No. 19-1004

IN THE

Supreme Court of the United States

October Term, 2019

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

Debtors,

TUMBLING DICE, INC., ET AL.,

Petitioner,

v.

UNDER MY THUMB, INC.,

Respondent.

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

BRIEF FOR PETITIONER

Team 28P
Counsel for Petitioner

Questions Presented

I. Under 11 U.S.C. § 365(c)(1), is a debtor in possession permitted to assume an executory contract over the non-debtor party's objections, even when applicable law prevents assignment to an entity other than the debtor or debtor in possession?

II. Under 11 U.S.C § 1129(a)(10), is acceptance from an impaired class of claims of each debtor required for a joint, multi-debtor plan?

Table of Contents

Table of Authorities

United States Supreme Court Cases

United States Courts of Appeal Cases

United States District Court Cases

United States Bankruptcy Court Cases

State Court Cases

United States Statutes

Legislative Materials

Secondary Sources

Opinions Below

The decision and orders from the bankruptcy court and the Bankruptcy Appellate Panel for the Thirteenth Circuit are unreported and therefore unavailable. The bankruptcy court and the Bankruptcy Appellate Panel for the Thirteenth Circuit answered both questions in favor of Tumbling Dice, Inc. and its affiliated debtors, the Petitioner in this case. On appeal, the Thirteenth Circuit reversed the bankruptcy court on both issues. R. at 3. The Opinion of the Thirteenth Circuit is set forth in case No. 19-1004, dated October 2019, and is incorporated in the record on appeal (hereinafter, "R.").

Statement of Jurisdiction

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

Statutes Involved

The relevant statutory provisions involved in this case are 11 U.S.C. §§ 365 and 1129 of the United States Bankruptcy Code. The text of these provisions is attached in Appendix A.

Statement of the Case

I. Facts

Tumbling Dice, Inc. (TDI) is a holding company formed to own the membership interests of its nine wholly-owned debtor subsidiaries, eight of which operate luxury casinos and resorts across the U.S. (the "Operating Debtors") R. at 4. The remaining debtor-subsidiary, Tumbling Dice Development, LLC ("Development"), serves a more limited purpose in the corporate structure by acting as the licensee under a non-exclusive software license agreement with Under My Thumb, Inc. ("Under My Thumb"). *Id.* Under My Thumb is a leading software designer that specializes in creating comprehensive, integrated software systems in the hospitality industry. *Id.*

In 2008, Development contracted with Under My Thumb to create a comprehensive, integrated software system that would modernize their customer loyalty program. *Id.* Their Software was specifically designed to better help Debtors integrate their business by tracking spending and other habits across their different properties. *Id.* Pursuant to their agreement, Under My Thumb incurred approximately $10 million in costs to create the Software. *Id.* Development agreed to reimburse Under My Thumb for a portion of those costs pursuant to an unsecured $7 million promissory note (the "R&D Note"). *Id.* Development and Under My Thumb also entered into a license agreement (the "Agreement") that granted Development a non-exclusive license to use its software. *Id.* at 5. Development's obligations under the R&D Note were separate and independent from its obligations under the Agreement. *Id.*

The Agreement permitted Development to "extend the benefits of the Agreement to its affiliated entities only" even though they were not parties to the Agreement. *Id.* Otherwise, Development was prohibited from assigning or sublicensing their rights to others without the consent of Under My Thumb. *Id.* Development agreed to pay a monthly fee for the license,

calculated based on the amount of spending activity by the loyalty program's members. *Id.* Under My Thumb benefited greatly from the Agreement and received much higher payments than expected. *Id.* Debtors' also remain current on all payments due under the Agreement. *Id.* at 6. The Software is essential to the Debtors' ongoing business model because the ability to integrate data from multiple properties across the U.S. allows them to increase membership and spending in an industry where customer loyalty programs are so prevalent. *Id.* at 5.

In December 2011, the stock of TDI was acquired by a hedge fund, Start Me Up, Inc., through a leveraged by out. *Id.* at 6. As part of the transaction, TDI and the Operating Debtors granted first priority liens on their assets to a group of lenders (the "Lenders") in exchange for a $3 billion loan. *Id.* Development was not required to act as a borrower or guarantor due to its limited purpose, the non-exclusive nature of the Software license, and certain restrictive covenants in the loan agreement. *Id.* As a result of the transaction, TDI was left with a significant and unserviceable debt load. *Id.*

On January 11, 2016, the Debtors commenced these chapter 11 cases. *Id.* Because the Debtors constitute one of the largest gaming operations in the country, they were authorized to continue using the prepetition cash management system of their integrated business. *Id.* at 4. TDI and each of the Operating Debtors jointly and severally owed the Lenders approximately $2.8 billion. *Id.* at 6. The Debtors also owed an estimated $120 million to their unsecured creditors, including Under My Thumb, who was stilled owed more than $6 million under the R&D Note. *Id.* After lengthy negotiations, the Debtors reached a deal, and in August 2016, filed a Joint Plan of Reorganization (the "Plan"), consistent with the terms of negotiation. *Id.* at 7.

Under the Plan, the Debtors would consensually restructure substantially all of the secured indebtedness owed to the Lenders. *Id.* In order to retain its equity interest in the Debtors, Start Me

Up was required to inject new capital to fund a 55% distribution to unsecured creditors. *Id.* The Plan called for the cancellation of the existing shares and membership interests in the Debtors and the issuance of new shares and membership interests in the reorganized Debtors, without changing the overall corporate structure. *Id.* One plan was filed on behalf of all the Debtors, but the Plan stated that the Debtors' were not being substantively consolidated. *Id.*

With respect to Under My Thumb, the Plan proposed to assume the Agreement under 11 U.S.C. §§ 365 and 1123(b)(2). *Id.* Under My Thumb would continue to receive monthly payments for the use of the Software under the Agreement and a 55% distribution of its unsecured claim owed under the R&D Note. This amount greatly exceeded the value of Development's assets. *Id.* After initially viewing the plan favorably, Under My Thumb voted to reject the Plan. *Id.* Under My Thumb became aware that Sympathy for the Devil (SFD) was investing $35 million to fund the unsecured distribution. *Id.* at 7-8. In return, SFD would receive 51% of the voting shares of reorganized TDI and several seats on its board of directors. *Id.* SFD's portfolio of companies includes a direct competitor of Under My Thumb. *Id.* at 8. The Plan had near universal support and each of TDI and the Operating Debtors had at least one impaired accepting class of creditors. *Id.* Concerned with SFD's potential access to the Software, Under My Thumb, who controlled Development's only class of impaired creditors, voted to reject the plan. *Id.*

II. Procedural History

Under My Thumb objected to the Plan numerous grounds. *Id.* It argued that the proposed assumption of the Agreement by the Debtors was impermissible under 11 U.S.C. § 356(c)(1) because applicable non-bankruptcy law excused performance in the absence of Under My Thumb's consent. *Id.* Second, it argued that the Plan was not confirmable under 11 U.S.C. § 1129(a)(10) because no impaired class of creditors of Development voted to accept the Plan. *Id.*

The bankruptcy court overruled the objections and confirmed the plan. *Id.* The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court on both issues. *Id.* at 9. Under My Thumb timely appealed to the Thirteenth Circuit where the decision was reversed on both issues, favoring Under My Thumb. *Id.* at 21.

Standard of Review

The facts of this case are not disputed by the parties. *Id* at 3 n.2. The questions presented in this case are questions of law. A court's conclusions of law are subject to *de novo* review. *See Highmark Inc. v. Allcare Health Management System, Inc.*, 572 U.S. 559, 563 (2014).

Summary of the Argument

The Thirteenth Circuit improperly held that § 365(c)(1) bars a debtor in possession to assume an executory contract when applicable non-bankruptcy law prevents assignment. The plain language of § 365(c)(1) demonstrates that Congress did not intend a bar on assignment to prevent a debtor in possession from assuming executory contracts under two theories. First, under *Footstar*'s plain language test, § 365(c) does not apply to debtors in possession, as it only applies to trustees. This interpretation serves the purpose of § 365(c)(1), which is to prevent a non-debtor contracting part from accepting performance from or rendering performance to an entity with which it did not originally contract. Because a debtor in possession is not a separate legal entity from the pre-petition debtor, and thus the non-debtor contracting party is merely continuing forward with the same contract it entered into with the debtor. Second, under the "actual test" used by a majority of the lower courts, § 365(c) does not bar a debtor in possession from assumption absent actual intent to assign away the executory contract. This is because, absent actual intent, the debtor in possession's assumption alone does not trigger the "applicable law" which bars assignment.

Further, § 365(c)(1)'s legislative history confirms that Congress did not intend for the bar against the trustee's ability to assume or assign an executory contract to apply when the debtor in possession wishes to assume. Finally, an interpretation that a debtor in possession may assume an executory contract best serves the Bankruptcy Code's objectives because it allows the debtor to assume assets vital to the debtor's reorganization. This interpretation best serves creditors' interests as well, as a creditor would generally fare better under a chapter 11 reorganization as compared to under a failed business's liquidated assets. Thus, this Court should reverse the Thirteenth Circuit's holding because § 365(c)(1) permits a debtor in possession to assume an executory contract even when applicable non-bankruptcy law precludes assignment.

The Thirteenth Circuit also improperly held that § 1129(a)(10) is applied "per debtor," requiring acceptance from an impaired class of claims of *each debtor* under a joint, multi-debtor plan. (emphasis added). The plain language of § 1129(a)(10) requires that it be applied "per plan," and is satisfied where at least one impaired class in a joint, multi-debtor plan accepts the plan. The words "plan" and "a least one class of claims…under the plan" make no distinction between creditors of different debtors or between a single plan and a joint, multi-debtor plan. This interpretation is consistent with the ordinary understanding of the word "plan," even in the context of a joint plan. It is also consistent with in the overall statutory scheme of § 1129(a).

The *per plan* interpretation also better serves the overall purpose of chapter 11 bankruptcy because it is a more balanced approached. It provides the plan proponent the necessary flexibility to effectively reorganize and does not allow a lone creditor to block confirmation, without justification, at the expense of all other parties involved. Creditors still have numerous other tools at their disposal to protect their substantive rights. Finally, general corporate law principles cannot be used to overcome the unambiguous language and purpose of § 1129(a)(10). Because at least

nine impaired classes accepted the Plan, TDI satisfied the requirement that "at least one class of claims that is impaired under the plan has accepted the plan."

Argument

I. THE THIRTEENTH CIRCUIT ERRED IN HOLDING THAT 11 U.S.C. § 365(a)(1) BARS A DEBTOR IN POSSESSION FROM ASSUMING AN EXECUTORY CONTRACT WHEN APPLICABLE NON-BANKRUPTCY LAW PREVENTS ASSIGNMENT.

Section 365 permits the debtor or trustee, "subject to the court's approval," to "assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a) (2018). Section 365(c) creates an exception to this general power, stating that in relevant part:

> "The *trustee* may not assume or assign any executory contract … 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 … 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."

11 U.S.C. § 365(c)(1)(A) (emphasis added). The primary issue before the Court is whether 11 U.S.C. § 365(c)(1) allows a debtor in possession to assume an executory contract, even if applicable non-bankruptcy law prohibits assignment of the contract. Two circuits and a vast majority of lower courts hold that § 365(c)(1) does not bar a debtor in possession from assuming an executory contract, even if applicable law bars assignment. *See Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489 (1st Cir. 1997), *abrogated on other grounds by Hardemon v. City of Boston*, 144 F.3d 24 (1st Cir. 1998); *Bonneville Power Admin v. Mirant Corp.* (*In re Mirant Corp.*), 440 F.3d 238 (5th Cir. 2006); *In re Adelphia Commc'ns Corp*., 359 B.R. 65 (Bankr. S.D.N.Y. 2007); *In re Aerobox Composite Structures, LLC*, 373 B.R. 135 (Bankr. D. N.M. 2007). Other circuits hold that § 365(c)(1) prevents a debtor in possession from assuming a contract if applicable

law prevents assignment of the contract. *See, e.g., In re W. Elecs. Inc.,* 852 F.2d 79, 79 (3d Cir. 1988).

Courts that hold § 365(c)(1) does not preclude a debtor in possession from assuming an executory contract do so under two lines of reasoning: (1) the *Footstar* interpretation and (2) the "actual test." Under *Footstar*, § 365(c)(1) is inapplicable to a debtor in possession, as the statute only applies when a trustee attempts to assume the contract. *In re Footstar, Inc.*, 323 B.R. 566, 570 (Bankr. S.D.N.Y. 2005). Under the actual test, § 365(c)(1) does not bar a debtor in possession from assuming an executory contract, when there is no actual intent to assign it. *See N.C.P. Mktg. Grp., Inc. v. BG Star Prods., Inc.*, 556 U.S. 1145, 1145 (2009). Using this test, courts make a case-by-case inquiry to determine whether the non-debtor party is *actually* being forced into a contract with an entity other than the debtor. *See Institut Pasteur*, 104 F.3d at 493 (emphasis original). Courts that incorrectly hold § 365(c)(1) precludes a debtor in possession from assuming an executory contract do so under the "hypothetical test." Under the hypothetical test, the chapter 11 debtor would lose its option to *assume* the contract, even though it never intended to *assign* the contract to another entity. *Summit Inv. & Dev. Corp. v. Leroux (In re Leroux)*, 69 F.3d 608, 612 (1st Cir. 1995).

Ultimately, this Court should follow the majority of courts, which find that § 365(c) does not bar a debtor in possession from assuming an executory contract merely because applicable law bars assignment. First, the plain language of the statute supports this interpretation. Further, the legislative history of § 365(c) confirms that Congress did not intend to bar a debtor in possession from assuming its own executory contract. Finally, allowing a chapter 11 debtor in possession to assume its own executory contracts best fulfills the Bankruptcy Code's purpose and policies.

A. <u>Section 365(c)(1) does not bar a debtor in possession from assuming an executory contract under the plain language of the statute.</u>

When interpreting statues, the Court must start with the language of the statute. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002). The Court must first determine whether the statutory text is plain or ambiguous. *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). The Court must determine the plainness or ambiguity of statutory language by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Additionally, the Court must avoid interpretations of a statute that would produce an absurd result if alternative interpretations consistent with the legislative purpose are available. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). Moreover, the rule against surplusage provides that the ordinary meaning should not render any word or phrases superfluous. *Corley v. United States*, 556 U.S. 303, 314 (2009).

Under the plain language of the statute, § 365(c)(1) permits a debtor in possession to assume an executory contract despite applicable non-bankruptcy law barring assignment. This interpretation is consistent under *Footstar*, as Congress specifically limited § 365(c)(1)'s applicability to a trustee, not a debtor in possession. Alternatively, this interpretation is consistent under the actual test, as the plain text does not bar a debtor in possession from assuming an executory contract unless the debtor has an actual intent to assign it.

i. The plain language of § 365(c)(1) under Footstar does not bar a debtor in possession from assuming an executory contract because the prohibition against assumption and assignment only applies to trustees.

Congress's use of the term "trustee" in the phrase "[t]he trustee may not assume or assign" is indicative that it intended § 365(c)(1) to apply only when the trustee, not the debtor in possession, is the party seeking to assume the executory contract. *In re Footstar, Inc.*, 323 B.R. at 570-75; *In re Adelphia Commc'ns Corp.*, 359 B.R. 65, 72 (Bankr. S.D.N.Y. 2007). Although courts often equate debtor in possession with a trustee, the two are not the same. *In re Mirant Corp.*, 40

F.3d at 249. Nowhere does the Bankruptcy Code define "trustee" as synonymous with "debtor" or "debtor in possession." *Id. at* 571. Quite the contrary, when the Bankruptcy Code refers to both "trustee" and "debtor in possession" in the same statutory provisions, the two terms are invariably invested with quite different meanings. *Id.*; *see also* §§ 365(e), (f). Further, congress has been quite careful in the use of the terms "trustee" and "debtor in possession," as shown in the 1984 amendment to § 365(c)(1). *In re Footstar, Inc.*, 323 B.R. at 571; Pub. L. No. 98-353 (1984) (replacing the original term "trustee" with "an entity other than the debtor or debtor in possession").

Interpreting the word "trustee" to mean "debtor in possession" would produce an absurd result. *In re Footstar, Inc.*, 323 B.R. at 573. Proponents of the hypothetical test argue that "trustee" includes the term "debtor in possession" under § 1107. Although § 1107 grants the debtor in possession all the rights and powers of a trustee, subject to any limitations on a trustee, this does not automatically equate the term "debtor in possession" with the term "trustee." *Id.* at 572; 11 U.S.C. § 1107(a). Instead, because the *trustee*'s power to assume executory contracts under § 365(a) is qualified by § 365(c)(1), the question becomes "whether the limitation in § 365(c)(1) *as applied to the debtor in possession* prohibits assumption without assignment." *In re Footstar, Inc.*, 323 B.R. at 573. Reading this limitation as preventing the trustee, who is a third-party entity with whom the non-debtor contracting party did not contract with, from assuming or assigning executory contracts makes perfect sense. However, because the trustee is an entity other than the debtor in possession, § 365(c)(1) must be read differently when a debtor in possession moves to assume, but not assign, a contract. Otherwise, the limitation would nonsensically read "the *debtor in possession* may not assign a contract if the counterparty is excused from accepting performance from an entity *other than the debtor in possession*." This would render the provision a "virtual

oxymoron," as mere assumption, without assignment, would not compel the counterparty to accept performance from or render it to "an entity other than" the debtor, leading to an absurd result. *Id.*

Interpreting § 365(c)(1) as only barring trustees from contract assumption, rather than debtors in possession, is consistent with Congress's intended purpose behind § 365(c)(1). *In re Footstar, Inc.*, 323 at 573. The basic objective of the limitation under § 365(c)(1) is to affirm the right of a contract counterparty under applicable non-bankruptcy law to refuse to accept performance from or render performance to an entity "*other than* the debtor or debtor in possession." *Id.* (emphasis original). A trustee *is* an "entity other than the debtor or the debtor in possession," as the trustee is an entirely different entity who has succeeded by operation of the Bankruptcy Code to all the debtor's property, including the debtor's contracts. *Id.* (emphasis original). This is because, upon filing chapter 11 bankruptcy, the debtor becomes and remains the debtor in possession, unless the court appoints a trustee under § 1104. *See generally* 11 U.S.C. § 1104 (2018). When the court appoints a trustee, the debtor is no longer "in possession," as the trustee succeeds to all the rights and properties of the debtor. *In re Footstar, Inc.*, 323 B.R. at 571. It is the appointment of a trustee that effects a statutory transfer or assignment of the debtor's property, including its contractual relationships, from the debtor to the trustee, which is why it makes sense to restrict the trustee's power to both assume and assign executory contracts. *See* 11 U.S.C. § 323(a); *In re Footstar, Inc.*, 323 B.R. at 573. The trustee will always be "an entity other than the debtor or debtor in possession" and will always be barred from taking over a contract absent the non-debtor's consent. *Id.* By the same token, the additional reference to "an entity other than … the debtor in possession" makes clear that the debtor in possession should not itself be barred from taking over the duties of the debtor under the contract because of a mere technical change in legal identity that makes the debtor in possession a "legal entity" other than the debtor.

Id. The debtor in possession, however, is not "an entity other than the debtor or debtor in possession," and so could always assume the contract. *Id.* However, the debtor in possession could not in turn *assign*, in the face of the anti-assignment statute, because the assignee will be an entity "other than the debtor or debtor in possession." *See In re Pioneer Ford Sales, Inc.*, 729 F.2d 27, 31 (1st Cir. 1984) (properly rejecting a debtor's attempt to assign the franchise when the franchise was non-assignable under without the non-debtor's permission).

Thus, the plain language of § 365(c)(1) only applies to trustees, and not debtors in possession, thereby permitting a debtor in possession to assume an executory contract.

ii. Alternatively, the plain language of § 365(c)(1) under the actual test does not bar a debtor in possession from assuming an executory contract, even when there is a bar against assignment.

Even if this Court finds that "trustee" includes the term "debtor in possession," § 365(c)(1)'s plain language still does not bar a debtor in possession from assuming an executory contract under the actual test. *See, e.g., In re Leroux,* 69 F. 3d at 612. This is because § 365(c)(1)'s statutory context overcomes the ordinary meaning of the ordinary disjunctive "or" in the phrase "assume or assign." Further, an interpretation under the hypothetical test would render the terms "or assign" surplusage. Congress's confirms its intent not to bar a debtor in possession from assumption by its use of the terms "applicable law" and "entity other than a debtor in possession."

Section 365(c)(1)'s statutory context overcomes the disjunctive "or" in "assume or assign" under the actual test. *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018) (stating statutory context may overcome the ordinary, disjunctive meaning of "or"); *see also De Sylva v. Ballentine*, 351 U.S. 570, 573 (1956) (stating "the word 'or' is often used as a careless substitute for the word 'and'"). Even if this Court finds that "trustee" includes the term "debtor in possession," § 365(c)(1)'s plain language still does not bar a debtor in possession from assuming

an executory contract under the actual test. *See, e.g., In re Leroux,* 69 F. 3d at 612. Under this interpretation, § 365(c)(1) does not bar assumption merely because non-bankruptcy law bar assignment. *Institut Pasteur*, 104 F.3d at 493. Proponents of the hypothetical test argue the actual test turns "assume or assign" into "assume and assign." *See, e.g., In re W. Elecs. Inc.,* 852 F.2d at 80. Courts that apply the hypothetical test would instead argue that the "or" in "assume or assign" is the disjunctive "or," meaning that this statute bars both assumption and assignment. *Id.* While the literal statutory language does not preclude this hypothetical approach to construing the non-assignability provisions in § 365(c)(1), a court may also construe these provisions as requiring an actual showing that the non-debtor party would not be forced to accept performance under its executory contract from someone other than the originally contracting party debtor party. *See In re Leroux*, 69 F. 3d at 612. Thus, the statutory context in which a court construe these provisions requiring an actual showing defeats the disjunctive "or" in the plain language of the statute.

Further, an interpretation of § 365(c) that bars both assumption and assignment would render the words "or assign" mere surplusage. *See In re Cardinal Indus. Inc.*, 116 B.R. at 977 ("[I]f non-assignability of a contract is sufficient as a matter of law to preclude assumption by the trustee, then there was no reason for Congress to provide that the trustee 'may not assume or assign' such contracts."). A contract cannot be assigned unless it is first assumed in accordance with § 365(b) of the Bankruptcy Code. 11 U.S.C. § 365(f)(2)(A) (providing that an executory contract cannot be assigned unless it is first assumed, meaning that assumption is a prerequisite to assignment). Accordingly, if Congress intended § 365(c)(1) to apply to the assumption and assignment of executory contracts, then it did not need to include the words "or assign." *In re Cardinal Indus. Inc.*, 116 B.R. at 977. However, the words "or assign" would not be superfluous if the applicable state law did not necessarily prevent the debtor in possession from assuming the contract. To the

contrary, the words "or assign" would serve the function of clarifying that the debtor in such circumstances may be able to assume but not assign an executory contract. *Id.* It would be sufficient for the clause to say that the trustee may not assume any executory contract of the debtor if applicable law excuses the non-debtor party from rendering performance to an entity other than the debtor in possession.

Additionally, the use of the terms "applicable law" demonstrates Congress intended for § 365(c) to bar a debtor in possession's assignment, not assumption, as a debtor in possession's assumption does not trigger applicable law absent intent to assign. *Texaco, Inc.*, 136 B.R. at 671. Courts commonly use the phrase "applicable law" to refer to the law applicable to the facts of the case at hand, rather than some law that may be applicable to another set of circumstances. *Id*. Where the debtor in possession seeks to assume, but not assign, an executory contract, this assumption does not trigger the applicable law referenced in § 365(c)(1). *In re Leroux*, 69 F.3d at 613. Thus, if there is no intent to assign that would trigger applicable law, then § 365(c)(1) does not bar the debtor in possession from assuming its executory contract.

Further, the use of the phrase "entity other than the debtor in possession" indicates Congress did not intend to bar a debtor in possession itself from assuming executory contracts, as a debtor in possession is not a separate entity from the pre-petition debtor. *See In re Leroux*, 69 F.3d at 614. The assumption of an executory contract or unexpired lease does not affect an assignment, as so defined outside of bankruptcy, because the debtor in possession is not a new or separate entity. *Id.* The Supreme Court previously diminished the legal "fiction" that the prepetition debtor and the post-petition debtor are to be treated as though they were separate legal entities. *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). The Court in *Bildisco* pointed out that if the post-petition debtor was a "new entity," it would be unnecessary for the Bankruptcy

Code to allow it to reject executory contracts because it would not be bound by them in the first place. *Id.* The Court continues to state that "it is sensible to view the debtor in possession as the same 'entity' which existed before the filing of the bankruptcy petition, but empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have done absent the bankruptcy filing." *Id.*

iii. The plain language of § 365(c)(1) does not bar a debtor in possession from assuming an executory contract when interpreted in context with §§ 365(e) and (f).

Further, when interpreted in context of § 365(e), an interpretation under the hypothetical test is incompatible with § 365(e). *See In re Leroux*, 69 F.3d at 612 (holding that a "proper construction of § 365(e) … requires consideration of companion § 365(c)"). Section 365(e) expressly invalidates clauses contained contracts that terminates the contract upon the commencement of bankruptcy. 11 U.S.C. § 365(e). The purpose of this section is to prevent a party to a contract from terminating this contract merely because the debtor commenced a bankruptcy case. 3 COLLIER ON BANKRUPTCY ¶ 365.07 (16th 2019). However, § 365(e)(2)(A) provides an exception to this rule when applicable law excuses a party "from accepting performance from or rendering performance to the trustee or an assignee of such contract." *Id.* at § 365(e)(2)(A). Courts interpret the § 365(e)(2)(A) exception as requiring that the non-debtor party make an "*actual* showing, prior to any termination of the debtor's post-petition contracts rights, that the non-debtor party … would not be forced to accept performance under its executory contract from someone other than the debtor party with whom it originally contract." *In re Leroux*, 69 F.3d at 612 (stating that applicable legislative history explained Congress anticipated a case-by-case analysis of this subsection). This is because requiring an actual showing would avoid automatic termination of a debtor's executory contract rights whenever non-bankruptcy law permitted. Were this not so, there

would be no contractual right left for a debtor or debtor in possession to *assume* under § 365(c)(1). Further, because the purpose of § 365(e) is to nullify provisions that terminate contracts merely because a contractual party, courts should not interpret § 365(c)(1) in a way to evade this provision. *Id.* at 613 (noting that if § 365(e)(2)(A) automatically terminated a debtor's executory contract rights, the exception would conflict with § 365(c)(1)); *see also In re Mirant Corp.*, 440 F.3d at 249 (adopting the actual test because the alternative would create conflict with § 365(c)(1)).

Additionally, viewing § 365(c) in the context of § 365(f)(1) supports an interpretation that Congress did not intend to bar a debtor in possession from assuming a contract. *See In re Adelphia Commc'ns Corp.*, 359 B.R. at 72 (stating "[i]f § 365(c)(1) made it impossible even to *assume* the contract to be assigned, there would be no reason for having a § 365(c)(1) exception in § 365(f)"). Sections 365(c)(1) and (f) are brought into conflict when a debtor seeks to assume and assign an executory contract and "applicable law" excuses a non-debtor party from accepting performance from a new obligor. *In re Cardinal Indus., Inc.*, 116 B.R. at 976-77. Section (f)(1) provides that:

> "[e]xcept 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."

11 U.S.C. § 365(f)(1). The conflict arises from § 365(c)(1) and (f)(1)'s treatment of the term "applicable law." Under the hypothetical test's interpretation of § 365(c)(1), this statute bars assumption whenever "applicable law" would bar assignment. *Id.* at § 365(c)(1). Section 365(f)(1), however, states that executory contracts may be assigned, *contrary provisions in applicable law notwithstanding*. *Id.* at § 365(f)(1) (emphasis added). But, in order for a contract to be assigned, the debtor must first assume it. *Id.* at § 365(f)(2)(A) (providing that the trustee may assign an executory contract if the trustee first assumes such a contract in accordance with the provisions of

§ 365). Thus, a literal reading of § 365(c)(1) would render § 365(f)(1) inoperative and superfluous. *See In re Catron*, 158 B.R. 629, 636 (Bankr. E.D. Va. 1993) (stating the conflict between § 365(c) and (f) is "inescapable").

Thus, under the actual test's plain language interpretation, § 365(c)(1) does not bar a debtor in possession from assuming an executory contract. This is consistent with its use of the terms "assume or assign," "applicable law," and "an entity other than a debtor in possession." It is also consistent when interpreted alongside §§ 365(e) and (f).

B. Alternatively, § 365(c)(1)'s legislative history confirms Congress did not intend for this statute to bar a debtor in possession from assuming an executory contract.

The legislative history of § 365(c) confirms that Congress did not intend for this provision to bar assumption of an executory contract by a debtor in possession. If the language of a statute is ambiguous, the Court may use legislative history as an aid to discern congressional intent. *Exxon Mobil Corp. v. Allapattah Serv., Inc.*, 545 U.S. 546, 568 (2005). The context provided by legislative history is a guide to clarify the law and help the Court determine the proper interpretation of a statute. *Garcia v. United States*, 469 U.S. 70, 76 (1984). In examining the legislative history of a statute, the Court may identify congressional intent through a review of amendments to the statute, committee reports, and house reports. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 464 (1892). When Congress amends a statutory provision, the Court must presume the change in statutory language creates a subsequent change in statutory meaning. *Gross v. FBL Fin. Serv., Inc.*, 557 U.S. 167, 174-75 (2009).

As set out above, the plain language of the Bankruptcy Code demonstrates that § 365(c)(1) does not bar a debtor in possession from assuming an executory contract absent actual intent to assign. However, even if the Court finds the statutory language ambiguous, the legislative history

of the Bankruptcy Codes reveals that Congress intended the prohibition against a trustee from assuming or assigning an executory contract did apply to a debtor in possession.

The 1984 amendment to § 365(c)(1) demonstrates Congress's legislative intent to allow debtors in possession to assume executory contracts despite a prohibition against assignment. *In re Leroux*, 69 F. 3d at 613. Section 365(c)(1) was initially enacted as a part of the Bankruptcy Reform Act of 1978. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 365(c) (1978). Originally, the pivotal language in § 365(c) prevented assumption if "applicable law excuses a party, other than debtor, to such contract or lease from accepting performance from or rendering performance *to the trustee or to an assignee* of such contract or lease…" *Id.* In 1980, there was a proposed bill to amend the Bankruptcy Code, the Bankruptcy Technical Correction Act of 1980. H.R. Rep. No. 1195 (1980). The Committee on the Judiciary published a report explaining the reasoning for the suggested changes. *Id.* The report included a proposed amendment to § 365(c)(1)(A) that would replace the words "the trustee" with "an entity other than the debtor or debtor in possession." *Id.* The report explained the Committee's intention was to:

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

Id. at § 27(b). Congress did not pass an amendment modifying § 365 until 1984. Pub. L. No. 98-353 (1984). With this amendment, Congress adopted the change in language as proposed exactly in 1980 and replaced "the trustee" with "an entity other than the debtor or debtor in possession."

Congress's amendment to the statutory language of § 365 confirms the conclusion compelled by both the plain meaning of the statute as written as well as its logic and purpose. *In re Footstar, Inc.*, 323 B.R. at 575. The 1980 Report clearly addressed the very amendment

Congress adopted in 1984 and just as clearly expressed the Committee's view as to the inapplicability of § 365(c)(1) to a debtor in possession's assumption. Congress designed this change in language to permit assumption of contracts when the same entity with which the non-debtor party had contracted was the one to or from which performance would occur post-petition. *In re Mirant Corp*., 440 F.3d at 249. Although an interpretation of the amended text under the hypothetical test may still bar a debtor in possession, there would be little reason for Congress to amend the statute unless its intentions were to permit a debtor in possession to assume an otherwise unassignable contract. *See* 3 COLLIER ON BANKRUPTCY ¶ 365.07; *see also Gross*, 557 U.S. at 174-75 (2009). Thus, § 365(c)(1) permits a debtor in possession to assume an executory contract despite applicable anti-assignment law, as evidenced by amending the statutory language as well as its 1980 Committee on the Judiciary report.

C. Section 365(c)(1) does not bar a debtor in possession from assuming an executory contract as this best fulfills the Bankruptcy Code's goals.

The overall goal and objective of a statute provides one of the best guides in determining the meaning of a statute. *See United States v. Congress of Indus. Org.*, 335 U.S. 106, 112-13 (1948). The statute's objective provides a strong factor to help determine congressional intent. *Id.* The objective of the Bankruptcy Code's chapter 11 is to "empower a debtor with going concern value to reorganize its operations to become solvent once more." *N.C.P. Mktg. Grp., Inc.,* 556 U.S at 1145. This objective is best met by concluding that § 365(c)(1) does not bar a debtor in possession from assuming an executory contract.

The conclusion reached by both *Footstar* and the actual test best serves the purpose of § 365(a). The purpose of § 365(a) is to "allow a debtor to reject executory contracts in order to relieve the estate of burdensome obligations while at the same time providing a means whereby a debtor can force others to continue to do business with it when the bankruptcy filing might otherwise make

them reluctant to do so." *See BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 563-64 (1994). A debtor's ability to assume or reject executory contracts in bankruptcy has long been recognized as one of the primary and essential tools available to a debtor under the Bankruptcy Code. *See, e.g., In re Gray Truck Line Co.*, 34 B.R. 174, 177 (Bankr. M.D. Fla. 1983). This tool generally allows a debtor to keep favorable contracts and compel continued performance by the non-debtor parties to such contracts, as well as to discard burdensome contracts, thereby avoiding any future performance obligations under such contracts. *See* 11 U.S.C. § 365(a).

Additionally, the actual test promotes uniform application of the Bankruptcy Code and balances the interests of both creditors and debtors. *In re Hartec Enters., Inc.*, 117 B.R. 117 B.R. 865, 873 (Bankr. W.D. Tex. 1990). This interpretation preserves legitimate anti-assignment laws which Congress designed to protect the non-debtor to the contract. *Id.* Further, this interpretation effectively bars state legislatures from using § 365 to pass laws designed to insulate their constituencies from ever having to do business with debtors in bankruptcy. *Id.* In this way, the Bankruptcy Code achieves the balancing of interests so essential to the successful uniform application of bankruptcy laws nationwide to a wide variety of business enterprises. *Id.*

In contrast, the hypothetical test's interpretation of § 365(c)(1) serves no chapter 11 policy at all. *Texaco, Inc.*, 136 B.R. at 671. The proposition that § 365(c)(1) be read under the hypothetical test tends to defeat the basic bankruptcy purpose of the betterment of the bankruptcy estate for the benefit of the debtor and general creditors. *Id.* It would allow one disgruntled creditor to frustrate the payment of claims to other creditors, contrary to the whole purpose of bankruptcy. *Id.* A refusal to permit debtors in possession to assume otherwise non-assignable contracts would present problems for debtors whenever the debtor's business is one that heavily relies on a non-assignable contract. For example, in this case, the non-assignable contract at issue is "an essential part of the

Debtor's ongoing business model." R. at 5. Without the ability to assume this contract, the Debtors in this case will likely be unable to reap the benefits of chapter 11 reorganization. Although it is reasonable for a creditor to be concerned that a debtor in possession, perhaps a less financially sound entity, would be unable to continue to perform under the contract, there are other provisions in § 365 that require the debtor in possession to cure prior defaults and provide adequate assurance of further performance before it can assume the contract. 3 COLLIER ON BANKRUPTCY ¶ 365.07; *see* 11 U.S.C. § 365(b) (requiring a debtor to cure defaults before assumption); *see also* 11 U.S.C. § 365(f) (requiring a debtor to provide adequate assurance of further performance before assumption).

Finally, an interpretation under either the actual test or *Footstar* benefit both creditors and debtors, as it is more congruent with the fundamental bankruptcy policy of the maximization of the value of the debtor's estate and repayment to creditors. *In re Edison Mission Energy*, No. 12-49219, 2013 WL 5220139, at *10 (Bankr. N.D. Ill. Sept. 16, 2013). Chapter 11 is grounded in the principle that business survival, that is, continued operation and productivity, through reorganization is generally preferable to the forced liquidation of a failed business' assets for the benefits of its creditors. 3 COLLIER ON BANKRUPTCY ¶ 365.07. Simply put, a creditor in a Chapter 11 bankruptcy should generally fare better by recovering more of that which is owed to them under the debtor's reorganization plan than they would have if the debtor had simply ceased operation of its business. *Id.* Section 365(a) of the Code furthers that purpose by allowing a trustee or debtor in possession to accept the benefits of an advantageous contract. *Id.* Thus, by allowing a debtor in possession to retain its valuable executory contracts, which could potentially affect the debtor's ability to continue operations, both the debtor and creditor are better off.

Thus, § 365(c)(1) does not bar a debtor in possession from assuming an executory contract. This is consistent with its plain language, legislative history, and chapter 11 policy.

II. THE THIRTEENTH CIRCUIT ERRED IN HOLDING THAT 11 U.S.C § 1129(a)(10) REQUIRES ACCEPTANCE FROM AT LEAST ONE IMPAIRED CLASS OF CLAIMS OF EACH DEBTOR UNDER A JOINT, MULTI-DEBTOR PLAN.

A plan for reorganization can be confirmed in two ways. The most common way is through consensual confirmation, which requires a plan proponent to obtain the consent of each class of claims. Section 1129(a) sets forth the requirements for consensual confirmation. 11 U.S.C § 1129(a) (2018). Section 1129(a) contains a checklist of sixteen different requirements that must be met in order for a plan for reorganization to be confirmed. *Id.* Among those requirements is § 1129(a)(10), which requires that "at least one class of claims that is impaired under the plan has accepted the plan." 11 U.S.C § 1129(a)(10). If a proponent is unable to achieve consensual confirmation, the plan may still be confirmed subject to the Bankruptcy Code's "cram down" process. *See* 11 U.S.C § 1129(b). Section 1129(a)(10) must still be met, even in a cram down situation. *See* 11 U.S.C § 1129(b)(1).

The issue before this Court is whether, in a joint, multi-debtor plan, § 1129(a)(10) requires acceptance from at least one impaired class of claims for each debtor, or, alternatively, acceptance from one impaired class of claims of any one debtor. The former is referred to as the "per debtor" approach and has been explicitly accepted only in a handful of opinions out of the District of Delaware. *See, e.g.*, *In re Tribune Co.*, 464 B.R. 126 (Bankr. D. Del. 2011). The latter is referred to as the "per plan" approach and has been accepted by numerous courts including the Ninth Circuit. *See JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc (In re Transwest Resort Props., Inc.)*, 881 F.3d 724 (9th Cir. 2018); *JPMorgan Chase Bank v. Charter Commc'ns (In re Charter Commc'ns)*, 419 B.R. 221 (Bankr. S.D.N.Y. 2009).

This Court should reverse the Thirteenth Circuit and find that § 1129(a)(10) only requires acceptance from one impaired class of claims of any one debtor in a joint, multi-debtor plan for, three reasons. First, the plain language requires that § 1129(a)(10) be applied on a *per plan* basis. Second, the overall purpose and policies behind the Bankruptcy Code are better served by the *per plan* approach. Finally, general corporate law principles cannot be used to supersede the plain language and purpose of § 1129(a)(10).

A. The plain language of 11 U.S.C § 1129(a)(10) requires that it should be applied on a *per plan* basis.

Section 1129(a)(10) provides:

> 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 by any insider.

11 U.S.C. § 1129(a)(10) (emphasis added). "Interpretation of the Bankruptcy Code starts 'where all such inquiries must begin: with the language of the statute itself.'" *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)). When the statute is plain and unambiguous, the Court must enforce the statute according to its plain meaning. The plain and unambiguous language of § 1129(a)(10) requires that it be applied on a *per plan* basis. First, the words "plan" and "at least one class of claims" make no distinction between creditors of different debtors or between a single and a joint plan. Second, the singular use of "plan" conforms with the ordinary understanding and practical realities of a joint plan. Finally, the *per plan* approach is consistent with the statutory scheme of § 1129(a).

i. The words "plan" and "at least one class of claims" make no distinction between creditors of different debtors or between a single and a joint plan.

Section 1129(a)(10) is unambiguous: it requires only that "at least one class of claims that is impaired under the *plan* has accepted the *plan.*" 11 U.S.C § 1129(a)(10) (emphasis added). The

singular use of the word "plan" makes it clear that once a single impaired class accepts a plan, § 1129(a)(10) is satisfied as to the entire plan. *See In re Transwest Resort Props., Inc.*, 881 F.3d at 729. The statute makes no distinction between creditors of different debtors nor does it distinguish between single-debtor and multi-debtor plans. *Id.* Congress could have easily included language requiring acceptance from "at least one class of claims of *each debtor* that is impaired under the plan," but it did not do so. *See Lopez-Soto v. Hawayek*, 175 F.3d 170, 173 (1st Cir. 1999) ("Courts have an obligation to refrain from embellishing statutes by inserting language that Congress opted to omit."). Reading § 1129(a)(10) as a *per debtor* requirement expands the statute to include words that are found nowhere in the text. This Court should refrain from adding such language to the statute. *See Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001) (holding that the Court must presume that Congress means what is says).

Proponents of the *per debtor* approach use the Code's statutory construction rule, § 102(7) to suggest that "each joint plan actually consists of a separate plan for each [d]ebtor." *See In re Tribune Co.*, 464 B.R. at 182. Section 102(7) states that "the singular includes the plural." 11 U.S.C. § 102(7). However, § 102(7) does not apply to every situation where the singular form is used in the Bankruptcy Code, and it cannot be used when the result would be totally inconsistent with purpose behind the statute. *See Christo v. Yellin (In re Christo)*, 192 F.3d 36, 37 (1st Cir. 1999) (holding that § 102(7) does not apply to § 522(d)(11)(D) because "Congress could not have intended" such a result); *see also Slobodian v. IRS (In re Net Pay Sols., Inc.)*, 822 F.3d 144, 150 (3d Cir. 2016) (holding that, "when read in context," § 102(7) does not apply to § 547(c)(9)).

Nevertheless, application of § 102(7) to § 1129(a)(10) is consistent with the *per plan* approach. When applying § 102(7) to § 1129(a)(10), the statute reads: "at least one class of claims that is impaired under the *plans* has accepted the *plans*." Even when changing the word "plan" to

"plans" the statute still only requires that *at least one class of claims that is impaired* has accepted the plans. *See In re Transwest Resort Props., Inc,* 881 F.3d at 730. This Court should not read "at least one class of claims" as requiring anything more than one impaired class to accept the plan or plans. Congress could not have intended such drastically different interpretation of § 1129(a)(10), such as the *per debtor* approach, through application of § 102(7). *See Whitman*, 531 U.S. at 468 ("Congress…does not, one might say, hide elephants in mouseholes.") (citations omitted).

ii. The plain meaning of "plan," as used in the singular, conforms with the ordinary understanding and practical realities of a joint plan.

The ordinary understanding of the word "plan" is that of a singular plan. Although each affiliated debtor entity is required to file its own bankruptcy petition and the claims of each creditor remain distinct from the claims of other debtors' creditors, it is a mischaracterization that "each joint plan actually consists of a separate plan for each [d]ebtor." *See In re Tribune Co.*, 464 B.R. at 182. This characterization ignores the fact that a single plan is proposed for all debtors. Thus, despite debtor entity separateness, the ordinary understanding of a joint plan in bankruptcy is that of a singular plan with a singular distribution scheme, which conforms to the singular use of "plan" in the statute.

The *Tribune* Court itself recognized this understanding of a joint plan as a singular plan. *Id.* at 183 ("[I]n many cases…a *single* distribution scheme is proposed, in which sources of plan funding and distribution are designed without regard to where assets are found or where liabilities lie.") (emphasis added). The *Tribune* Court also suggested that, under a *per debtor* approach, plan proponents would need to "drop from a proposed joint plan those debtors that do not or cannot meet the § 1129(a)(10) requirement." *Id.* at 184. But if one considers each debtor under a joint plan to be proceeding under a separate plan, dropping from the plan would not be necessary because debtors with accepting impaired classes, having satisfied § 1129(a)(10), could confirm

and move forward without approval from other debtors' impaired classes. Dropping debtors that cannot meet § 1129(a)(10) necessarily means that the remaining debtors are not proceeding under separate plans. *See In re Transwest Resort Props., Inc.*, 881 F.3d at 732 (Friedland, J., concurring).

iii. The per plan approach is consistent with the statutory scheme of § 1129(a).

The *per plan* approach is also consistent with the other requirements of § 1129(a). *See King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) ("[A] statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context). The *Tribune* court suggested that § 1129(a)(10) must be read on a *per debtor* basis because other subsections of § 1129(a) are applied on a *per debtor* basis. *See In re Tribune Co.*, 464 B.R. at 183 (referencing, specifically to §§ 1129(a)(3), (a)(7), and (a)(8)). This conclusion is illogical for two reasons. First, although each requirement of § 1129(a) must be met in order for a plan to be confirmed, there is nothing in the plain language to suggest that all subsections in § 1129(a) are to be applied in the same manner. *See In re Transwest Resort Props., Inc.*, 881 F.3d at 730. Second, the plain language in each subsection is different because each subsection serves an entirely different purpose. *See Lewis v. Reg'l Ctr. of the E. Bay*, 174 Cal. App. 3d 350, 354 (Ct. App. 1985) ("To read together statutory provisions which the Legislature adopted for different purposes would place a judicial gloss on the statutes….").

The subsections in § 1129(a) are only related in the sense that each one is a requirement for confirmation. However, each subsection serves an entirely different purpose and each subsection is phrased differently. For example, § 1129(a)(14) deals with domestic support obligations, § (a)(13) deals with retiree benefits, and § (a)(12) deals with court fees, just to name a few. *See* 11 U.S.C. §§ 1129(a)(14), (a)(13), (a)(12). Subsections 1129(a)(7) and (a)(8) are phrased differently and also serve a different purpose. These subsections are phrased to apply to

"*each* class" and "*each* holder." 11 U.S.C. §§ 1129(a)(7), (a)(8) (emphasis added). The way these subsections are phrased makes them more conducive to a *per debtor* application, not the fact that they both fall within § 1129(a). Congress clearly could have written § 1129(a)(10) to require "at least one class of claims of *each debtor*" to accept the plan, but it did not. The phrasing of each subsection highlights the differing purposes. Subsection (a)(7) is focused on the distribution scheme and ensuring that *each* holder of claim receives at least as much as they would in liquidation. It would make no sense to apply this provision selectively to creditors of some debtors, prioritizing them over other creditors of other debtors. Further, Congress knew how to cross-reference the subsections of § 1129(a), as it did with § 1129(b) and § 1129(a)(8). *See* 11 U.S.C § 1129(b)(1). The fact that Congress did not make any cross-references with respect to § 1129(a)(10) shows that it is a mutually exclusive requirement for confirmation. *See In re Transwest Resort Props., Inc.*, 881 F.3d at 730. Thus, it should be interpreted independently of other subsections.

B. The *per plan* approach is more consistent with the purpose and policies of the Bankruptcy Code.

The *per plan* approach also better serves the purpose of the Bankruptcy Code. Chapter 11 reorganization is about balance. 3 COLLIER ON BANKRUPTCY ¶ 1100.01 (16th ed. 2019). "[C]orporate reorganization must 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 stakeholders' existing legal rights to the greatest extent possible." *Id.* By continuing to operate, a debtor can preserve any positive difference between the going concern value of the business and the liquidation value. *See United States v. Whiting Pools*, 462 U.S. 198, 203 (1983) ("Congress presumed that the assets of the debtor would be more valuable if used in a rehabilitated business than if 'sold for scrap.'") (citing H. R. Rep. No. 95-595, p. 220 (1977)).

In order to effectuate a successful reorganization for the benefit of all parties, the debtor in a chapter 11 case is provided with considerable control over continued operation of the business and plan negotiations. 3 COLLIER ON BANKRUPTCY ¶ 1100.01 (citing 11 U.S.C. §§ 1108, 1121). In order to strike a balance, the Code also provides protection for creditors. *Id.* (citing 11 U.S.C. §1112(b), §1104(a), § 362(d)). However, "[t]he hallmark of Chapter 11 is flexibility." *Id.* The *per plan* approach is more consistent with the overall purpose of the Bankruptcy Code for two reasons. First, viewing § 1129(a)(10) as a technical requirement for confirmation better serves debtor's need for flexibility. Second, other sections of the Code balance out the need for flexibility by better protecting creditors' substantive rights.

i. Section 1129(a)(10) provides no substantive rights to creditors, but rather serves as a technical requirement for confirmation.

Section 1129(a)(10) "is an obligation for the proponent to fulfill; it is not a substantive right of objecting creditors. *See In re Rhead*, 179 B.R. 169, 177 (Bankr. D. Ariz. 1995); *see also In re Bataa/Kierland, LLC*, 476 B.R. 558, 578 (Bankr. D. Ariz. 2012). Thus, the *per plan* approach does not "alter or abridge parties' substantive legal rights." R. at 20. Rather, it is a technical requirement to ensure "*some* indicia of creditor support for the debtor's schemes." *See In re LOOP 76, LLC*, 442 B.R. 713, 722 (Bankr. D. Ariz. 2010) (emphasis added) (quoting P. Murphy, CREDITOR'S RIGHTS IN BANKRUPTCY, Section 16.11, at 16-20 (1980)).

Section 1129(a)(10) was added to the Code late in the legislative process in response to two cases where bankruptcy courts confirmed plans in which there was only one class of creditors, and that class objected. *See In re LOOP 76, LLC*, 442 B.R. at 722 (first citing *In re Hobson Pike Assocs., Ltd.*, 1977 WL 182364, at *7 (Bankr. N.D. Ga. Sept. 20, 1977); then citing *In re Marietta Cobb Apartments Co.*, 1977 WL 182365, at *7 (Bankr. S.D.N.Y. Sept. 9, 1977)). In hearings before the Senate Committee, the National Association of Real Estate Investment Trusts stated,

"[t]his section should be amended to be consistent with the rest of S. 2266 and in particular confirmation should not be permitted in situations where *no class* of affected creditors has voted for the plan." *Hearings on S. 2266 and H.R. 8200 before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 721 (1977).

The proposal submitted by the National Association of Real Estate Investment Trusts was adopted almost verbatim in what became § 1129(a)(10). *See id.* at 969; *see also In re Greystone III Joint Venture*, 102 B.R. 560, 571 n.13 (Bankr. W.D. Tex. 1989), *rev'd on other grounds*, 995 F.2d 1274 (5th Cir. 1991); S. Rep. No. 150, 97th Cong., 1st Sess. 1981 ("Paragraph (10) makes clear the intent of section 1129(a)(10) that *one* 'real' class of creditors must vote for the plan of reorganization."). Thus, it seems more likely that Congress added § 1129(a)(10) as a technical requirement to ensure that, in single asset real estate cases, a plan could not be confirmed when it had no support. "There is no evidence of any legislative intent to confer on undersecured creditors a veto power…so they could defeat confirmation simply by causing the plan to fail to satisfy § 1129(a)(10)." *In re LOOP 76, LLC*, 442 B.R. at 722.

Many scholars and judges have questioned the purpose and utility of § 1129(a)(10). *See In re Greystone III Joint* Venture, 102 B.R. at 566; Randolph J. Haines, *Elimination of the Need for an Accepting Impaired Class*, 1995-96 ANN. SURV. BANKR. L. 203, 203-04 (Stating that § 1129(a)(10) is "probably the most useless confirmation requirement); Kenneth N. Klee, *Adjusting Chapter 11: Fine Tuning the Plan Process*, 69 AM. BANKR. L.J. 551, 568 (1995) ("It is time for Congress to excise § 1129(a)(10) from the Bankruptcy Code."). Even the ABI Chapter 11 Reform Commission has recommended that § 1129(a)(10) be eliminated from the Code entirely. *See American Bankruptcy Institute Reform Commission to Study the Reform of Chapter 11, 2012-2014 Final Report and Recommendations* 257-61 (2014). Thus, § 1129(a)(10) is often viewed as an

unnecessary technical hurdle for plan proponents to ensure that there is at least minimal support for a plan.

Given the scant history of § 1129(a)(10) and the confusion regarding its intended purpose and utility, it is unlikely that Congress intended it as a substantive right that would give creditors substantial veto power and hold up value. A single unsecured creditor would hold such power, solely because it controls the lone impaired class of a single debtor. *See Young v. Higbee Co.*, 324 U.S. 204, 211 (1945) (stating that a stakeholder should not be allowed to "obstruct a fair reasonable reorganization in the hope that someone would pay them more"). Alternatively, a large creditor could strategically purchase claims in each class and block the plan. A plan proponent under the *per debtor* approach has little recourse. The plan proponent can attempt to renegotiate and amend the plan to meet the demands of the lone creditor, but this inevitably leads to discord amongst other creditors involved and ultimately makes confirmation impossible.

Alternatively, as the *Tribune Court* suggested, a plan proponent could drop from a proposed joint plan those debtors that cannot meet the § 1129(a)(10) requirement, but this option also does not provide the flexibility necessary to effectively reorganize a business that is managed on an integrated basis, as is the case here. *See In re Charter Commc'ns*, 419 B.R. at 266; *In re Enron Corp.*, 2004 Bankr. LEXIS 2549, at *134 (Bankr. S.D.N.Y. July 15, 2004) (showing that attempting to separate the debtors "would have resulted in *substantially* lower recoveries for virtually all Creditors.") (emphasis added). Congress could not have intended a result that is so counterproductive to the flexibility and potential for reorganization envisioned by the Code. *See In re Scrub Island Dev. Group Ltd.*, 523 B.R. 862, 874 (Bankr. M.D. Fla. 2015) (Chapter 11 "was designed to provide debtors with as much flexibility as possible to formulate a plan.").

It is also a more balanced approach. Unlike plan proponents under the *per debtor* approach, creditors under a *per plan* approach have other tools at their disposal, which are better aimed at protecting their substantive rights.

ii. Other sections of the Code provide substantive protections for creditors, which balance out proponents' needs for flexibility.

While § 1129(a)(10) is a technical requirement for confirmation, other sections of the Code better protect creditor's substantive rights. These sections balance out the proponent's need for flexibility. The Code mandates a hearing to occur prior to confirming a reorganization plan, at which all creditors, impaired and unimpaired, have the opportunity "to comment on the plan's proposed treatment of their claims or interests, and object if necessary." 11 U.S.C § 1128. An impaired dissenting creditor can and should object based on the creditors' "best interest test" in § 1129(a)(7) or on the basis of fairness and equity principles in § 1129(b). Other sections also protect creditors from debtor abuse. *See* 11 U.S.C §§ 1129(a)(3), 1129(a)(11).

Section 1129(a)(7) is an individual guaranty to each creditor or interest holder that it will receive at least as much in reorganization as it would in liquidation. 3 COLLIER ON BANKRUPTCY ¶ 1129.02. ("Section 1129(a)(7) is one of the *cornerstones* of chapter 11 practice.") (emphasis added). Section 1129(a)(7) operates on an individual basis applying to "*each* holder of a claim" of an impaired class. 11 U.S.C § 1129(a)(7) (emphasis added). If even one impaired dissenting creditor does not meet the test, a plan cannot be confirmed. Thus, § 1129(a)(7) ensures significant protection for each impaired dissenting creditor far and above the technical requirement of § 1129(a)(10).

Section 1129(b) also provides significant protections for creditors substantive rights. Under § 1129(b), a plan can only be confirmed only "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." 11 U.S.C § 1129(b)(1). Congress intended that protection from "unfair discrimination" would be of "greatest value" to a creditor that "has not accepted the plan [and] is to receive less than full value under the plan." H.R. Rep. No. 595, 95th Cong., 1st. Sess. 416 (1977). This section gives creditors a valuable to tool for creditors to challenge a plan based on receiving different treatment under the plan than other classes. 3 COLLIER ON BANKRUPTCY ¶ 1129.03 (citing numerous courts finding unfair discrimination based on classes receiving different terms or recoveries without justification).

The "fair and equitable" aspect of § 1129(b)(1) also affords creditors substantial protection. Known as the "absolute priority rule," this section means that a plan may not allocate any property to any junior class unless all senior classes consent or receive property equal in value to the full amount of their claims. *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202 (1988). A second component of this section is that a senior class cannot receive more than full compensation for its claims. *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 612 (Bankr. D. Del. 2001). Other sections provide further protection for creditors. Section 1129(a)(3) requires that a plan be proposed in good faith, and § 1129(a)(11) requires that the plan be feasible and not likely to be followed by liquidation or further reorganization. *See* 11 U.S.C. §§ 1129(a)(3), (a)(11). Further, § 1129(a)(10) itself provides protection by requiring that acceptance be from a non-insider. 11 U.S.C § 1129(a)(10).

Each of these sections provide creditors with powerful tools, which can be used as a balancing mechanism against a debtor who abuses the flexibility granted to it in the Code. For example, while a debtor has substantial flexibility to classify claims and to impair classes under the plan, these sections provide checks and balances to prevent abuse. First, the proponent must still meet the requirements of § 1122(a) which requires that "a plan may place a claim or an interest

in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." 11 U.S.C § 1122(a). While this section does not appear to restrict classifying substantially similar claims differently, many courts require a proponent to provide a legitimate reason for the separate classification. *See In re Deming Hospitality, LLC*, 2013 WL 1397458, at *2 (Bankr. D.N.M. Apr. 5, 2013). Thus, a debtor may not abuse the flexibility to classify claims by "Gerrymandering" claims in order to satisfy § 1129(a)(10).

Creditors may also challenge a proponent who they believe has "artificially impaired" a class of claims in order to meet the requirements of § 1129(a)(10). *See In re L & J Anaheim Assocs.*, 995 F.2d 940, 943 n.2 (9th Cir. 1993) ("The bankruptcy court can and should address such abuses by denying confirmation on the grounds that the plan has not been "proposed in good faith."); *In re Windsor on the River Assocs.*, Ltd., 7 F.3d 127, 132 (8th Cir. 1993) ("If this impairment has been manufactured, then the plan must be regarded as having circumvented the purpose of the statute namely, consensual reorganization."). Thus, a proponent's substantial flexibility cannot be abused, and creditors have tools to balance that flexibility.

C. General corporate law principles cannot be used to supersede the plain language and purpose of § 1129(a)(10).

Respondents cannot rely on general corporate law to support the *per debtor* approach. Generally, separate legal entities are to be treated separately. *See Skidmore, Owings and Merrill v. Canada Life Assurance Co.*, 907 F.2d 1026, 1027 (10th Cir. 1990). Substantive consolidation is an equitable remedy where the assets and liabilities of technically separate entities are pooled together and treated as if they were one single entity. *See In re Owens Corning*, 419 F.3d 195, 205 (3d Cir. 2005). Substantive consolidation should be applied sparingly. *Id.* However, the issue of substantive consolidation is not properly before this Court and is irrelevant to a technical requirement like § 1129(a)(10). Moreover, Under My Thumb did not rely on entity separateness

and is not adversely affected by the Plan. Finally, individual debtors are not always viewed in isolation in bankruptcy simply because they are separate corporate entities.

A plan itself that effectively merges the debtors without conducting an assessment of whether consolidation is appropriate results in "de facto" consolidation, not a *per plan* interpretation of a technical requirement like § 1129(a)(10). *See In re Transwest Resort Props., Inc.*, 881 F.3d at 732-33 (Friedland, J., concurring). While it is true in this case that the Plan stated that the Debtors' estates were not being substantively consolidated, these are just empty words, as the Plan itself still effectively merged the Debtors. R. at 7. Under My Thumb should have objected on this basis prior to confirmation thus requiring altering the Plan to maintain entity separateness. They failed to do so and, thus, whether the bankruptcy court treated the Plan as if it were a substantive consolidation is not before this Court. The problem is not the interpretation of the statute, but rather the Plan itself. *Id.* This approach allows the issue of consolidation to be handled on a case by case basis, which is appropriate given the fact intensive nature of the substantive consolidation inquiry.

Even if this is case is viewed as a "de facto" consolidation and even if such a remedy should be used sparingly, Under My Thumb was treated fairly. *See Alexander v. Compton (In re Bonham)*, 229 F.3d 750, 765 (9th Cir. 2000) (stating that the "sole aim" of substantive consolidation analysis is "fairness to all creditors"). The underlying principle for avoiding substantive consolidation is protecting creditors from any adverse effects of relying on entity separateness. *See In re Owens Corning*, 419 F.3d at 212. Here, Under My Thumb treated Debtors as one legal entity. Under My Thumb is a leading software designer that specializes in creating software that helps businesses integrate. R. at 4. The Agreement between Development and Under My Thumb specifically allows the affiliated entities to use the Software even though they were not parties to the Agreement. R.

at 5. It also requires Development to pay a monthly fee based the spending activities by Club members. *Id.* Thus, they understood that the purpose of their endeavor was specifically to help the Operating Debtors integrate their business and that their reimbursement would come solely from, and be dependent on, the success of the Operating Debtors. Having relied so heavily on the Debtors as a single entity, and benefiting from it, Under My Thumb may not now plead "de facto" consolidation.

Nor was Under My Thumb adversely affected. Implicit in the courts' analysis in *SGPA* and *Charter* is that § 1129(a)(10) is a technical requirement, and that analyzing the plan thoroughly under other substantive sections better protects creditors from any adverse effects of relying on entity separateness. In *SGPA*, the court spent a considerable amount of time analyzing the "fair and equitable" requirements of § 1129(b), which the court determined to be the "heart of the matter." *See In re SGPA, Inc.*, No. 1-01-02609, 2001 Bankr. LEXIS 2291, at *34 (Bankr. M.D. Pa. Sep. 28, 2001). In *Charter*, the court rejected the creditors' argument that the plan was the "functional equivalent of substantive consolidation." *See In re Charter Commc'ns*, 419 B.R. 221 at 269. Again, the court focused on other sections, namely §§ 1129(a)(3), (a)(7), and (b). *Id.* By conducting a fact intensive analysis involving examining the parties' interests and potential for adversity under other sections, a plan inadvertently complies with the principles set forth in *Owens Corning*. Whether or not any of the above courts, or the lower courts in this case, expressly addressed substantive consolidation, their analysis served the same purpose. Here, Under My Thumb was not adversely affected by the Plan.

Finally, there have been other instances in which bankruptcy courts have granted relief that treats entities as if they have been substantively consolidated. *See Gen. Growth Props. Inc.* 409 B.R. 43 (Bankr. S.D.N.Y. 2009). In *Gen. Growth*, the court held that the interests of an entire

enterprise, rather than an individual subsidiary, should be considered together. *Id.* at 61 (allowing solvent subsidiaries to file where the subsidiaries were SPEs structured specifically to insulate the financial position of each of the subsidiaries from the problems of its affiliates). Another example is in cases where there are multiple claims by different creditors arising from a single transaction that are asserted against a single debtor. *See Nw. Mut. Life Ins. Co. v. Delta Air Lines, Inc. (In re Delta Air Lines, Inc.)*, 608 F.3d 139, 149 (2d Cir. 2010) (allowing multiple claims from different creditors to proceed against a single debtor). To conflate such distinct claims questions the foundation of corporate separateness. These situations highlight that individual debtors are not always viewed in isolation simply because they are separate corporate entities. What is more important is that creditors are treated fairly and not adversely affected.

CONCLUSION

Therefore, this Court should reverse the Thirteenth Circuit's holding, finding that § 365(c)(1) does not bar a debtor in possession from assuming an executory contract and § 1129(a)(10) requires only that at least one impaired class of claims of any one debtor in a joint, multi-debtor plan, accepts the plan.

Appendix A

11 U.S.C. § 365

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

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

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

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

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

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

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

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

(D) the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

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

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

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

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

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

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

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

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

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

(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor

within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

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

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

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

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

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

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

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

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

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

> (A) the insolvency or financial condition of the debtor at any time before the closing of the case;
>
> (B) the commencement of a case under this title; or
>
> (C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

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

> (A)(i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and
>
> (ii) such party does not consent to such assumption or assignment; or
>
> (B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

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

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

> (A) the trustee assumes such contract or lease in accordance with the provisions of this section; and
>
> (B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

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

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

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

> (1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or
>
> (2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title--
>
> > (A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or
> >
> > (B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title--
> >
> > > (i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or
> > >
> > > (ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

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

> (i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to t reat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or
>
> (ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.

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

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

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

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

> (i) if the rejection amounts to such a breach as would entitle the timeshare interest purchaser to treat the timeshare plan as terminated under its terms, applicable nonbankruptcy law, or any agreement made by timeshare interest purchaser, the timeshare interest purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection; or
>
> (ii) if the term of such timeshare interest has commenced, then the timeshare interest purchaser may retain its rights in such timeshare interest for the balance of such term and for any term of renewal or extension of such timeshare interest to the extent that such rights are enforceable under applicable nonbankruptcy law.

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

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

> (2) If such purchaser remains in possession--
>
> > (A) such purchaser shall continue to make all payments due under such contract, but may,1 offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

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

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

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

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

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

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

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

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

(i) the duration of such contract; and

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

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

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

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

(C) the licensee shall be deemed to waive--

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

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

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

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

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

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

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

(i) perform such contract; or

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

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

(o) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled

to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

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

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

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

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

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

11 U.S.C § 1129

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

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

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

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

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

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

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

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

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

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

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

(i) has accepted the plan; or

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

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

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

(A) such class has accepted the plan; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

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

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

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

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

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

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

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

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

(B) With respect to a class of unsecured claims--

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

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

(C) With respect to a class of interests--

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

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

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

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

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