]ection 102(7) does not undermine our view that Section 1129(a)(10) applies on a 'per plan' basis.").

Reading the other requirements of Section 1129 illuminates why the *per debtor* approach is flawed, and cannot be correct. The application of Section 102(7) makes perfect sense under other provisions of Section 1129. For example, Section 1129(a)(2) requires that "the proponent of the plan compl[y] with the applicable provisions of this title." It logically follows that Section (a)(2) not only applies to a singular proponent, but to multiple proponents as well, if multiple proponents exist. Consider also Section 1129(a)(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 securities or for costs and expenses in or in connection with the case . . . has been approved by . . . the court as reasonable.

The application of Section 102(7) accords with the reading of this provision to include the plural of "proponent," "debtor," "person," and "plan." If multiple proponents, debtors, persons, or plans exist, then the provision would equally apply to each of them under Section 102(7). Only in Section (a)(10) would the Thirteenth Circuit's reasoning allow Section 102(7) to *change* a word in the statute, rather than simply ascribe the plural form.

It does not accord to read the word "debtors" when the word "plan" is used in the statute. The court in *Tribune* reasoned that the singular use of the word "plan" is not sufficient to conclude that the statute does not apply to every debtor as opposed to the plan as a whole. 464 B.R. at 182 ("[A]scribing the plural to the meaning of 'plan' in § 1129(a)(10) is entirely logical and consistent with such a scheme."). However, this reading does more than ascribe the plural; it substitutes a word or phrase in the place of the word "plan."

The facts of this case exemplify why Congress formulated the statute in this way. The Respondent owns a fraction of a percentage of the debt held by the debtors. R. at 6. Yet, if the Thirteenth Circuit's interpretation of the statute stands, Respondent would hold veto control over confirmation of the proposed plan. If Development is forced out of the reorganization and into Chapter 7 liquidation, the rest of the Debtors' continuing business plan may lose its validity, since the Software provided by Respondent is "an essential part of the Debtors' ongoing business model." R. at 5. This cannot be the result Congress intended – and clearly indicates why Section (a)(10) requires only one impaired class *per plan* to accept.

iv. The per plan approach better fits in the statutory scheme as a whole.

When looking at the statute as a whole, the use of the word "plan" can only be read as *per plan*, not *per debtor*. When interpreting a statute, it is important to look not "merely to a particular clause in which general words may be used," but to look at the entire statute. *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (internal quotations omitted). When viewing the entire statute, it is clear that Congress could not have intended for subsection (a)(10) to apply on a *per debtor* basis. Congress clearly knew that some items would only apply to the plan as a whole, while other requirements would apply to debtors.

Section 1129(a) uses the word "plan" sixty-eight times (not including the title of the section). Other portions of Section 1129 readily use other phrases to require the provision be satisfied by every debtor, or other entities. *See* 11 U.S.C. § 1129(a)(2), (4), (5), (7), (8), (9), (11), (14), & (15). In fact, subsections (a)(1) and (a)(2) contain the exact same requirement – one imposes the requirement on the plan, while the other imposes the requirement on the proponent of the plan. If the term "plan" is imposed on every debtor, then clearly exacting an identical requirement on a "proponent of the plan" would be superfluous. *See* 11 U.S.C. § 1129(a)(2). The statutory scheme is clear in its delineation of requirements placed on entities as opposed to requirements to technical requirements of the plan.

Other provision of Section 1129 are not inhibited by the *per plan* reading of Section 1129(a)(10). The *Tribune* court considered this, and incorrectly concluded that other sections would be inconsistent if the *per plan* reading were used. 464 B.R. at 182 Specifically, the court looked to Sections 1129(a)(1) & (3). The court asserted that those sections could not be satisfied "if only one or more - - but fewer than all - - debtors proposing a joint plan satisfies them." *Id*. The court was correct on this point. However, this reasoning is not upset by the *per plan* reading of §1129(a)(10). Sections (a)(1) and (3) state, respectively, that a plan must "compl[y] with the applicable provision of this title" and must be "proposed in good faith and not by any means forbidden by law." These sections are not satisfied if *the plan* is does not meet the requirement. An analyzing court need not inquire on a per debtor basis, because the plan as a whole must meet the requirements. Indeed, "plan" is likely used because a plan presented to a court has many technical requirements. The assertion that this must be read as *per debtor* simply does not comport.

Application of the *per debtor* approach would render other parts of Section 1129(a) illogical and superfluous. Consider §1129(a)(4) which uses the words "debtor" and "plan" in dictating its applicable scope. If "plan" is read to mean that it applies to every debtor covered in the plan, then using the words "debtor" and "proponent" are unnecessary, and makes the provision unnecessarily duplicative. Similarly, in (a)(7)(A)(ii), the "effective date of the plan" is referenced. This subsection cannot mean "effective date of the plan *per debtor*."

The *per plan* approach better accords with the statute as a whole. Section 1129(a) clearly states when a subsection applies as a technical requirement on the plan, and when it places a duty or burden on a proponent of the plan. Reading each reference to a reorganization plan to mean that it is applied *per debtor* renders portions of the section unnecessary and illogical.

C. The "per plan" approach better accords with the goals of the Bankruptcy Code.

The plan presented to the bankruptcy court in the case *sub judice* achieves the aims of a Chapter 11 reorganization. As dissenting Judge Jones acknowledged, "the majority recognizes, but offers little to dispel, the purpose and policy considerations that favor the *per plan* approach." R. at 31. Respondent cannot make a legitimate objection to confirmation of the plan under any other section of the Bankruptcy Code, so it seeks to contort Section (a)(10) in an effort to derail the Plan as submitted.

In the decision below, the Thirteenth Circuit acknowledges the strong policy arguments in favor of the "per plan" approach. Section (a)(10) is included to "encourage consensus in the reorganization process." R. at 16. Stated differently, Section (a)(10) ensures the presence of "some indicia of support for a plan of reorganization by affected creditors." *In re Combustion Engineering, Inc.*, 391 F.3d 190, 243-44 (3d Cir. 2004) (internal quotations omitted). Petitioner not only has consensus in support of its plan, but enjoys "near universal support" amongst its varied creditors. R. at 8.

Chapter 11 leads to one of three possible outcomes: (1) a confirmed plan, (2) conversion to Chapter 7 liquidation, or (3) dismissal of the Chapter 11 case. *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 979 (2017). Chapter 11 generally exists to promote negotiation between debtors and creditors to develop "a plan that will govern the distribution of valuable assets from the debtor's estate." *Id.* at 978. Here, a plan has been put forward that benefits all creditors and keeps the Petitioner's business afloat. Should the Respondent prevail, the result will be failure of the plan. This failure would result in harm to the creditors of each of the debtors, with no benefit to the Respondent. The Bankruptcy Code could not mandate such a poor result.

Respondent would receive a larger portion of the amount owed under the R&D Note through the proposed plan than it would under a liquidation of its sole debtor, Development. R. at 7. This is one of the key goals of Chapter 11 bankruptcy: "it is more economically efficient to reorganize than to liquidate, because it preserves jobs and assets." H.R. Rep. No. 95-595, at 5 (1978). This plan satisfies each of the requirements of Section 1129, and treats Respondent more favorably than any alternative – namely a liquidation proceeding.

v. The technical requirements of § 1129(a) are not the only protections afforded to creditors in a cram down scenario.

Creditors have other protections under the Bankruptcy Code in the instance of cram down. *See* 11 U.S.C. § 1129(b) (providing that a cram down plan must not "discriminate unfairly, and is fair and equitable"). As one court noted, "Section 1129(a)(10) is a technical requirement for confirmation . . . not a substantive right of objecting creditors." *In re Rhead*, 179 B.R. 169, 177 (Bankr. D. Ariz. 1995).

The policy goals of Chapter 11 are not met with the *per debtor* approach. Business reorganization aims 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." *Toibb,* 501 U.S. at 163-64. Allowing creditors, like the Respondent, to singlehandedly derail a plan confirmation works in direct opposition to this goal. To be sure, if Respondent has its way, Development will be forced into liquidation. Not only will Development cease to provide employees with jobs and operate as a business, but Under My Thumb would receive less in a liquidation than it would under the Plan. R. at 7.

To read the statute as broadly as Respondent asserts would prove to overcomplicate multi-debtor cases, and potentially make a negotiated plan unworkable. Consider the present case, where Petitioner is certainly receiving more than it would in a liquidation. Still, if the *per debtor* approach is adopted, creditors like Respondent would be empowered to unnecessarily stall negotiations in an effort to undermine other creditors and the debtors. Such power being granted to the sole creditor of one debtor could certainly not be the result Congress intended in passing Section 1129(a)(10). The Bankruptcy Code simply is not benefitted by granting creditors like the Respondent an unchecked veto on plan confirmations. *See In re LOOP 76, LLC*, 442 BR. 713, 722 (Bankr. D. Ariz. 2010). The Thirteenth Circuit acknowledged that "[a]n impaired creditor's right to vote is one of its most powerful tools in the bankruptcy process." R. at 16. However, the Thirteenth Circuit has effectually turned this tool into a unilateral veto power.

Creditors, like the Respondent, would not be left without remedy if subsection (a)(10) is interpreted according to the *per plan* approach. For example, the plan would still need to satisfy the best interest test. *See* 11 U.S.C. §1129(a)(7). If a *plan* is found to be in violation of the best interest test, the plan cannot go forward. This is true whether it is for the creditor of one debtor, or the creditor of multiple debtors. This is also applicable in other forms of cram down, such as when gerrymandering is used to create an impaired class to vote in favor of a plan. *See In re L & J Anaheim Assocs.*, 995 F.2d 940, 943, n.2 (9th Cir. 1993).

Respondent's qualms with Plan began when it learned of Sympathy for the Devil's involvement. R. at 7-8. Sympathy is a private equity group, and purportedly holds an interest in one of Respondent's competitors. R. at 8. Assuming that Respondent worries of some nefarious dealings by Sympathy, those worries are alleviated by the contract terms of the Agreement, and by other provisions of the Bankruptcy Code.

The Agreement stipulates that the Debtors cannot share Respondent's software with any third parties. R. at 5. Should Sympathy seek to share any proprietary information with this purported competitor, Respondent would have breach of contract of claims to protect its interest. Moreover, if this is the basis for the Respondent's qualms, its more appropriate objection would be that the Plan was not submitted in good faith under 11 U.S.C. § 1129(a)(3). Certainly, if the facts showed that Sympathy sought to use its equity share of the Debtors to divulge the software provided by the Respondent, then the Plan would not be proposed in good faith. In short, the creditor is protected by the Bankruptcy Code – but subsection (a)(10) does not exist to provide Respondent with veto-power over the Plan.

The more appropriate objection may be that the case has resulted in de facto substantive consolidation. In the instant case, the majority stated that it viewed the debtors as having "proceeded to confirmation as though all ten bankruptcy estates had been substantively consolidated." R. at 18 (majority opinion). The court in *Transwest* dealt with a similar issue. Aside from adopting the *per plan* reading of the statute, the court noted that the creditor's contention that *de facto* substantive consolidation had occurred was misplaced. 881 F.3d at 730. These arguments are not pertinent in deciding the correct interpretation of §1129(a)(10), and the Thirteenth Circuit erred in considering the substantive consolidation issue in its analysis.[5] As the concurrence in *Transwest* noted, this argument "would have required the bankruptcy court to evaluate whether it was fair to proceed on a consolidated basis." *Transwest*, 881 F.3d at 732 (Friedland, J. concurring). Just as in *Transwest*, this challenge was not brought prior to confirmation, and is not properly before this Court. However, in cases similar to the one *sub judice*, that option is available to creditors similarly situated to the Respondent. This case turns on the statute – and the aims of the statute are clearly met.

A *per debtor* reading would lead to absurd results not in line with the aims of Section 1129(a). If a plan, like the one in this case, is submitted for multiple debtors, a court will be forced to evaluate each of the sections of Section 1129(a) with every debtor. Not only is this unduly burdensome, it creates unnecessary, duplicative work. If a plan is submitted with only some of the debtors satisfying subsection (a)(10), the confirmation would be stalled. Likely, the confirmed debtors cannot proceed under the plan, as some of the provisions of the plan cannot be met without participation by the entire corporate structure. Effectually, this would lead to joint administration

[5] The creditor may well be able to argue that substantive consolidation was inappropriate in this case. If it were successful in that argument, perhaps the plan could have been amended to appropriately consider this issue. However, that issue was not raised below, and was effectively waived. *See Transwest*, 881 F.3d at 733 (Friedland, J., concurring).

being untenable in some circumstances, like the one currently before the Court. Without the ability to utilize the cram down rule provided in Section 1129(b), debtors will be stripped of a large bargaining chip at the negotiation table, particularly in a case like this, where the Respondent owns $6 million in debt and the Debtors as a whole owe nearly $3 billion to creditors.

The purpose of joint proceedings would thus be hindered by this interpretive change. The *per debtor* approach imposes unnecessary hurdles that joint administration seeks to abrogate. TDI and its affiliated debtors were managed on an integrated basis, making joint administration convenient and reasonable. When a joint plan is accepted by an impaired class included under the plan, §1129(a)(10) is satisfied. *See In re Charter Commc'ns*, 419 B.R. 221, 266 (Bankr. S.D.N.Y. 2009).

In sum, the plain language of 11 U.S.C. § 1129(a)(10) is more appropriately satisfied through the *per plan* reading. Not only is the plain language clear – but the *per plan* approach better aligns under the applicable canons of statutory interpretation, and the aims of the Bankruptcy Code.

CONCLUSION

The clear language and history of the Bankruptcy Code grants debtors in possession the right to assume executory contracts. Further, the plain language and intent of the Section 1129 of the Bankruptcy Code is satisfied when one impaired class accepts a reorganization plan. The decision of the Thirteenth Circuit should be *reversed.*

APPENDIX A

11 U.S.C. § 102(7): In this title-- (7) the singular includes the plural;

11 U.S.C. § 365(a): Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

11 U.S.C. § 365(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 . . .

11 U.S.C. § 365(d)(1): In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

11 U.S.C. § 365(e)(1): Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on--
(A) the insolvency or financial condition of the debtor at any time before the closing of the case;
(B) the commencement of a case under this title; or
(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

11 U.S.C. § 365(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.

11 U.S.C. § 1101(1): In this chapter--"debtor in possession" means debtor except when a person that has qualified under section 322 of this title is serving as trustee in the case;

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.

11 U.S.C. § 1123(a): Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—
. . .

(5) provide adequate means for the plan's implementation, such as--
(A) retention by the debtor of all or any part of the property of the estate;
. . .

(G) curing or waiving of any default;

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 . . .
(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.
. . .

(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.