Docket No. 19-1004

In The

Supreme Court of the United States

October Term, 2019

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

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

v.

UNDER MY THUMB, INC.,
***Respondent*.**

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR RESPONDENT

Team Number R. 33
Counsel for Respondent

QUESTIONS PRESENTED

1. Whether 11 U.S.C. § 365(c) bars a debtor from assuming an executory contract when the nondebtor has withheld their consent?

2. Whether, in the context of a joint, multi-debtor plan, 11 U.S.C. § 1129(a)(10) requires the approval of at least one impaired class of claims for each individual debtor, preserving the safeguard intended for objecting, impaired creditors?

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OPINIONS BELOW

The Bankruptcy Court, over Respondent Under My Thumb's objections, approved and confirmed the joint, multi-debtor plan proposed by the Debtors. (R. 8.) Under My Thumb objected to the proposed plan on two grounds: First, in relying on the "hypothetical test," Respondent argued that the proposed assumption of the Agreement was impermissible under § 365(c)(1) because performance by Under My Thumb was excused by applicable, non-bankruptcy law. (R. 8.) Second, Respondent objected to the Plan because no impaired class of claims for Development voted to accept the plan, a requirement of § 1129(a)(10). (R. 8.) The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court's decision on both issues. (R. 9.)

Under My Thumb timely appealed to the Court of Appeals for the Thirteenth Circuit, which reversed the Appellate Panel on both issues. The Thirteenth Circuit adopted the "hypothetical" test, holding that § 365(c)(1) precludes assumption of the executory contract over the non-debtor's objection. (R. 12.) It further adopted the "per debtor" approach, interpreting § 1129(a)(10) to require acceptance from at least one impaired class of claims for each debtor in a joint, multi-debtor plan. (R. 17.) The Supreme Court of the United States granted Tumbling Dice, Inc.'s petition for a writ of certiorari. (R. 1.)

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved in the case are listed below and reproduced in Appendices A through I.

STATEMENT OF THE CASE

This bankruptcy case commenced voluntarily by Tumbling Dice, Inc., and its subsidiaries (hereinafter "Debtors") under chapter 11 of the Bankruptcy Code on January 11, 2016. (R. 3.) The Debtors were authorized by the bankruptcy court to continue using the prepetition cash management system and, because no trustee was appointed, became the debtors in possession (hereinafter "DIP"). (R. 3-4.)

Tumbling Dice, Inc. (hereinafter "TDI") is a holding company formed of nine wholly-owned debtor-subsidiaries. (R. 4.) Of those, eight subsidiaries operate a luxury casino and resort. (R. 4.) The remaining subsidiary, known as Tumbling Dice Development, LLC (hereinafter "Development") plays a limited role by acting as the licensee under a non-exclusive software licensing agreement with Under My Thumb. (R. 4.)

Under My Thumb is a leading software designer that specializes in customer loyalty and reservations programs. (R. 4.) TDI, like many other casinos, launched a casino loyalty program called Club Satisfaction. (R. 4.) This loyalty program rewarded members who frequently engaged in gaming at TDI properties. (R. 4.) In 2008, Development contracted with Under My Thumb to create an integrated software system that would modernize Club Satisfaction. (R. 4.) Under My Thumb incurred $10 million in costs and spent nearly a year to create the Club Satisfaction Software (hereinafter "Software") for Development. (R. 4.) Development signed a research and development note (hereinafter "R&D Note") in order to reimburse a portion of Under My Thumb's initial costs. (R. 4.)

When the Software was completed, Under My Thumb and Development entered into a non-exclusive licensing agreement (hereinafter "Agreement"). (R. 5.) The Agreement allowed Development, and its affiliates, to use Under My Thumb's patented and copyrighted Software. (R. 5.) In exchange for the Software, Development agreed to pay Under My Thumb a monthly

fee. (R. 5.) Further, the Agreement expressly prohibited Development from assigning or sublicensing their rights to others without Under My Thumb's express written consent. (R. 5.) Finally, Under My Thumb licensed similar versions of the Software to third parties. (R. 5.)

With the new Software, Club Satisfaction became a tremendous success. (R. 5.) Membership in Club Satisfaction tripled and spending by each member increased. (R. 5.) The Debtors continued to remain current on both the Agreement and the R&D Note until June of 2015, when the Debtors abruptly ceased making payments on the R&D Note. (R. 6.)

In December 2011, the stock of TDI was acquired by Start Me Up, Inc., a hedge fund, through a leveraged buy-out. (R. 6.) In response, the Debtors granted first priority liens on their assets to a syndicated group of lenders (hereinafter "Lenders") in exchange for a loan of $3 billion. (R. 6.) Because of Development's limited purpose, the Lenders did not require Development to act as a guarantor under this agreement. (R. 6.) Due to the significant debt from the leveraged buy-out, the Debtors turned to chapter 11 bankruptcy. (R. 6.) As of that petition, the Debtors owe the Lenders $2.8 billion. (R. 6.) TDI stated that the primary goal of the bankruptcy case was to restructure and refinance their debt load with the Lenders. (R. 6.) Further, the Debtors owed another $120 million to their unsecured creditors, of which, $6 million was owed to Under My Thumb under the R&D Note. (R. 6.)

After lengthy negotiations, of which Under My Thumb was not a part of, a deal was reached. (R. 6-7.) The terms of the deal were memorialized in a plan support agreement (hereinafter "Plan"). (R. 6-7.) The Plan contemplated that TDI would restructure most of the secured indebtedness owed to the Lenders by agreeing to a lower interest rate and extending payments over a twenty-year period. (R. 7.) Start Me Up was required to inject new capital to fund a 55% distribution to unsecured creditors. (R. 7.) The Debtors filed the Plan and disclosure

statement in August 2016. (R. 7.) The Plan was filed jointly, so one plan was filed on behalf of all the Debtors. (R. 7.)

The Plan proposed to assume the Software Agreement with Under My Thumb under Section 365 and § 1123(b)(2) of the Bankruptcy Code. (R. 7.) The proposal ensured Under My Thumb would continue to receive their monthly payments. (R. 7.) Further, it proposed a pro rata distribution of $66 million, including $6 million owed by Development to Under My Thumb under the R&D Note. (R. 7.) Under My Thumb initially viewed this Plan favorably as it provided for the Agreement to continue and for the R&D Note to be paid off. (R. 7.) However, upon careful review of the disclosure statement, Under My Thumb learned that Start Me Up was only funding about half, $31 million, of the pro rata distribution, while the other $35 million was being invested by Sympathy for the Devil (hereinafter "SFD"), a private equity group. (R. 7-8.) In return for their investment, SFD would receive a majority of the voting shares of the reorganized TDI and several seats on the new board of directors. (R. 8.) SFD's portfolio of companies includes a direct competitor to Under My Thumb who has tried to replicate Under My Thumb's Software for several years. (R. 8.)

The Plan had near universal support from all creditor groups. (R. 8.) After the creditor ballots were reviewed, each of TDI and its subsidiaries had at least one impaired accepting class of creditors. (R. 8.) However, this was not true for TDI's subsidiary, Development. (R. 8.) Under My Thumb, who controlled Development's only class of creditors, voted to reject the Plan. (R. 8.) Development was left with no impaired accepting class of creditors. (R. 8.)

The Bankruptcy Court overruled Under My Thumb's objections and confirmed the plan based on the majority of creditors' support. (R. 8.) The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court on both issues. (R. 9). Under My Thumb timely

appealed the ruling to the United States Court of Appeals for the Thirteenth Circuit and that court reversed the bankruptcy court on both issues. (R. 21). TDI's petition for a writ of certiorari was granted by the Supreme Court of the United States. (R. 1).

SUMMARY OF THE ARGUMENT

The Court of Appeals for the Thirteenth Circuit properly decided both issues. First, it properly determined that § 365(c) bars the debtor from assuming an executory contract over the nondebtors objection. Second, the Thirteenth Circuit also properly determined that § 1129(a)(10) of the Bankruptcy Code requires, in the context of a joint, multi-debtor plan, acceptance by at least one impaired class of claims for *each* debtor. The Thirteenth Circuit's decision should be affirmed for the following reasons.

In general, § 365(a) allows a debtor to maximize their beneficial contracts and reject their more burdensome contracts. However, this section is explicitly limited to the narrow exception of § 365(c). § 365(c) provides the nondebtor an excuse from performance when an "applicable law" allows and the nondebtor withholds their consent. A split among the circuits has resulted in differing interpretations of § 365(c).

One interpretation, called the "hypothetical test," has been adopted by most circuit courts including the Third, Ninth, and Eleventh Circuits. It bars a debtor from assuming an executory contract if the nondebtor objects to the assumption. The test is called the "hypothetical test" because courts have denied the debtor's assumption if the debtor could not have assigned the executory contract to a hypothetical third-party. This test aligns with statutory interpretation principles while also giving effect to the remaining provisions in the statute.

In contrast, the "actual test," which has been adopted by most lower courts, allows a debtor to assume an executory contract over the nondebtor's objection so long as the debtor did not intend to assign that contract over to an actual third-party. This test changes the statutory

wording of § 365(c) to, "a trustee may not assume *and* assign…." This change is not in line with Congressional intent and renders § 365(c) ineffective. Therefore, the Thirteenth Circuit Court of Appeals properly determined that § 365(c) creates a "hypothetical test" and effectively bars a debtor from assuming an executory contract over the nondebtor's objection.

The Thirteenth Circuit also properly determined that § 1129(a)(10) requires approval for an impaired class of claims for each debtor in a joint plan. Section 1129(a)(10) represents a significant safeguard to impaired classes of creditors, namely, allowing them an important voting right in the approval process for proposed plans. It requires "at least one class of claims that is impaired under the plan [to] accept[] the plan." 11 U.S.C. § 1129(a)(10). The meaning of § 1129(a)(10) becomes more difficult to apply in the context of joint, multi-debtor plans. This difficulty has created a split of authority giving rise to two differing interpretations: the "per plan" approach and the "per debtor" approach.

The "per plan" approach, adopted recently in the Ninth Circuit Court of Appeals, only requires one impaired class to accept the proposed plan, regardless of how many individual debtors retain their own, individual plan. This approach is not in line with statutory interpretation objectives found within the Bankruptcy Code, conflates joint administration with the extraordinary equitable remedy of substantive consolidation, and largely eliminates impaired class' voting rights. In contrast, the "per debtor" approach, adopted by leading bankruptcy courts in the District of Delaware, reads § 1129(a)(10) to require, in the context of a joint, multi-debtor plan and absent substantive consolidation, acceptance from an impaired class of claims for *each* debtor. This reading comports with the Bankruptcy Code's statutory scheme, ensures that a jointly administered plan is not treated as a substantively consolidated plan, and also preserves an impaired creditor's only effective bargaining chip during negotiations.

Because Under My Thumb, an impaired creditor of Development's, rejected the plan, the plan is not confirmable under § 1129(a)'s requirements. The Thirteenth Circuit properly adopted the "per debtor" approach in this case, thus, the plan is not confirmable due to Under My Thumb's rejection of the plan as one of the Debtors' impaired creditors.

ARGUMENT

The Court of Appeals for the Thirteenth Circuit properly decided both Bankruptcy Code questions. Courts review questions regarding the interpretation and application of the Bankruptcy Code *de novo. In re Chase & Sanborn Corp.*, 904 F.2d 588, 593 (11th Cir. 1990). The Court of Appeals for the Thirteenth Circuit properly determined that § 365(c)(1) of the Bankruptcy Code precludes a debtor in possession from assuming a non-exclusive software license over the objection of the licensor when applicable non-bankruptcy law excuses the licensor from accepting or rendering performance to an entity other than the debtor in possession. Under My Thumb has withheld their consent pursuant to § 365(c)(2), thus TDI is barred from assuming the licensing agreement under § 365(a).

Further, the Thirteenth Circuit properly determined that, absent substantive consolidation, § 1129(a)(10) of the Bankruptcy Code requires the proponent of a joint, multi-debtor plan that impairs a class of creditors to obtain acceptance of the plan from at least one impaired class of creditors of *each* debtor. Statutory interpretation principles, as applied to the Bankruptcy Code, along with policy considerations emphasizing the important safeguard § 1129(a)(10) provides for impaired creditors exercising their voting rights compels the adoption of this "per debtor" approach.

I. THE "HYPOTHETICAL TEST," CREATED BY § 365(C), BARS TDI FROM ASSUMING THE LICENSING AGREEMENT ABSENT CONSENT OF THE NONDEBTOR.

The Thirteenth Circuit was correct to deny TDI's assumption of the licensing agreement under Bankruptcy Code § 365. The executory contracts and unexpired leases section of 11 U.S.C. § 365 of the Bankruptcy Code was added to the statute in the Bankruptcy Reform Act of 1978. Section 365 allows a trustee, or debtor-in-possession ("DIP"), to assume or reject any executory contract or unexpired lease. 11 U.S.C. § 365(a). Assumption of an executory contract permits the debtor to maximize their beneficial contracts while simultaneously allowing for rejection of their more burdensome contracts. This section is vital to a successful reorganization and the debtor receiving a "fresh start."

The general rule of § 365(a) is subject to limitations within the statute. One such limitation is § 365(c). The relevant portion of § 365(c) states: The trustee may not assume *or* assign the *executory contract* if 1) *applicable law* excuses the nondebtor from accepting performance from or rendering performance to an entity other than the debtor; and 2) the nondebtor *does not consent* to such assumption. 11 U.S.C. § 365(c) (emphasis added).

A. Courts are split on which test to apply under § 365(c).

The Ninth Circuit's decision in *Perlman v. Catapult Entertainment* is the most recognized case setting forth the "hypothetical test." That test strictly follows the statutes' plain words and denies a debtor the ability to assume an executory contract when the nondebtor has withheld their consent. With this decision, the Ninth Circuit joined the Third and Eleventh circuits in adopting the "hypothetical test" stating, "… we are bound by the plain terms of the statute." *Perlman v. Catapult Entertainment (In re Catapult Entertainment)*, 165 F.3d 747, 750 (9th Cir. 1999); *see also In re West Electronics, Inc.*, 852 F.2d 79 (3d Cir. 1988); *City of Jamestown v. James Cable Partners, L.P. (In re James Cable Partners)*, 27 F.3d 534, 537 (11th Cir. 1994). In contrast, the court in *Institut Pasteur v. Cambridge Biotech Corporation* favors

what is called the "actual test." 104 F.3d 489, 493 (1st Cir. 1997). That test replaces the "or" in the first sentence of § 365(c) to "and" and allows a debtor to assume a contract so long as the debtor did not *actually* intend to assign that contract to a third party. *In re Aerobox Composite Structures*, 373 B.R. 135, 142 (Bankr. D.N.M. 2007). Finally, a third test called the "*Footstar* test" rejects both statutory interpretations and strictly applies § 365(c) as written. *See In re Footstar, Inc.*, 323 B.R. 566 (Bankr. S.D.N.Y. 2005).

1. Most circuit courts favor the "hypothetical test."

In re Catapult involved a debtor who sought to assume a nonexclusive patent license. 165 F.3d at 748. The patent licensor withheld their consent to the assumption. *Id.* at 749. The Ninth Circuit concluded that a patent license agreement is an executory contract and that patent law constitutes "applicable law." *Id.* at 750. The court reasoned that nonexclusive licenses are "personal and assignable only with the consent of the licensor." *Id.* (citing *Everex Sys. v. Cadtrak Corp. (In re CFLC, Inc.)*, 89 F.3d 673, 680 (9th Cir. 1996). The Ninth Circuit stated that the plain language of § 365(c)(1) "links nonassignability under 'applicable law' together with a prohibition on assumption in bankruptcy." *In re Catapult Entertainment*, 165 F.3d at 749. The court then expressly rejected the "actual test" and adopted the "hypothetical test." *Id.* at 749-50. The court held "where applicable nonbankruptcy law makes an executory contract nonassignable because the identity of the nondebtor party is material, a debtor in possession may not assume the contract absent consent of the nondebtor party." *Id.* at 754.

Similarly, the court in *RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)* held that § 365(c) creates a "hypothetical test" and barred the debtor from assuming the licensing agreement over the nondebtors objection. 361 F.3d 257, 271-72 (4th Cir. 2004). In *Sunterra*, a debtor sought to assume a nonexclusive license to copyrighted software. *Id.* at 260. The Fourth

Circuit concluded that this agreement was an executory contract because both party's obligations were so underperformed that either party's failure to complete that performance would be a breach of contract. *Id.* at 264. Further, the court held that copyright law constitutes applicable law. *Id.* at 271. Turning to the statute, the court explained that its lower court read § 365(c) incorrectly to say that a trustee may not assume *and* assign an executory contract. *Id.* at 263. The *Sunterra* court expressly rejected a statutory rewrite for the "actual test" to actually work and left any modification of the statute to Congress. *Id.* at 269.

In *Catapult* and *Sunterra,* the debtor argued that a literal reading of § 365(c)(1) would render § 365(f)(1) superfluous. *In re Catapult Entertainment*, 165 F.3d at 751. Those circuit courts argued that "applicable law" in § 365(c)(1) and in § 365(f)(1) was of a "… markedly different scope." *In re Sunterra,* 361 F.3d at 266. The courts distinguished § 365(f)(1) to be a broad rule and, under that rule, "applicable law" is the law prohibiting or restricting assignments. *Id.* However, under the narrow § 365(c)(1) exception, "applicable law" allows for legal excuses for a nondebtor to refuse to accept performance. *Id.* Thus, both courts correctly held that the two provisions are not conflicting at all. *Id*; *see also In re Catapult*, 165 F.3d at 752.

However, the court in *In re West Electronics, Inc.* used a different approach but came to the same conclusion. 852 F.2d 79. That court focused on the distinction between the contracting solvent debtor and that same debtor submitting the petition for bankruptcy. *Id.* at 83. The Third Circuit stated "… a solvent contractor and an insolvent debtor in possession going through bankruptcy are materially distinct entities." *Id.* The court then adopted the "hypothetical test" and barred the *new* debtor from assuming the agreement over the objection of the nondebtor party. *Id.* at 83-84.

2. The majority of district courts apply the "actual test."

In contrast, the court in *Institut Pasteur v. Cambridge Biotech Corp.* expressly rejected the "hypothetical test" in favor of the "actual test." 104 F.3d at 495. The court held that § 365(c) requires a "case-by-case inquiry into whether the nondebtor party *actually* was being 'forced to accept performance under its executory contract from someone other than the debtor party with whom it originally contracted.'" *Id.* at 493 (quoting *Summit Inv. & Dev. Corp. v. Leroux (In re Leroux)*, 69 F.3d 608, 612 (1st Cir. 1995)). After adopting the "actual test," the court decided that because the debtor is the same party that was contracted with, the debtor may assume the licensing agreement over the nondebtor's objection. *Id.* at 495.

Similarly, *In re Aerobox Composite Structures*, the debtor sought to continue their licensing agreements with the nondebtor. 373 B.R. at 138. The court rejected the separate entity theory and held that a debtor, who simply wants to continue to operate the agreement post-petition, can do so over the objection of the nondebtor. *Id.* at 141-142.

3. A few courts apply the "Footstar test."

Contrasting the above, the "*Footstar* test," created in *In re Footstar, Inc.*, positions itself as the closest reading of the statute while maintaining the same result as the "actual test." 323 B.R. 566. That court focused on the word "trustee" in § 365(c). *Id.* at 570. The court explicitly rejected the idea that the word "trustee" includes the debtor or DIP stating "[n]owhere does the Bankruptcy Code define 'trustee' as synonymous with … 'debtor in possession.'" *Id.* at 571. The court held that only a trustee needs approval from the nondebtor to assume, but the DIP does not. *Id.* at 575.

B. <u>The "hypothetical test" is the appropriate test for § 365(c).</u>

When interpreting provisions of the Bankruptcy Code, a court must begin with the statute itself. *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 557-58 (1990). *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (noting that the statutory language is to be

addressed before all others). When the statute is unambiguous on its face, a court must apply its plain meaning and enforce it according to its terms. *Patterson v. Shumate*, 504 U.S. 753, 757 (1992). If the statutory scheme is consistent, there is no need for a court to inquire beyond that plain language. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). The relevant portion of the statute reads:

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

11 U.S.C. § 365(c)(1).

The "hypothetical test" is appropriate because it adheres the closest to the plain meaning and interpretation of the statute. The statute begins "[t]he trustee may not assume or assign…." *Id.* Interpreting its plain meaning, § 365(c) bars the trustee from either assuming or assigning the contract if applicable law would bar assignment to a hypothetical third party and the nondebtor withholds their consent. This test only expands the meaning of "trustee" to include a DIP. This is an already understood interpretation of the Bankruptcy Code because in a chapter 11 case, the debtor typically takes the roll of DIP and assumes the position of trustee. For these reasons, numerous courts have established that "the terms 'trustee' and 'debtor in possession,' as used in the Bankruptcy Code, are … essentially interchangeable." *Official Comm. Of Unsecured Creditors of Cybergenics Corp. v. Chinery (In re Cybergenics Corp.)*, 226 F.3d 237, 243 (3d Cir. 2000); *see also In re Rickel Home Ctrs., Inc.*, 209 F.3d 291, 297 (3d Cir. 2000); *Breeden v. Catron (In re Catron)*, 158 B.R. 629, 633 (E.D. Va. 1993) (stating "the debtor in possession not only receives the power of a trustee, but actually stands in the shoes of the trustee in every

way.") (quoting the legislative history to § 1107).[1] This expansion is in congruence with multiple courts and § 1107's legislative history. The "hypothetical test" follows the statute's plain meaning while still giving power to every provision.

In contrast, the "actual test" demands a judicial rewrite. That test only works if the court changes the wording of § 365(c) to say, "assume *and* assign." The test then asks whether the debtor was going to assign their rights to another and, if not, allows assumption over the nondebtor's objection. This change from the clear conjunction "or" to "and" is an outright modification of the statute. As many previous courts have recognized, the modification of a statute to achieve a preferred outcome is a job reserved specifically for Congress. *In re Sunterra*, 361 F.3d at 269 (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank. N.A.*, 530 U.S. 1, 13 (2000)). Thus, the "actual test" flies in the face of Congressional intent and is not the appropriate test to apply § 365(c).

Similarly, a bankruptcy court in the case of *In re Footstar Inc.*, believes that the closest interpretation of § 365(c) is exactly how the statute was written. 323 B.R. 566. That court focused on the word "trustee" and denied the synonymous use of "debtor" or "debtor in possession." *Id.* at 570-71. However, for this court to hold the same would make this issue effectively moot. Section 365(a) explicitly states "… the *trustee* … may assume or reject any executory contract or unexpired lease of the debtor." § 365(a) (emphasis added). If this court agreed with the *Footstar* court, then a DIP could not use any part of § 365. Only a trustee would be allowed to assume or reject in § 365(a) and only a trustee would be allowed to assume or assign in § 365(c). Alternatively, if a debtor could assume or reject under § 365(a), the word "trustee" would have two different meanings within the same statute. This would go against the

[1] *See* S. Rep. No. 95-989, at 116 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5902.

canon of statutory construction that prefers the presumption of consistent usage. Therefore, the *Footstar* test cannot be the appropriate test for § 365. Thus, the "hypothetical test" is the appropriate test under § 365(c) because the test follows the plain meaning of the statute and preserves the power of each provision.

C. The License Agreement is not assumable.

1. The licensing agreement fits squarely into § 365(c).

Before applying the "hypothetical test", the licensing agreement must fit into § 365(c). Thus, a trustee must be able to assume an executory contract unless applicable law excuses the nondebtor and the nondebtor withholds their consent. As established, the DIP stands in the shoes of the trustee and therefore acts as the trustee in every way. Here, TDI took over the cash management system and thus became its own trustee. (R. 4). Further, courts apply the Countryman definition to determine if a contract is executory. *In re Sunterra Corp.*, 361 F.3d at 264. A contract is executory if the "obligations of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete the performance would constitute a material breach excusing the performance of the other." *Gloria Mfg. Corp. v. Int'l Ladies' Garment Workers' Union*, 734 F.2d 1020, 1022 (4th Cir. 1984) (quoting Countryman, *Executory Contracts in Bankruptcy:* Part I, 57 Minn. L. Rev. 439, 460 (1973)).

Here, TDI was granted continual access to the non-exclusive license in exchange for payment of a monthly fee to Under My Thumb (R. 5). Thus, the licensing agreement was an executory contract. Additionally, "applicable law" has been construed by courts to mean applicable non-bankruptcy law. *In re Pioneer Ford Sales, Inc.*, 729 F.2d 27, 28 (1st Cir. 1984). As discussed previously, both federal patent law and federal copyright law are included as "applicable law" under § 365(c)(1). Here, Under My Thumb's Software is both patented and copyrighted and, thus, constitutes applicable law. (R. 5). Finally, § 365(c)(2) gives the nondebtor

power to withhold their consent to assumption or assignment. Generally, the right is not assignable if it would increase the nondebtor's burden or risk of receiving a return performance or a reduction in their value. *In re Schick*, 235 B.R. 318, 323 (Bankr. S.D.N.Y. 1999). Here, the licensing agreement prohibited Development from assigning or sublicensing their rights without Under My Thumb's consent. (R. 5.) Importantly, Under My Thumb withheld their consent to protect themselves from competitors who have continually attempted to copy their Software. (R. 8.) That competitor is a subsidiary of the company who will have majority control of the voting shares after the bankruptcy Plan is approved. (R. 8.) Under My Thumb should be able to deny assumption because overruling their objection will increase their risk of their Software being copied and resulting in a reduction in their company's value.

2. The "hypothetical test" bars assumption of the executory contract.

Under the "hypothetical test," a DIP cannot assume an executory contract, over the nondebtor's objection, if applicable law bars assignment to a hypothetical third party, even when the DIP has no intention to assign the agreement to a third party. *In re Catapult Entertainment*, 165 F.3d at 750. Here, in congruence with the Ninth Circuit and the Fourth Circuit, TDI should be barred from assuming this licensing agreement because patent law, copyright law, and their licensing agreement, forbids assigning the agreement to a hypothetical third party. Patent law explicitly allows the intellectual property holder to exclude the use of their intellectual property. *See* 35 U.S.C. § 154(a)(1). Further, the licensing agreement broadly prohibited Development from assigning or sublicensing their rights to others without Under My Thumb's written consent. (R. 5.)

Alternatively, the solvent debtor who originally contracted with Under My Thumb is not the same debtor who will be formed after the chapter 11 bankruptcy is finished. Similar to the reasoning of *West Electronics*, which distinguished a solvent debtor who contracted for the

licensing agreement and an insolvent debtor in bankruptcy, TDI's subsidiary, Development, was a solvent debtor who contracted with Under My Thumb but has since become an insolvent debtor on the brink of a third-party buyout. (R. 6.) Additionally, should that buyout be granted, Development's parent company, TDI, will be the same company in name only. Instead, TDI will be owned by two other entities, Start Me Up, Inc. and SFD, neither of which were parties to the original agreement. (R. 6-7).

Thus, § 365(c)(1) creates a hypothetical test, that the majority of circuit courts have followed, and bars a debtor from assuming a contract if applicable law, and their licensing agreement, prohibits assumption. Alternatively, a debtor is barred from assuming a contract when the nondebtor withholds their consent because the post-petition debtor is not the same entity as the party who originally contracted for the licensing agreement. Therefore, TDI, and their new owners, should be barred from assuming the executory contract under § 365(c) because the hypothetical test disallows assumption or assignment when consent is withheld by the nondebtor.

II. IN THE CONTEXT OF A JOINT, MULTI-DEBTOR PLAN, ABSENT SUBSTANTIVE CONSOLIDATION, 11 U.S.C. § 1129(A)(10) REQUIRES ACCEPTANCE OF THE PLAN BY AT LEAST ONE IMPAIRED CREDITOR FOR EACH DEBTOR.

The Court of Appeals for the Thirteenth Circuit did not err when it determined that § 1129(a)(10) requires the approval by an impaired class of creditors for each individual debtor in a joint, multi-debtor plan. The Bankruptcy Code ultimately functions to foster plans of reorganization by imposing flexible guidelines to debtors and creditors alike. Section 1129 of the Bankruptcy Code imposes sixteen requirements that must be met in order for a plan to be approved. *See* 11 U.S.C. § 1129. Specifically, § 1129(a)(10) requires approval by at least one impaired class of claims. It states that "[i]f a class of claims is impaired under the plan, *at least*

one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider." *Id.* at (10) (emphasis added). In the context of single debtor cases, this requirement functions simply. But in the increasingly common and complex joint, multi-debtor cases, § 1129(a)(10)'s requirement becomes more difficult in its application.

A. <u>A split of authority exists with respect to § 1129(a)(10)'s approval requirements, causing courts to adopt either a "per plan" or "per debtor" approach.</u>

In the context of joint, multi-debtor reorganization plans, § 1129(a)(10) gives rise to differing interpretations. *Compare JMPCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props.* (*In re Transwest Resort Props.*), 881 F.3d 724 (9th Cir. 2018), *with In re Tribune Co.*, 464 B.R. 126, 180 (Bankr. D. Del. 2011). Commonly described as either a "per plan" or "per debtor" approach, courts have relied on a variety of both statutory interpretation principles and broader policy rationales to adopt one model over the other.

In *Transwest*, the Ninth Circuit Court of Appeals contemplated § 1129(a)(10) in the context of a joint, multi-debtor reorganization plan. 881 F.3d 724, 729. There, the court began its analysis of § 1129 (a)(10) with its plain language. *Id.* It interpreted subsection (10) as "mak[ing] no distinction concerning or reference to the creditors of different debtors under 'the plan,'" and further noted that it does not "distinguish between single-debtor and multi-debtor plans." *Id.* The court also noted that Congress itself could have required approval by each debtor if it so intended, and that it is "not [the courts'] role to modify the plain language of a statute by interpretation." *Id.*

It next looked into both the statutory context and the statutory interpretation canon employed by 11 U.S.C. § 102(7) of the Bankruptcy Code: "the singular includes the plural." *Id.* at 729-30. In describing this canon as effectively modifying § 1129(a)(10) to use the word

"plans" instead of "plan," the court held that the subsection still applied on a "per plan" basis. *Id.* at 730. With regard to the statutory context, the court was also unpersuaded by the "per debtor" approach in the greater context of the Bankruptcy Code as a whole because the Code "phrases each subsection differently." *Id.*

Lastly, the court in *Transwest* briefly entertained broad policy arguments made by the lender, ultimately dismissing the potential "parade of horribles" that would follow a "per plan" approach due to the fact that "such hypothetical concerns are policy considerations best left for Congress to resolve." *Id.* Based upon these stringent interpretations of the Code, the Ninth Circuit ultimately adopted the "per plan" approach. *Id.* This approach to § 1129(a)(10) only requires the approval of one single impaired class to accept the plan in the context of a multi-debtor plan.

In the District of Delaware, influential in the law of bankruptcy, courts have reached the opposite conclusion. *See e.g.*, *In re Tribune*, 464 B.R. 126, 180-84; *see also In re Woodbridge Grp. of Cos., LLC*, 592 B.R. 761, 778 (Bankr. D. Del. 2018); *In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293, 301-02 (Bankr. D. Del. 2011). In *Tribune*, the Bankruptcy Court for the District of Delaware took up a similar joint, multi-debtor plan of reorganization, leading to an in-depth interpretation of § 1129(a)(10)'s requirement that at least one impaired class of claims accept the proposed plan. *Id.* at 180.

To begin its analysis of § 1129(a)(10), the *Tribune* court discussed the same canons of statutory interpretation discussed by the court in *Transwest*: plain language and statutory context. *Id.* at 182. The court described the necessity of reading the Bankruptcy Code as a whole, considering both the object of the law and the policy behind it. *Id.* at 182-83 (citing *Credit Agricole Corporate and Inv. Bank v. American Home Mortg. Holdings, Inc.*, 637 F.3d 246, 255

(3d Cir. 2011)). After referencing the "cardinal" rule of statutory interpretation, that statutes must be read as a whole, taking consideration of the greater context, the court cited to two other subsections of § 1129(a) that support a per debtor interpretation: (7) and (8), which speak to the "best interests of the creditors" test, and impaired classes' acceptance of a plan, respectively. *Id.* at 183. Because other provisions of § 1129(a) imply a per debtor approach, the court concluded, subsection (10) should also be read through a per debtor lens. *Id.* This interpretation triggers the per debtor reading of subsection (10) that in a joint, multi-debtor plan, one impaired class for *each* debtor must approve the plan in order to it to be accepted by the court. *Id.*

The *Tribune* court also considered the context of substantive consolidation and broad policy interests surrounding the per debtor approach. *Id.* at 182-83. The debtors' estates in *Tribune* were notably *not* substantively consolidated, thus, the proposed plan "actually consist[ed] of a separate plan for each [d]ebtor." *Id.* at 182. The court concluded by noting that in the absen[ce] [of] substantive consolidation, there must be a consenting class for *each* individual debtor in a joint plan for it to be confirmed." *In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293, 302 (Bankr. D. Del. 2011) (emphasis added). Lastly, the court commented on the necessity and convenience of jointly administering complex, multiple-debtor proceedings. *Tribune*, 464 B.R. at 183. In highlighting the importance of convenience to both the parties and the court, it ultimately noted that "convenience alone is not [a] sufficient reason to disturb the rights of impaired classes of creditors of a debtor not meeting confirmation standards." *Id.*

The Delaware Bankruptcy Courts' decision to affirmatively adopt the "per debtor" approach has ultimately led to a split of authority in the interpretation of § 1129(a)(10)'s applicability and functionality in the context of complex, multi-debtor joint plans. The current state of the law regarding impaired class voting rights should be resolved utilizing the per debtor

approach adopted by that court in order to preserve § 1129(a)(10)'s "powerful and important safeguard for impaired, objecting creditors." (R. 16).; *see also* Suzanne T. Brindise, *Choosing the "Per-Debtor" Approach to Plan Confirmation in Multi-Debtor Chapter 11 Proceedings*, 108 Nw. U. L. Rev. 1355, 1359 (2014) ("An impaired creditor's vote is its most powerful tool during bankruptcy, and adopting a per-plan approach discredits the value of that vote."). The per debtor approach comports equally with principles of statutory interpretation specific to the Bankruptcy Code while also furthering policy considerations designed to protect an impaired, objecting creditor's bargaining power during the negotiation process.

B. <u>Utilizing the "per debtor" approach to effectuate § 1129(a)(10)'s approval requirement by ensuring that at least one impaired creditor for each debtor approves a proposed reorganization plan better serves the goals of the Bankruptcy Code while preserving impaired creditors' limited bargaining power.</u>

Section 1129(a)(10) requires, in the context of a joint, multi-debtor plan, approval from at least one class of impaired claims for each individual debtor. As the Court of Appeals for the Thirteenth Circuit poignantly noted in its opinion on § 1129's acceptance requirements, "[a]n impaired creditor's right to vote is one of its most powerful tools in the bankruptcy process… its bargaining chip at the negotiating table." (R. 16.) A class of claims becomes impaired when "the [pre-bankruptcy] legal, equitable, or contractual rights" of a creditor are altered in some way under the proposed agreement. *See* 11 U.S.C. § 1124(2)(E). Under My Thumb, Inc. is an impaired creditor of TDI because it's contractual rights under the Software Licensing Agreement with Development, a debtor-subsidiary of TDI, would be significantly altered under the proposed plan. *See id.*

The Bankruptcy Code provides certain additional rights to classes of impaired claims, namely, the right to vote on a proposed plan. *See* 11 U.S.C. § 1126. This voting right is an impaired creditor's "most powerful tool in the bankruptcy process," and "represents a creditor's

only opportunity" to object to a proposed plan. Suzanne T. Brindise, *Choosing the "Per-Debtor" Approach to Plan Confirmation in Multi-Debtor Chapter 11 Proceedings*, 108 Nw. U. L. Rev. 1355, 1362-63 (2014).

Section 1129(a)(10) provides an important safeguard to impaired classes, as it applies even during a cram down scenario where the proponent of the plan attempts to confirm a proposed plan over the objection of another class of creditors. *See* 11 U.S.C. § 1129(b). Thus, the overall purpose of § 1129(a)(10) is to "'provide some indicia of support [for a plan of reorganization] by affected creditors and prevent confirmation where such support is lacking.'" *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 243–44 (3d Cir. 2004), *as amended* (Feb. 23, 2005) (quoting *In re Windsor on the River Assocs., Ltd.*, 7 F.3d 127, 131 (8th Cir. 1993)).

The adoption of the "per debtor" approach, which requires each debtor in a joint plan to obtain approval from at least one impaired class of claims in order to satisfy § 1129(a)(10), aligns with the Bankruptcy Code's own statutory construction devices, safeguards the protections granted to impaired creditors in chapter 11 proceedings, and provides more predictable outcomes in joint, multi-debtor plans.

First, statutory interpretation principles adopted by the Bankruptcy Code favor the "per debtor" approach to § 1129(a)(10) based on its plain language and context. Section 102(7) provides that "the singular includes the plural," thus, § 1129(a)(10)'s singular use of the word "plan," necessarily includes the plural use of the same. In the absence of substantive consolidation, where "entity separateness is fundamental," it logically follows that within one joint plan lies a separate plan for each individual debtor. *Tribune*, 464 B.R. at 182. If, in the absence of substantive consolidation, the "per plan" approach is applied, the value of an impaired creditor's vote is greatly diminished, rendering § 1129(a)(10) largely ineffective. This is so

because the "per plan" approach conflates joint administration with substantive consolidation, the latter being one instance where all parties agree to an alteration of their rights under the Bankruptcy Code. To avoid such a conflation and the potential overuse of the controversial remedy of substantive consolidation, § 1129(a)(10)'s requirement should be applied on a "per debtor" basis in joint, multi-debtor plans where no substantive consolidation has occurred.

Further, the "per debtor" approach aligns with § 1129's various other requirements for the confirmation of a plan. The statutory context specifically surrounding subsection (a)(10) references "all" debtors, or "each" impaired class.[2] These surrounding subsections further indicate the Code's "focus on each individual debtor, rather than on the debtors as a whole." Suzanne T. Brindise, *Choosing the "Per-Debtor" Approach to Plan Confirmation in Multi-Debtor Chapter 11 Proceedings*, 108 Nw. U. L. Rev. 1355, 1375 (2014).

By ensuring that each debtor receives acceptance of the proposed plan from at least one of its impaired classes of creditors, § 1129(a)(10) can still adequately safeguard the already limited rights of impaired creditors while at the same time ensuring that joint administration and substantive consolidation do not become conflated over time. The "per debtor" approach, when used in the limited context of a jointly administered, multi-debtor plan that does *not* employ substantive consolidation, also provides some level of predictability in chapter 11 proceedings. It allows the many rights of a debtor entity to be fairly balanced against the limited rights an impaired creditor possesses, while also providing clarity to chapter 11 parties. For example, if a debtor prefers the use of the "per plan" approach to fulfilling § 1129(a)(10)'s requirement, that debtor should simply seek substantive consolidation. In such an instance, all parties involved will

[2] Specifically, § 1129(a) requires *all* debtors to meet its many requirements before a plan can be confirmed. Further, § 1129(a)(7) refers to "each holder of a claim or interest," again implying that the requirements for confirmation apply to each individual debtor, including in a joint plan.

be on notice that the basic rights afforded to them under the Bankruptcy Code will be modified, and the issue of impaired creditor approval can be largely avoided.

Utilizing the "per debtor" approach, TDI's proposed plan cannot be confirmed because Under My Thumb, Inc., one of Development's impaired classes of creditors, voted to reject the plan. Thus, the plan does not meet each of § 1129's confirmation requirements. Here, regardless of the overall support for the plan, Development did not obtain at least one impaired class' approval, thus rendering the entirety of the joint plan non-confirmable. Though viewed by some courts as a mere technicality, § 1129(a)(10) provides a substantive protection to impaired classes of creditors; overlooking such an important safeguard for the sake of convenience fiercely departs from the objectives of the Bankruptcy Code and principles of fairness. For the reasons discussed above, the Thirteenth Circuit's adoption of the "per debtor" approach should be affirmed.

CONCLUSION

Therefore, the Thirteenth Circuit Court of Appeals was correct to apply the "hypothetical test" to deny the assumption of the licensing agreement because Under My Thumb withheld their consent from TDI. Additionally, the Thirteenth Circuit properly adopted the "per debtor" approach to § 1129(a), requiring at least one impaired class of claims for each debtor to vote to approve the plan. Respondent Under My Thumb, Inc., respectfully requests that the Supreme Court affirm the judgments of the Court of Appeals for the Thirteenth Circuit.

Team R. 33
Counsel of Record

APPENDIX A

11 U.S.C. 102(7)

Rules of construction

In this title--

(1) [omitted]

(2) [omitted]

(3) [omitted]

(4) [omitted]

(5) [omitted]

(6) [omitted]

(7) the singular includes the plural;

(8) [omitted]

(9) [omitted]

APPENDIX B

11 U.S.C. § 365(a)

Executory contracts and unexpired leases

(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.

APPENDIX C

11 U.S.C. § 365(c)

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—

(c)(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

(c)(1)(B) such party does not consent to such assumption or assignment; or

(c)(2) [omitted]

(c)(3) [omitted]

APPENDIX D

11 U.S.C. § 365(f)

Executory contracts and unexpired leases

(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 the 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.

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

(f)(2)(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(f)(2)(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.

(f)(3) [omitted]

APPENDIX E

11 U.S.C. 1124(2)

Impairment of claims or interests

Except as provided in section 1123(a)(4) of this title, a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan-

(1) [omitted]

(2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default—

(2)(A) cures any such default that occurred before or after the commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title or of a kind that section 365(b)(2) expressly does not require to be cured;

(2)(B) reinstates the maturity of such claim or interest as much maturity existed before such default;

(2)(C) compensates the holder of such claim or interest of any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law;

(2)(D) if such claim or such interest arises from any failure to perform a nonmonetary obligation, other than a default arising from failure to operate a nonresidential real property lease subject to section 365(b)(1)(A), compensates the holder of such claim or such interest (other than the debtor or an insider) for any actual pecuniary loss incurred by such holder as a result of such failure; and

(2)(E) does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entities the holder of such claim or interest.

APPENDIX F

11 U.S.C. 1126

Acceptance of plan

(a) The holder of a claim or interest allowed under section 502 of this title may accept or reject a plan. If the United States is a creditor or equity security holder, the Secretary of the Treasury may accept or reject the plan on behalf of the United States.

(b) For purposes of subsections (c) and (d) of this section, a holder of a claim or interest that has accepted or rejected the plan before the commencement of the case under this title is deemed to have accepted or rejected such plan, as the case may be, if—

(b)(1) the solicitation of such acceptance or rejection was in compliance with any applicable nonbankruptcy law, rule, or regulation governing the adequacy of disclosure in connection with such solicitation; or

(b)(2) if there is not any such law, rule, or regulation, such acceptance or rejection was solicited after disclosure to such holder of adequate information, as defined in section 1125(a) of this title.

(c) A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

(d) A class of interests has accepted a plan if such plan has been accepted by holders of such interests, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount of the allowed interests of such class held by holders of

such interests, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

(e) On request of a party in interest, and after notice and a hearing, the court may designate any entity whose acceptance or rejection of such plan was not in good faith, or was not solicited or procured in good faith or in accordance with the provisions of this title.

(f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.

(g) Notwithstanding any other provision of this section, a class is deemed not to have accepted a plan if such plan provides that the claims or interests of such class do not entitle the holders of such claims or interests to receive or retain any property under the plan on account of such claims or interests.

APPENDIX G

11 U.S.C. § 1129(a)

Confirmation of plan

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

(a)(1) [omitted]

(a)(2) [omitted]

(a)(3) [omitted]

(a)(4) [omitted]

(a)(5) [omitted]

(a)(6) [omitted]

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

(a)(7)(A) each holder of a claim or interest of such class—

(a)(7)(A)(i) has accepted the plan; or

(a)(7)(A)(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

(a)(7)(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.

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

(a)(8)(A) such class has accepted the plan; or

(a)(8)(B) such class is not impaired under the plan.

(a)(9) [omitted]

(a)(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.

(a)(11) [omitted]

(a)(12) [omitted]

(a)(13) [omitted]

(a)(14) [omitted]

(a)(15) [omitted]

APPENDIX H

11 U.S.C. 1129(b)

Confirmation of plan

(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.

(b)(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:

(b)(2)(A) With respect to a class of secured claims, the plan provides--

(b)(2)(A)(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

(b)(2)(A)(i)(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;

(b)(2)(A)(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

(b)(2)(A)(iii) for the realization by such holders of the indubitable equivalent of such claims.

(b)(2)(B) With respect to a class of unsecured claims--

(b)(2)(B)(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

(b)(2)(B)(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.

(b)(2)(C) With respect to a class of interests--

(b)(2)(C)(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

(b)(2)(C)(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.

APPENDIX I

35 U.S.C. § 154(a)(1)

Contents and term of patent; provisional rights

(a) In General.—

(a)(1) **Contents.**--Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, of the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States, and, if the invention is a process, of the right to exclude others from using, offering for sale or selling throughout the United States, or importing into the United States, products made by that process, referring to the specification for the particulars thereof.