Team 2P

No. 19-1004

IN THE

Supreme Court of the United States

October Term, 2019

IN RE TUMBLING DICE, INC. ET AL.,

Debtors,

UNDER MY THUMB, INC.,

Petitioner,

v.

TUMBLING DICE, INC. ET AL.,

Respondent.

On Writit of Certiorari from
the United Stated Court of Appeals
for the Thirteenth Circuit

BRIEF FOR THE PETITIONER

Team 2P

Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether 11 U.S.C. § 365(c)(1) precludes a debtor-in-possession from assuming an executory contract when the pre-petition debtor is the same entity as the post-petition debtor, and the non-creditor is not forced to render or receive performance from an entity other than the original debtor?

II. Whether 11 USC § 1129(a)(10) in the case of a joint, multi-debtor plan requires acceptance from at least one impaired class of claims of any one debtor or, alternatively, from each debtor?

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OPINIONS BELOW

The U.S. Bankruptcy Court for the District of Moot and Bankruptcy Appellate Panel, held in favor of Petitioner, Tumbling Dice, Inc. on both issues. More narrowly, the courts found that because Under My Thumb was not being forced to accept performance from any entity other than whom it originally contracted, but instead, was merely being asked to honor its existing contractual obligation, the Development could assume the Agreement. R. at 9. Regarding the second issue, both courts adopted a per plan approach, holding that section 1129(a)(1) is satisfied when at least one impaired class of any one debtor in a joint, multi-debtor plan accepts the plan. The Thirteenth Circuit Court of Appeals reversed the lower court's holding on both issues. This Court, then, granted the debtor-licensor's petition for writ of certiorari.

STATEMENT OF JURISDICTION

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

RELEVANT STATUTES

The relevant federal statues governing this case include 11 U.S.C. § 365(c)(1) and 11 U.S.C. § 1129(a) of the Bankruptcy Code. The text of these provisions is attached in their entirety in Appendix A.

STATEMENT OF THE CASE

I. Facts

This case involves a jointly administered chapter 11 bankruptcy proceeding of Tumbling Dice, Inc. and its nine affiliated debtors (collectively, the "Debtors"). Under My Thumb, Inc. made two objections to the Debtor's Joint Plan of Reorganization, halting the conclusion of this bankruptcy proceeding.

Tumbling Dice, Inc. ("TDI"), a holding company formed to the membership interests of its nine wholly owned debtor-subsidiaries[1], filed the lead bankruptcy case. R at 4. A majority of the debtor-subsidiaries operate a luxury casino and resort, making up one of the largest gambling operations in the country. *Id*. Unlike the other subsidiaries, Tumbling Dice Development, LLC ("Development") serves a more limited purpose in the corporate structure; Development acts as the licensee under a non-exclusive software license agreement with Under My Thumb, Inc. ("Under My Thumb"). *Id*.

Development contracted with Under My Thumb to develop an integrated software system (the "Software") for the Debtor's casino loyalty program, Club Satisfaction. *Id*. The development of the Software cost Under My Thumb approximately $10 million and took nearly a year to complete. *Id*. Development entered into two separate agreements pertaining to the Software. First, Development executed an unsecured $7 million promissory note (the "R&D Note") to compensate Under My Thumb for the development of the Software. *Id*. Upon the completion of the Software, Development and Under My Thumb entered into a separate license agreement (the "Agreement") that granted Development a non-exclusive license to use the Software. R at 5. The

[1] The Debtors in these cases are: (1) Tumbling Dice, Inc.; (2) Tumbling Dice Atlantic City; LLC, (3) Tumbling Dice Chicagoland, LLC; (4) Tumbling Dice Detroit, LLC; (5) Tumbling Dice Lake Tahoe, LLC; (6) Tumbling Dice Las Vegas, LLC; (7) Tumbling Dice New Orleans, LLC; (8) Tumbling Dice Palm Springs, LLC; (9) Tumbling Dice Tunica, LLC; (10) Tumbling Dice Development, LLC.

Agreement permitted Development and its affiliates to use the Software but prohibited assigning or sublicensing these rights without Under My Thumb's express consent. *Id*. Development agreed to pay Under My Thumb a monthly fee that was calculated based on the amount of spending activity within Club Satisfaction. *Id*. The Software yielded success for both the Debtors and Under My Thumb. *Id*. Debtors revamped Club Satisfaction using the Software, which resulted in triple membership for Club Satisfaction and an increase in spending by the members. *Id*. The Software is an essential part of the Debtors' ongoing business model. *Id*. Under My Thumb, as permitted under the Agreement, licensed similar versions of the Software to third parties and received higher than expected payments under the Agreement. *Id*.

In December 2011, a hedge fund, Start Me Up, Inc. ("Start Me Up"), acquired the stock of TDI through a leveraged buy-out. R at 6. In exchange for a $3 billion-dollar loan, TDI and the Operating Debtors granted first priority liens on their assets to a syndicated group of lenders (the "Lenders"). *Id*. Development did not act as a borrower or guarantor with respect to the buy-out. *Id*. After the buy-out, the Debtors remained current with the R&D Note until June 2015. *Id*. Crippled with the debt from the leveraged buy-out, the debtors then commenced these chapter 11 cases on January 11, 2016. R at 3, 6. The Debtors have secured and unsecured debt of nearly $3 billion. TDI and the Operating Debtors jointly and severally owed the Lenders, the sole secured creditor, approximately $2.8 billion. R at 6. The Debtors also owed an estimated $120 million to their unsecured creditors, including more than $6 million owed to Under My Thumb under the R&D Note. *Id*. However, the Debtors have remained current with their payments due under the Agreement. R at 8. Under My Thumb is Development's only class of creditors. *Id*.

At the conclusion of negotiations, the Debtors and Start Me Up, the Lenders, the unsecured creditors' committee, and other stakeholders, excluding Under My Thumb, agreed to terms for a plan, and then the Debtors presented a plan support agreement. R at 6-7. Regarding its secured indebtedness, the Debtors would consensually restructure a majority of the debt with the Lenders. The Lenders agreed to a lower interest rate and extension of payments over a period of twenty years. R at 7. In exchange for retaining its equity interest in the Debtors, Start Me Up would inject new capital to fund a 55% pro rata distribution (i.e., $66 million) to the unsecured creditors. *Id*. Without changing the overall corporate structure, the plan support agreement also required cancellation of existing shares and membership interests to then issue new shares and memberships. *Id*.

The Debtors filed a Joint Plan of Reorganization (the "Plan") and disclosure statement in August 2016. *Id*. The Plan expressly stated that the Debtors' estates were not being substantively consolidated, and that no Debtor is to become liable for the obligations of another. *Id*. With respect to Under My Thumb, the Plan proposed to assume the Agreement under sections 365 and 1123(b)(2). Therefore, Under My Thumb would continue to receive the monthly payments for the use of the Software. *Id*. Under My Thumb would receive $6 million plus obligation owed by Development under the R&D Note. *Id*. initially, Under My Thumb viewed the Plan favorably; however, its view changed when it learned that Start Me Up was directly funding only $31 million of the unsecured distribution while the remaining amount was being invested by a private equity group, Sympathy for the Devil, I.P. ("SFD). *Id*. Under the Plan, SFD would receive 51% of the voting shares of the reorganized TDI and several seats on the board of directors. R at 8. Under My Thumb was suspicious of SFD's involvement because SFD's portfolio includes a direct competitor of Under My Thumb that had for several years attempted to replicate the Software. *Id*.

Nearly all of the creditor groups supported the Plan. *Id*. TDI and the Operating Debtors had several creditors while Development had only one. TDI and the Operating debtors had at least one impaired class accepting class of creditors. Controlling Development's only class of creditors, Under My Thumb voted to reject the plan and made numerous objections. *Id*. Thus, Development did not have an impaired accepting class of creditors. *Id*. Due to the overwhelming creditor support, the bankruptcy court overruled the objections and confirmed the Plan. *Id*.

II. Procedural History

The Debtors commenced voluntary cases under chapter 11 of the Bankruptcy Code on January 11, 2016. R at 3. The cases were jointly administered for the convenience of the parties and the Court. *Id*. In August 2016, the Debtors filed a joint plan on behalf of all the Debtors as well as a disclosure statement. R at 6. Under My Thumb then made two objections that are at issue in this case. R at 8. The first objection pertained to the assumption of the Agreement, and the second dealt with confirmation by an impaired class requirement. *Id*.

The bankruptcy court overruled both of Under My Thumb's objections. *Id*. With respect to the first objection, the bankruptcy court adopted the actual test rather than the hypothetical test, holding that section 365(c)(1) requires a case-by-case inquiry into whether the non-debtor party was forced to accept or render performance under its executory contract from someone other than the party with whom it contracted. R at 8-9. Regarding the second objection, the bankruptcy court concluded that 1129(a)(1) is satisfied where at least one impaired class in a joint, multi-debtor plan accepts the plan. R at 9. The bankruptcy court confirmed the Plan. *Id.* Under My Thumb appealed to the Bankruptcy Appellate Panel for the Thirteenth Circuit which affirmed the bankruptcy court on both issues. R at 9. Under My Thumb appealed to the Court of Appeals for the Thirteenth Circuit. A split court reversed the Bankruptcy Appellate Panel on both issues in favor of Under my Thumb. R at 21.

STANDARD OF REVIEW

The Thirteenth Circuit's conclusion, as to both issues, is a matter of statutory interpretation and a question of law, as such, this case is reviewed *de novo. Exec. Bens. Ins. Agency v. Arkison*, 573 U.S. 25; 134 S. Ct. 2165; 189 L. Ed. 2d 83 (2014).

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit Court of Appeals erred when it reversed the bankruptcy court and denied TDI's request to assume its contract with Under My Thumb through its adoption of the hypothetical test. First, the plain language of section 365 refers to trustees, not debtors or debtors-in-possession and the statute clearly distinguishes the difference between a trustee and debtor through their irrespective definitions. Second, the "hypothetical" test delegates a large amount of power to the non-debtor, essentially, leaving debtors at the mercy of the non-debtor party. Additionally, the "actual" test fits seamlessly with the legislative intent of section 365. Section 365 allows debtors to eliminate unprofitable contracts and retain those that are profitable. Further, it gives a financially overwhelmed debtor the opportunity to reorganize its debts while continuing to function. The hypothetical test disregards the facts and assumes that all debtors plan to assume and assign; in doing so, the hypothetical test leaves both the debtor and non-debtor void of what each party bargained for. In contrast, the hypothetical test allows the debtor to continue to perform under the contract while the non-debtor renders and/or receives performance just as planned. Even if the court declines to adopt the "actual" test, the plain meaning of the statute rejects adoption of the "hypothetical" test.

The purpose of chapter 11 is to allow a fresh start, and section 365 allows reorganization of debts to achieve this purpose, while protecting non-debtors from being forced into a K with an entirely different entity that they never intended to perform for or receive performance from. This interpretation calls for a case-by-case inquiry as to whether the non-debtor party is being forced to render or receive performance from a different entity than the debtor. This interpretation ensures that non-debtors are protected, and debtors have the opportunity to successfully use Section 365 for its intended design.

Finally, the Thirteenth Circuit Court of Appeals also erred by reversing the bankruptcy court's holding that section 1129(a)(10) at least one impaired class in a joint, multi-debtor plan accepts the plan. The bankruptcy court and bankruptcy court of appeals interpreted section 1129(10)(a) using the per plan approach unlike the Thirteenth Circuit Court of Appeals which used the per debtor approach. Under the per plan approach, acceptance by an impaired class of any debtor under the plan satisfies section 1129(a)(10). On the other hand, the per debtor approach interprets section 1129(a)(10) to require acceptance by an impaired class of each debtor.

The plain language of the statute as well as the purpose behind the requirement support the bankruptcy court's interpretation of section 1129(a)(10). When a statute is not ambiguous, its plain language controls. According to the unambiguous language of section 1129(a)(10), at least one impaired class of claims under the plan must accept the plan; thus, the per plan approach is the proper reading of the statute. Regardless of whether the plan is a single debtor or multi-debtor, the requirement for acceptance by at least one impaired class of claims remains the same because the statute references under the plan rather than the debtor.

The purpose of the requirement supports the per plan approach. The purpose of section 1129(a)(10) is to ensure at least a minimum amount of creditor support before a cramdown under

1129(b). This is enough of a safeguard for creditors, as there are other requirements in place for a cramdown to ensure that creditor's rights are protected. The statute does not consider the number of impaired claims; even acceptance by an impaired class when there is a large group of creditors. Just as one acceptance by an impaired class amongst numerous other creditors suffices to provide the minimum support required, an impaired class from a group of debtors in a joint multi-debtor plan provides the necessary support for the plan.

ARGUMENT

I. THE THIRTEENTH CIRCUIT COURT OF APPEALS ERRED WHEN IT REVERSED THE BANKRUPTCY COURT'S DECISION TO APPROVE TUMBLING DICE INC.'S ASSUMPTION OF ITS CONTRACT WITH UNDER MY THUMB.

Chapter 11 is a shining beacon of hope for debtors looking for a fresh start; it is just one of many slices of the bankruptcy pie and allows a debtor an opportunity to reorganize their businesses, debts and assets. *U.S. v. Whiting Pools, Inc.*, 462 U.S. 198, 203 (1983) (explaining the policy underlying the reorganization provisions of the Bankruptcy Code and how "Congress anticipated that the business would continue to provide jobs, to satisfy creditors' claims, and to produce a return for its owners").Once a debtor files for chapter 11 bankruptcy, Section 365 of the Bankruptcy Code (the "Code") allows a debtor to proceed in one of three ways, a debtor may (1) assume, (2) assume and assign, or (3) reject an executory contract. *Id*. at 462 U.S. 203; 11 U.S.C. § 365(a) (2006).The right to assume or assign are subject to restrictions under 365(c). Section 365 allows debtors with too much debt on their plate to "shed" some of that debt by eliminating unprofitable contracts and keeping those that are profitable. *Id*.; see 11 USC 365(a) (referencing the treatment of executory contracts under bankruptcy law). 11 USC 365(c) provides in relevant part, notwithstanding the general policy set out in § 365(a):

> (c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if (1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and (B) such party does not consent to such assumption or assignment. 11 USC 365(c)(1).

In most executory contracts, the issue or whether a debtor can assume, or assign does not present itself because most executory contracts may be freely assigned; however, executory contracts that allow the use of intellectual property ("IP") licenses are different. IP licenses are considered personal contracts; therefore, the law hesitates in applying the general rule of free assignability. Ying, Jennifer, <u>The Plain Meaning of Section 365(c): The Tension Between Bankruptcy and Patent Law in Patent Licensing</u>, 158 Penn State L. Rev. 1225, 1246-47 (2010). Generally, courts have consistently held that in interpreting the language of statute, the court must first look to the statutory language and then to the legislative history if the statutory language creates an ambiguity. *Toibb v. Radloff*, 501 U.S. 157, 162 (1991)(quoting *Blum v. Stenson*, 465 U.S. 886, 896)). The personal nature of IP licenses has prompted a circuit split between courts in deciding whether a debtor-in-possession may assume an executory contract, involving the use of IP licenses, that it does not intend to assign. On one hand, some courts apply the "hypothetical test." Laura D. Steele, <u>Actual or Hypothetical: Determining the Proper Test for Trademark Licensee Rights in Bankruptcy</u>, 14 Intellectual Property L. Rev. 411, 430 (2010); Ying, Jennifer, <u>The Plain Meaning of Section 365(c): The Tension Between Bankruptcy and Patent Law in Patent Licensing</u>, 158 Penn State L. Rev. 1225, 1248-50 (2010). Courts adopting this test assert that the plain language of the statute is clear, leaving no ambiguity; thus, there is no reason to inquire into legislative history or intent. *In re Catapult Entertainment*, 165 F.3d 747 (9th Cir. 1999); *In re Sunterra Corp.*, 361 F.3d 257 (4th Cir. 2004). The hypothetical test disregards the *actual* facts of each case and, instead, focuses on whether the debtor may assign the license to an unaffiliated third party regardless of whether the debtor intends to do so. *Bonneville Power Admin. v. Mirant Corp*. (*In re Mirant*), 440 F.3d 238 (5th Cir. 2006).

In sum, the hypothetical test interprets 365(c) as using "trustee" and "debtor" or "debtor-in-possession" interchangeably and reads the word "and" in the statute as "or;" thus, preventing the assumption or assignment of an executory contract, specifically those involving IP licenses, unless the non-debtor party gives consent. *In re Catapult Entertainment*, 165 F.3d at 747; *In re Sunterra Corp*., 361 F.3d at 257.In contrast, other courts apply the "actual test." This test works seamlessly with section 365 and allows both parties the benefit of chapter 11. The actual test focuses on whether the debtor-licensee *actually* intends to assign the license to a third-party. *Institut Pasteur*, 104 F.3d at 489; *In re Mirant*, 440 F.3d at 238. In sum, the actual test interprets 365(c) as only prohibiting assumption if the debtor-licensee intends to assume and then assign the license. *Id.*

The purpose and history of chapter 11 and section 365 support a debtor-friendly interpretation that ensures a debtor's ability to use the stature for its designed purpose. *N.C.P. Mktg. Group Inc., v. BG Star Prods*., 556 U.S. 1145, 1146; 129 S. Ct. 1577 (2009); *Summit Inv. & Dev. Corp. v. Leroux*, 69 F.3d 608, 612 (1st Cir. 1995). The actual test is the proper test and inquiry into whether a debtor-in-possession can assume an executory contract involving an IP license; however, in err, the Thirteenth Circuit applied the hypothetical test. Specifically, the court prohibited TDI from utilizing chapter 11 for its intended benefit, and instead, (1) ignored the fact that TDI merely sought to assume the contract and continue performing for its benefit and the benefit of Under My Thumb; (2) gave Under My Thumb veto power over the fate of TDI's business; and (3) interpreted the statute in a manner that paralyzed TDI's ability to use chapter 11 for its intended purpose. The Supreme Court has yet to grant certiorari for a case presenting the issue here; however, in 2009, Justice Kennedy touched on the issue when The Court denied certiorari in the case *N.C.P. Mktg. Group, v. BG Star Prods*., 556 U.S. 1145; 129 S. Ct. 1577; L. Ed. 2d 1028 (2009), a chapter 11 case posing the same question as the one at issue here. Justice Kennedy, writing in denial of a certiorari, briefly articulated both the hypothetical and actual test. *Id.* Justice Kennedy highlighted two flaws in the hypothetical test. First, the hypothetical test sacrifices "sound bankruptcy policy. Second, the hypothetical test creates a windfall for the non-debtor. Kennedy noted that to prevent section 365 from "engendering" what he refers to as "unwise policy," bankruptcy courts and a minority of appeals courts rejected the hypothetical test in favor of the "actual test." In his articulation, Justice Kennedy made no criticisms of the actual test and acknowledged that 365(c) was subject to multiple interpretations. *Id.* at 1146, 129 S. Ct. at 1577, L. Ed. 2d at 1028. As the former Supreme Court Justice recognized, the hypothetical test produces unintended and damaging consequences to a debtor-in-possession and delegates a surplus of control to the non-debtor party. Both of these results cut against Congress' intent in implementing section 365.

A. <u>The "hypothetical" test leaves debtors at the mercy of non-debtor parties, which Congress never intended.</u>

Courts will not adopt a "literal" construction of a statute if such interpretation would thwart the statute's obvious purpose or lead to an "absurd result." *Chesapeake Ranch Water Co. v. Board of Comm'rs of Calvert County*, 401 F.3d 274, 280 (4th Cir. 2005). The consequences of the hypothetical test prove that Congress never intended a literal interpretation of section 365. For example, the hypothetical test leaves debtors at the mercy of non-debtor parties and delegates the non-debtor an insurmountable level of power over a debtors' ability to reorganize its debts. The First Circuit highlighted these unintended consequences in its analysis in *Institut Pasteur v.*

Cambridge Biotech Corp., 104 F.3d 489 (1st Cir. 1997) and expressly rejected the hypothetical test in favor of the "actual" test. *Institut Pasteur v. Cambridge Biotech Corp*., 104 F.3d 489 (1st Cir. 1997). In *Institut Pasteur*, a debtor sold retroviral diagnostic tests. *Id*. at 490. The non-debtor and debtor entered into a mutual cross-licensing agreement, in which they each received a non-exclusive license to use the patented technology of one another. *Id*. Each license broadly precluded the assignment or sub-licensing of that license to others. *Id*. The debtor became overwhelmed with debt, filed chapter 11 bankruptcy and continued to operate; however, the non-debtor objected to debtor's reorganization plan because, among other things, it included a propose sell of its stock to one of the non-debtor's major competitors. *Id.* at 490-91.

The bankruptcy court approved the debtor's plan and the district court affirmed. *Id*. at 491. In affirming the bankruptcy court, the district court held that the non-debtor failed to show that it would not receive the full benefit of its bargain with the debtor because of the plan. *Id*. The First Circuit affirmed the lower courts holding. First, the court rejected the hypothetical test, reasoning that an inquiry must be made as to whether the non-debtor is *actually* being forced to accept performance from an entity other than the debtor. *Id*. at 494. Second, the court noted that "the sale of stock to the non-debtor's competitor was irrelevant because stock sales are not mergers whereby outright tile and ownership of the licensee-corporation's assets pass to the acquiring corporation." *Id*. Finally, the court determined that because the license agreement did not include a provision terminating or limiting the debtor's rights if another corporation acquired the stock, the absence of such language suggested that any matters not mentioned were intended not to be included. *Id*. at 494-95.

The case at bar falls directly in line with *Institut Pasteur* and should be analyzed as such. The non-debtor party in *Institut Pasteur* objected to the debtor's plan because it involved selling stock to one of the non-debtor's competitors. Similarly, in this case, the only reason Under My Thumb Inc. objected to TDI's reorganization plan is because one of the entities contributing to the unsecured distribution has a portfolio of companies that includes one of its competitors. The exact logic applied by the First Circuit applies here. First, voting shares for SFD do not equate to ownership nor does it equate to voting shares for the competitor company. Second, delegating voting shares to SFD does not require a disclosure of licensing information. Finally, Under My Thumb and TDI have the option to rewrite the terms of their contract and, in doing so, may implement restrictions on the sharing of any licensing information. In conclusion, the First Circuit's adoption and explanation of the actual test as it applies to IP licenses is the most appropriate. In contrast, the Ninth Circuit adopted the "hypothetical" test. *In re Catapult Entertainment*, 165 F.3d 747 (9th Cir. 1999). In doing so, the court ignored the *actual* facts of the case and failed to highlight the true issue that should have been the driving force supporting its decision." *In re Catapult Entertainment,* 165 F.3d 747 at 748. In *Perlman*, a debtor-licensee entered into two licensing agreements with non-debtor-licensor. *Id*. The debtor-licensee then entered into a merger agreement (the "agreement") with another corporation, Mpath Interactive, Inc. *Id*. at 749. The agreement contemplated the filing of chapter 11 bankruptcy, and shortly after entering the into the agreement, the debtor-licensee, did in fact, file chapter 11. *Id*. The non-debtor-licensor sought to stop the debtor-licensee from assuming the licenses as part of its reorganization plan through its merger with another company. *Id*. The bankruptcy court approved the plan, and the trial court affirmed. *Id*. The Ninth Circuit, however, reversed the bankruptcy court, holding that under federal patent law, non-exclusive licenses were personal and non-delegable. *Id*. at 755.

This case is factually distinct from the case at bar and clearly goes against the very essence of chapter 11, specifically section 365. If the Ninth Circuit applied the "actual test" consistent with its subordinate courts, the court's holding would not change and its' analysis would sync harmoniously with section 365. In Perlman, the debtor-licensee entered into a merger agreement with another company; this merger would make the debtor and an outside third-party one company. In sum, the non-debtor-licensor would be forced to render performance to a third-party. In contrast, in the case at bar, there is no merger. TDI is the same entity pre-petition as it was post-petition; therefore, Under My Thumb is not being forced to render or receive performance from any entity other than the original party, TDI.

If the hypothetical test becomes the standard, courts will be forced to ignore the actual facts of the case and instead focus on non-bankruptcy law. Further, courts will paralyze debtor parties seeking to reorganize their debts by forcing them to reject contracts, even when they have no intention of assigning the contract at issue. The best outcome for a debtor and non-debtor who contracted with a debtor who files for chapter 11 is to allow the debtor-in-possession to continue to perform just as the parties planned. If the debtor pre-petition is the same entity as the debtor-in-possession, the protections for a non-debtor under section 365 are not needed, to apply these protections any way, is a fruitless act that hurts the debtor.

B. <u>The actual test accounts for the facts of each case and allows both the debtor and non-debtor party to receive the maximum benefit of section 365.</u>

The hypothetical test ignores the actual facts of the case and triggers unnecessary protections. The courts adopting the hypothetical test highlight that its purpose is to ensure that a non-debtor party is not forced to receive or render performance from a third-party entity; however, by ignoring the *actual* facts, the court applies this protection when it is not warranted. For example, in *RCI Technology Corp. v. Sunterra Corp.* (*In Re Sunterra Corp.*), the bankruptcy court adopted the actual test. *In re Sunterra*, 361 F.3d 257 (4th Cir. 2004). In doing so, the court held that Section 365(c) did not prohibit Sunterra, the debtor-in-possession, from assuming the license because

Sunterra never intended to assign the license to a third-party. Further, the court supported this interpretation because RCI, the non-debtor-licensor, would not be forced to accept performance from any party other than Sunterra. *Id.* at 263. On appeal, the district court affirmed the bankruptcy court's decision. *Id.* The Fourth Circuit, however, reversed the decision of the lower courts. The Court held that federal copyright law was the applicable non-bankruptcy law and that it precluded Sunterra from assuming the license. *Id.* at 262 n. 7, 271.

The Fourth Circuit's adoption of the hypothetical test forced the debtor in possession to reject its contract with the non-debtor licensor without justification. The Court articulated that federal copyright law precluded assignment; however, the facts make clear that Sunterra had no intent on assigning the contract to a third-party but, instead, sought to assume. This is the fundamental issue with the hypothetical test. On one hand, courts that adopt it argue that it protects the non-debtor party, but the courts ignore facts that demonstrate that a non-debtor does not always need protection because the debtor often seeks to assume the contract and continue its performance. The debtor in Sunterra merely sought to reorganize its debts while continue to operate, fulfilling all obligations to the non-debtor licensee as the contract required; however, the Fourth Circuit's decision took away that right and precluded the non-debtor licensor from receiving the benefit promised under the contract.

C. <u>Even if the court declines to adopt the "actual" test, the plain meaning of the statute rejects adoption of the "hypothetical" test.</u>

Under the first and "cardinal canon" of statutory construction, the courts *must* presume that a legislature says in a statute what it means and means in a statute what it says. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992). Congress added the present language of Section 365(c) in the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the "1984 Act"). Pub. L. No. 98-353, 98 Stat. 333. The 1984 Act accompanied an earlier Senate bill that sought to "correct technical errors, clarify and make minor substantive changes." H.R. REP. NO. 96-1195, at 1 (1980). Among other things, the 1984 Act amended what is now 11 U.S.C. § 365(c)(1) by replacing the phrase "entity other than the debtor or the debtor in possession" with "the trustee." Compare 11 U.S.C. § 365(c)(1)(A) (1982) and Pub. L. No. 98-353, § 362(a), § 365(c)(1)(A), 98 Stat. at 362. A committee report that accompanied the amendment stated:

> This amendment makes it clear that the prohibition against a trustee's power to assume an executory contract does not apply where it is the debtor that is in possession and the performance to be given or received under a personal service contract will be the same as if no petition had been filed because of the personal service nature of the contract. H.R. REP. NO. 96-1195, at 12.

Thus, some courts have held that the bar against assumption applies only to a *trustee* and does not prevent a debtor-in-possession from assuming a license, per the text of the statute. Gilhuly; Posin; Dillman, The Comprehensive Guide to Navigating IP Issues in Chapter 11; ABI Law Review Article Vol. 21 No. 1, 2013 (referencing *In re Footstar, Inc*., 323 B.R. 566, 570 (S.D.N.Y. 2005) (emphasis added). This third approach is known as the "Footstar Approach." In the case of *In Re Footstar*, a bankruptcy court acknowledged that the actual test was the most appropriate; however, concluded that neither the hypothetical nor actual test were necessary. *In re Footstar, Inc*., 323 B.R. 566, 570 (S.D.N.Y. 2005). Instead, the court determined that the "plain meaning" of the statute fulfilled both the objection of Section 365(c) and the purpose of the Code. *Id.* —the purpose of chapter 11 is to allow a fresh start for debtors in a way that protects non-debtors from being forced into a contract with a different entity that they never intended to perform for or receive performance from. *Id.*

First, the court pointed out that previous decisions that used trustee and debtor-in-possession interchangeably were "fundamentally flawed" because neither the Code or its legislative history "equates" a trustee with a debtor or debtor in possession. *Id.* at 570-71. Further, in reading the statute to apply only to a trustee, the non-debtor's rights remain protected because the non-debtor can decline performance from a party other than the debtor in possession. *Id.* at 573. Finally, the court determined that under this interpretation, a debtor or debtor in possession is protected from the "perverse and anomalous" consequences of the hypothetical test. *Id.* at 574.

Courts in favor of the hypothetical test articulate reasoning contrary to their own position. For example, the Third and Ninth Circuits assert that there is no ambiguity in the statutory language and therefore declines to review the purpose and history of section 365; however, in the same sense, those courts argue that "trustee" also means "debtor" or "debtor in possession" although that interpretation goes outside of the statutory language. The holding of *In re Footstar* directly supports the logic articulated by courts adopting the hypothetical test. Courts adopting that test argue that the statute is not ambiguous, and therefore, it is not necessary to look at the history and purpose in statute. Under that same logic, the literal language if the statute precludes a "trustee" from assigning or assuming a contract and makes no mention of a debtor. Moreover, the Code does not use the words "trustee" and "debtor" or "debtor in possession" synonymously, but instead makes clear the distinctions between the two through the different definitions of each.

II. THE THIRTEENTH CIRCUIT COURT OF APPEALS ERRED IN REVERSING THE BANKRUPTCY COURT'S HOLDING THAT SECTION 1129(a)(10) IS SATISFIED WHEN AT LEAST ONE IMPAIRED CLASS IN A JOINT, MULTI-DEBTOR PLAN ACCEPTS THE PLAN.

Chapter 11 is designed for debtors to egress from bankruptcy, a scheme that is achieved by the confirmation of a plan of reorganization. Among other things, section 1129(a) requires some support from classes of claims that are impaired under the plan to accept the plan of reorganization. 11 USC § 1129(a)(10). Under chapter 11, creditors are sorted into classes of claims, grouped together by claims that are "substantially similar" and then labeled as impaired or not impaired. 11 USC § 1122(a). When a class of creditors' pre-bankruptcy rights are altered under the plan, it is identified as impaired. Impaired classes receive important rights, including the right to vote on the plan. 11 USC § 1129(a).

There are sixteen requirements listed in section 1129. If all sixteen requirements are met, the court shall confirm the plan. 11 USC § 1129(a). When every requirement under subsection (a) except 1129(a)(8)[2] is satisfied, then a court can proceed with a cramdown under section 1129(b) so long as the plan meets the specification listed under that section. 11 USC § 1126(b). Relevant to this case, one requirement is that at least one class of impaired claims under the plan has accepted the plan. 11 USC § 1129(a)(10).

Although the impaired class acceptance provision appears straight forward, there are two different views regarding its application when there is joint plan of reorganization for administratively consolidated cases. One view is that section 1129(a) requires at least one impaired class of claims for each separate debtor under the plan to accept plan (the “per debtor approach”). However, the proper interpretation is found in the second view, which is that acceptance is needed by at least one impaired class for any one debtor under the plan (the “per plan approach”).

Supported by the text of the provision itself, the per plan approach is the correct reading of section 1129(a)(10). Section 1129(a)(10) is not ambiguous, and thus the plain language of the statute controls. The plain language of the provision states that “at least one” impaired class of claims under the plan has accepted the plan; this indicates that a class of any debtor under the plan needs to accept. Alternatively, if section 1129(a)(10) is ambiguous, the policy behind it supports adopting the per plan approach. Because of the policy behind section 1129(a)(10) and its practical application, neither of the two exceptions to the plain language rule are applicable.

[2] Section 1129(a)(8) states: “With respect to each class of claims or interest – (a) such class has accepted the plan; or such class is not impaired under the plan.”

A. Unambiguous, the plain language of section 1129(a)(10) supports the per plan approach.

The plain language of section 1129(a)(10) indicates that in either single debtor or multi-debtor plans, acceptance by only one impaired class of claims is required to satisfy that provision. When interpreting a statute, the starting point is always the language. *Cmty for Creative Non-Violence v. Reid*, 440 U.S. 730, 739 (1989). If a statute's language is not ambiguous, the sole function of the courts is to enforce it according to its terms. *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). The ambiguity of statutory language is determined by the language itself, the language's context, and the broader context of the statute as a whole. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

Starting with the language of section 1129(a), it states:

> "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 an insider."

11 USC § 1129(a)(10). Notably, the impaired class acceptance provision does not distinguish the "at least one" requirement for single plans and joint, multi-debtor plans. The provision specifies only under the plan generally. It also does not consider the numerosity of creditors. The plain language requires only that one class of impaired claims under the plan accept the plan, regardless of how many impaired classes are under the plan. Therefore, section 1129(a)(10) is unambiguous, and the language indicates that acceptance by one impaired class of any debtor under the any type of plan is sufficient. Thus, the per plan approach is the proper interpretation of section 1129(a)(10) according to the statute's plain language.

The impaired class acceptance provision remains unambiguous when reviewing the language within section 1129(a) as a whole. In the broader context of section 1129(a), some of the provisions are from the perspective of the plan. For example, one of the provisions states that the plan must comply with applicable provisions of the Bankruptcy Code. 11 USC § 1129(a)(1). Contrastingly, some provisions focus on the classes of claims. *See* 11 USC § 1129(a)(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"). Other provisions direct the requirement to the proponent of the plan. *See* 11 USC § 1129(a)(2) (requiring that the proponent of the plan needs to comply with the applicable provisions of the Bankruptcy Code). The impaired class acceptance provision could have been drafted from the perspective of the debtor, yet it specifies impaired classes under the plan. The subsections of 1129(a) do not uniformly apply on a per debtor basis as some requirements only look at the action or status of classes of claims. *See In re Transwest Resort Properties, Inc.*, 881 F.3d 724 (9th Cir. 2018) (noting that the Bankruptcy Code phrases the subsections in section 1129(a) differently). Therefore, the language of section 1129(a)(10) referencing impaired classes under the plan without including per debtor fits logically within the larger scheme of the section 1129(a).

Although this language appears to be straightforward, there has been a split in authority regarding the interpretation of this provision when the case involves a joint, multi-debtor plan. It is important to note that there is very little case law interpreting section 1129(a) in a multi-debtor plan context. The courts that have interpreted the impaired class acceptance provision two different ways: the per plan approach and the per debtor approach. Utilizing the per plan approach does not depend on anything more than reading the plain language. Implementing the per debtor approach necessitates the addition of language into the provision.

The cases endorsing the per plan approach are the most persuasive. The leading case, *Transwest*, begins and ends its analysis with the plain language of the statute. *Transwest*, 881 F.3d at 730 (stating that because the plain language demonstrates that Congress intended the per plan approach, it would not look to legislative history or policy concerns). The *Transwest* court focused on the "at least one. . . under the plan" language and the exclusion of the term "debtor" from the section. *Id.* at 729-730. The *Transwest* court properly applied the plain language of the statute which references only the plan, not the debtors. There are also a few unpublished opinions reaching the same conclusion based on the plain language. *See In re Enron*, 2004 Bankr. Lexis 2549 (Bankr. S.D.N.Y 2004) (holding that the per plan approach was proper), *In re SGPA, Inc.*, 2001 Bankr. Lexis 2291 (Bankr. M.D. Pa 2001) (concluding that it was not necessary to have acceptance by and impaired class for each individual debtor).

In re Tribune, 464 B.R. 126, the case relied on by the majority of the Thirteenth Circuit, is premised on the plural construction rule as well as the notion that each joint plan actually consists of separate plan for each debtor. *In re Tribune*, 464 B.R. 126, 181-183 (Bankr. De 2011). The general bankruptcy rule of construction that the singular includes the plural does not alter the plain meaning of the impaired class acceptance provision. 11 USC § 102(7) ("the singular includes the plural"). Even when the singular is altered to the plural, the "at least one" language stands. This rule does not permit the addition of words or phrases; it only allows for changing singular words to their plural version. At most, section 1129(a)(10) could state "under the plans." This does not generate an interpretation that there must be acceptance by an impaired class for each debtor. Therefore, even with a plural reading of the provision, the requirement remains at least one impaired class under the plans has accepted the plans.

The notion that the per debtor approach is supported by the fact that a multi-debtor plan is a separate plan for each debtor is also not availing. The plain language still only requires acceptance by one impaired class under the plans. Even if the plan is separate for each debtor, it is still is the same plan with the same creditors. Acceptance by an impaired class under the same plan applies uniformly, just at the plan applies uniformly to all of the consolidated debtors. If an impaired class of any debtor accepts the plan, there is acceptance that attaches to the plan even when it is considered to be a separate plan for each debtor because it is the same plan for each.

B. The two exceptions to the plain meaning rule are not applicable in this case.

The literal language of section 1129(a)(10) cannot be disregarded to implement the per debtor approach. Generally, the plain language of a statute prevails; however, the plain language of a statute can be overcome in limited circumstances only if either the outcome is so absurd as to shock common sense or it produces an outcome that is demonstrably at odds with clearly expressed legislative intent. *In re Sunterra Corp*, 361 F.3d 257, 265 (4th Cir. 2004). These are rare exceptions. *Id.*

Neither of the two exceptions to the plain meaning rule apply. The application of the plain language does not shock the conscience. The impaired class acceptance provision is a minimum requirement that is not meant to be difficult for debtors to achieve. It facilitates the potential for a cramdown over the objection of the creditors. This is still the case when the plan is a joint, multi-debtor plan. Nor does the language produce an outcome that is at odds with the policy, but rather, it furthers the policy as explained in the proceeding section.

C. Alternatively, if the language of section 1129(a)(10) is ambiguous, the policy of the provision supports the per plan approach.

Alternatively, if the language of section 1129(a)(10) is ambiguous, the policy underlying chapter 11 and specifically section 1129(a)(10) support adopting the per plan approach.

When a statute is ambiguous, courts should employ canons of statutory construction to ascertain legislative intent, which may include turning to the legislative history. There is scant legislative history that provides essentially no insight into the provision's role. *In re Village at Camp Bowie I, L.P.*, 710 F.3d 239 (5th Cir. 2013). However, the policy of chapter 11 along with the purpose of section 1129(a)(10) support an application of the per plan approach.

The policy of chapter 11 and the purpose for the impaired class acceptance requirement endorse the per plan approach. Requiring only sixteen components for confirmation of a plan, chapter 11 is a flexible scheme that allows for meaningful negotiations among the parties. By implementing workable and relatively few requirements for confirmation, chapter 11 is generally debtor friendly. Overall, the purpose of chapter 11 is facilitate the debtor's emergence from bankruptcy to a reorganized, functional entity while remaining fair to the debtor's creditors. Specifically, the purpose of section 1129(a)(1) is to prevent confirmation where support is lacking by mandating some indicia for support. *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 243-44 (3rd Cir. 2004), *Matter of Windsor on the River Assoc. Ltd.*, 7 F.3d 127 (8th Cir. 1993) (noting that the purpose of 1129(a)(10) is to provide some indicia of support for a cramdown plan by the affected creditors). The impaired class acceptance provision strikes a balance between protecting impaired creditors and making reorganization possible for the debtor.

The purpose of section 1129(a)(10) does not change when the plan is a joint, multi-debtor plan. The impaired class acceptance provision contemplates that not all, or even most of the creditors will approve of the plan. If every requirement under section 1129(a) is met except the acceptance by all impaired classes as required by section 1129(a)(8), the plan can be approved by way of a cramdown. In those cases, the court is mandated to confirm the plan if it does not discriminate unfairly and it is fair and equitable to the impaired class that has not accepted the plan. 11 USC § 1129(b)(1). Consequently, the non-supporting creditors' interests are still protected under section 1129.

Additionally, the function of requiring some indicia of support is still retained in the multi-debtor plan context. Section 1129(a) is a minimalist requirement, helping ensure the court that there is at least one creditor that is affected by the plan. When affiliated organizations with nearly all the same creditors present a joint, multi-debtor plan, creditor support in those instances serves the same function as in single debtor plan.

Interpreting section 1129(a)(10) under the per debtor approach is essentially a form of judicial activism as that approach is unsupported by the plain language and the purpose of the section. Congress is the policymaker, not the courts. *Hartford Underwriters Ins. Co. v. Union Planters Banks, N.A.*, 530 U.S. 1, 13 (2000). Applying the per debtor approach requires the addition of language not found in the provision. Congress was aware of joint, multi-debtor plans when it enacted section 1129(a). Even when amended, Congress retained the "under the plan" language and did not substitute it for "debtor." Thus, applying the per debtor approach requires Congress to rewrite the statute.

The impaired class acceptance provision serves the purpose of evidencing a minimum level of support of creditors, allowing the court to evaluate the equitability of impaired classes that have not accepted the plan in order to allow the debtor to reorganize. Without the ability of the court to evaluate, impaired creditors could prevent debtors from achieving a plan confirmation and thus thwarting the goal of chapter 11 bankruptcy. The drafters of chapter 11 recognized this need, as well as the necessity of some support on behalf of the impaired classes. At least one acceptance, even in cases with numerous creditors, is enough to provide that safeguard. The acceptance of one impaired class out of many for a sole debtor is not distinguishable from the acceptance of at least one impaired class for debtors in a joint plan with respect to the need for some creditor support. In both examples, there is at least some margin of approval to trigger the court's ability to assess the fairness of the plan. The acceptance requirement does not consider the numerosity of creditors; instead, the requirement only seeks to prevent confirmation of a plan that no creditor accepts by mandating that only one is needed. Just as the number of creditors does not affect the acceptance requirement, the number of affiliated debtors under a joint multi-debtor plan also should not affect that requirement as the purpose of the provision is met without considering the number of creditors or debtors.

There is a negative practical consequence of the per debtor approach. As seen in this case, a plan with overwhelming creditor support can be thwarted by a single creditor. Here, the Debtors presented a workable, fair and equitable plan of reorganization. Since Development has only one impaired class of claims, the per plan approach would allow the disapproval of a single creditor out of many to prevent confirmation of a plan. This is the reverse of the purpose of section 1129(a)(10) which allows the approval of a single creditor out of many to allow confirmation of a plan by way of cramdown (if it is fair, equitable, etc.). In cases where there is only impaired class for some of the debtors, proceeding by way of a cramdown could be impossible despite a majority of creditor support.

Interpreting the provision as the majority of the Thirteenth Circuit did requires the insertion of additional words not found in the text of section 1129(a)(10). To read the provision as the majority does, "for each debtor" must be added to the text. This is not permissible when the statute is unambiguous. Since section 1129(a)(10) is not ambiguous, the cardinal rule of statutory construction mandates that it be read according to its plain language; the plain language clearly indicates that at least one class of impaired claims accept the plan. This does not change when debtors seek confirmation of a joint, multi-debtor plan. Section 1129 does not distinguish by type of plans, and thus it applies uniformly to all plans. Because the language of section 1129 does not differentiate between plans, it should not be interpreted differently dependent upon the plan before the court. Furthermore, the purpose of section 1129(a)(10) is still achieved under the per plan approach. Thus, the per plan approach is the proper interpretation of 1129(a)(10).

Conclusion

In conclusion, the actual test is the proper test for determining whether a debtor-in-possession can assume an executory contract, and the per plan approach is the proper interpretation of the requirement of acceptance by at least one impaired class of creditors. For the reasons articulated above, we respectfully ask that this Court reverse the Thirteenth Circuit's decision.

Appendix A

11 U.S.C. § 365(c)(1). Executory Contracts and Unexpired Leases

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

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

(B) such party does not consent to such assumption or assignment[.]

11 U.S.C. 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 non-bankruptcy 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.