No. 19-1004

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

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

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

V.

UNDER MY THUMB, INC., RESPONDENT.

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

Brief for Petitioner

Team P38
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether 11 U.S.C. § 365(c)(1) permits a debtor in possession to assume an executory contract over the objection of the non-debtor party to such contract when applicable non-bankruptcy law excuses the non-debtor party from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession?

II. Whether, in a case where a class of claims is proposed to be impaired under a joint, multi-debtor plan, 11 U.S.C. § 1129(a)(10) requires acceptance from at least one impaired class of claims of each debtor or, alternatively, acceptance from one impaired class of claims of any one debtor?

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OPINIONS BELOW

In unreported opinions, the Bankruptcy Court for the District of Moot ruled in favor of the debtors on both issues, holding (1) section 365(c)(1) contemplates a case-by-case inquiry under the so called "actual test," and (2) section 1129(a)(10) is satisfied where at least one impaired class in a joint, multi-debtor plan accepts the plan. R. at 8–9. The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court on both issues. The creditor timely appealed that ruling to the United States Court of Appeals for the Thirteenth Circuit, which reversed the Bankruptcy Appellate Panel on both issues. R. at 9.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

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

11 U.S.C. § 102

11 U.S.C. § 365(a)

11 U.S.C. § 365(c)

11 U.S.C. § 522(m)

11 U.S.C. § 1107

11 U.S.C. § 1129(a)

STATEMENT OF THE CASE

The case at issue arises from the jointly administered chapter 11 bankruptcy cases of ten related parties that function as a single business enterprise to conduct one of the largest gaming operations in the United States. R. at 2–3. Tumbling Dice, Inc. ("TDI") is the holding company that owns the membership interest in each of nine wholly-owned subsidiaries. *Id*. Eight of the subsidiaries are operating companies that own and operate a luxury casino and resort (the "Operating Debtors"). *Id*. The ninth subsidiary is Tumbling Dice Development, LLC ("Development"), a company formed to act as the licensee under a non-exclusive software license agreement with Under My Thumb, Inc. ("Under My Thumb"). *Id*. Collectively, TDI, the Operating Debtors, and Development are referenced as the "Debtors."[1]

The Debtors operated their traditional casino loyalty program, Club Satisfaction, for nearly twenty years before deciding in 2008 that they needed an integrated software system to modernize the program. R. at 4. To achieve this objective, Development engaged Under My Thumb, a leading software designer that specializes in customer loyalty and reservations programs for the hospitality industry, to create the system. *Id*. Pursuant to a Research and Development Agreement between the parties, Under My Thumb incurred approximately $10 million in costs to create the Club Satisfaction software (the "Software"), a process which took nearly a year. *Id*. Development agreed to reimburse Under My Thumb for a portion of these costs pursuant to an unsecured $7 million promissory note (the "R&D Note"). *Id*.

[1] A complete list of the Debtors in this case is as follows: (i) Tumbling Dice, Inc. (Case No. 16-47250), (ii) Tumbling Dice Atlantic City, LLC (Case No. 16-47251), (iii) Tumbling Dice Chicagoland, LLC (Case No. 16-47252), (iv) Tumbling Dice Detroit, LLC (Case No. 16-47253), (v) Tumbling Dice Lake Tahoe, LLC (Case No. 16-47254), (vi) Tumbling Dice Las Vegas, LLC (Case No. 16-4725), (vii) Tumbling Dice New Orleans, LLC (Case No. 16-4726), (viii) Tumbling Dice Palm Springs, LLC (Case No. 16-4727), (ix) Tumbling Dice Tunica, LLC (Case No. 16-4728), and (x) Tumbling Dice Development, LLC (Case No. 16-4729). R. at 2.

After the Software was completed, Under My Thumb and Development entered into a license agreement (the "Agreement") that granted Development a non-exclusive license to use its copyrighted and patented Software and permitted Development to "extend the benefits of the Agreement to its affiliated entities only" even though such affiliated entities were technically not parties to the Agreement. R. at 5. The Agreement otherwise broadly prohibited the Debtors from assigning or sublicensing their rights to others without Under My Thumb's express written consent. *Id*. In exchange for the license, Development agreed to pay Under My Thumb a monthly fee that was calculated based on the amount of spending activity by Club Satisfaction members. *Id*. Development's obligations under the R&D Note are separate and independent from its obligations under the Agreement. *Id*.

The software was a tremendous success for both the Debtors and Under My Thumb. R. at 5. For the Debtors, membership in Club Satisfaction tripled, and the Software became an essential part of their ongoing business model. *Id*. Under My Thumb received higher than expected variable payments under the Agreement due to this success, and it was also able to license similar versions of the software to third parties. R. at 5–6. The Debtors paid amounts due to Under My Thumb for both the R&D Note and the Agreement with no issues until June 2015, when they ceased making payments on the R&D Note due to financial difficulties. *Id*. Those financial difficulties began largely because, in December 2011, a hedge fund, Start Me Up, Inc., acquired TDI's stock through a leveraged buy-out. R. at 6. As part of the transaction, TDI and the Operating Debtors granted first priority liens on their assets to a syndicated group of lenders (the "Lenders") in exchange for a loan in the amount of $3 billion. *Id*. The Lenders did not, however, require Development to act as a borrower or guarantor under the credit facility. *Id*.

Saddled with a significant and unserviceable debt load from the leveraged buy-out transaction, the Debtors commenced these chapter 11 cases in January 2016. R. at 6. As of the petition date, TDI and each of the Operating Debtors jointly and severally owed the Lenders approximately $2.8 billion. *Id*. Negotiating a deal with the Lenders to restructure or refinance this debt load was a primary goal of the Debtors in these bankruptcy cases. *Id*. The Debtors also owed an estimated $120 million more to their unsecured creditors, including Under My Thumb, who was still owed more than $6 million under the R&D Note. *Id*. The Debtors were current, however, with respect to payments due under the Agreement. *Id*.

The Debtors, Start Me Up, the Lenders, the unsecured creditors' committee, and certain other stakeholders (but, notably, not Under My Thumb), ultimately negotiated a deal under which the Debtors could reorganize. R. at 6–7. Among other material terms, the plan support agreement contemplated that the Debtors would consensually restructure substantially all of the secured indebtedness owed to the Lenders by agreeing to a lower interest rate and extending payments over a period of twenty years. R. at 7. Start Me Up was required to inject new capital in order to fund a 55% distribution to unsecured creditors. *Id*. In exchange for this new capital, Start Me Up would be entitled to retain its equity interest in the Debtors. *Id*. In that regard, the plan support agreement called for the cancellation of the existing shares and membership interests in the Debtors and the issuance of new shares and membership interests in the reorganized Debtors, without changing the overall corporate structure. *Id*.

The Debtors filed their *Joint Plan of Reorganization* (the "Plan") and disclosure statement in August 2016. R. at 7. The Plan was a joint plan, meaning the Debtors filed one plan on behalf of all of the Debtors. *Id*. The Plan expressly stated that "the Debtors' estates are not being substantively consolidated and 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). R. at 7. Under My Thumb would therefore continue to receive the monthly payments for the use of the Software under the Agreement. *Id*. The Plan also provided for a pro rata distribution of $66 million (i.e., 55%) to the Debtors' unsecured creditors, including the $6 million plus obligation owed by Development to Under My Thumb under the R&D Note. *Id*. With Development assuming the Agreement, and Under My Thumb's distribution on account of its unsecured claim greatly exceeding the value of Development's assets, Under My Thumb initially viewed the Plan favorably. *Id*. Upon careful review of the disclosure statement, however, Under My Thumb began to view the Plan unfavorably when it learned that Start Me Up was directly funding only $31 million of the unsecured distribution. R. at 7. The remaining $35 million was being invested by Sympathy for the Devil, LP ("SFD"), a private equity group. In return, SFD would receive 51% of the voting shares of reorganized TDI (Start Me Up would receive the remaining 49%) and several seats on its reconstituted board of directors. R. at 7–8. SFD's portfolio of companies includes a direct competitor of Under My Thumb who had, for several years, tried to replicate the Software. R. at 8. Under My Thumb was, therefore, immediately suspicious of SFD's involvement. *Id*.

The Plan enjoyed near universal support from all creditor groups. *Id*. After creditor ballots were reviewed and tallied, each of TDI and the Operating Debtors had at least one impaired accepting class of creditors, but the same was not true for Development. *Id*. Concerned with SFD's potential access to the Software, Under My Thumb, who controlled Development's only class of creditors, voted to reject the Plan. *Id*. Development thus had no impaired accepting class of creditors. *Id*. Under My Thumb timely objected to the Plan on two grounds now pursued on appeal. *Id*. First, relying on the so-called "hypothetical test," it argued that the Debtors' proposed assumption of the Agreement by the Debtors was impermissible under section 365(c)(1) because applicable non-bankruptcy law excused performance by Under My Thumb in the absence of its consent, which it was not giving. R. at 8–9. Second, it argued that the Plan was not confirmable under section 1129(a)(10) because Development had no impaired class of creditors vote to accept the Plan. R. at 9.

Noting the overwhelming creditor support that existed, the bankruptcy court overruled the objections and confirmed the Plan. R. at 9. With respect to Under My Thumb's first objection, the bankruptcy court adopted the so-called "actual test" and held that section 365(c)(1) contemplates a case-by-case inquiry into whether the non-debtor party (i.e., Under My Thumb) actually was being forced to accept performance under its executory contract from someone other than the party with whom it originally contracted (i.e., Development). *Id*. Concluding that Under My Thumb was being asked to do nothing more than honor its existing contractual obligation with Development, the bankruptcy court held that Development could assume the Agreement. *Id*. With respect to the second objection, the bankruptcy court held that section 1129(a)(10) is satisfied where at least one impaired class in a joint, multi-debtor plan accepts the plan. *Id*. Noting that all but one of the Debtors' impaired classes voted to accept the Plan, the court rejected Under My Thumb's argument that the Plan was not confirmable simply because no impaired class of Development voted in favor of it. *Id*. The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court on both issues. The creditor timely appealed that ruling to the United States Court of Appeals for the Thirteenth Circuit, which reversed the Bankruptcy Appellate Panel on both issues. *Id*. This appeal follows.

SUMMARY OF THE ARGUMENT

11 U.S.C. § 365(c)(1) does not prohibit a debtor in possession from assuming an executory contract over the objection of the non-debtor party to such contract when applicable non-bankruptcy law excuses the non-debtor party from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession.

First, the hypothetical test produces the absurd result that a debtor seeking to assume and perform a contract has to be able to first prove the assignability of that contract without ever having the intention to assign it. Second, the purpose and legislative history of section 365(c)(1) confirm that Congress intended for debtors in possession to be able to freely assume executory contracts. Third, sound bankruptcy policy favors allowing a debtor to continue under the terms of executory contracts when no breach has occurred. Finally, given the distinction between a debtor and a trustee, section 365(c)(1) does not apply to a debtor seeking to assume an executory contract. Thus, this Court should reverse.

Turning to the second question, in a case where a class of claims is proposed to be impaired under a joint, multi-debtor plan, 11 U.S.C. § 1129(a)(10) requires acceptance from only one impaired class of claims of any one debtor. First, requiring acceptance from only one impaired class of claims of any one debtor applies the text of section 1129(a)(10) as written. Thus, it gives effect to the plain meaning of the statute and avoids the creation of creditor protections in plan confirmation beyond what Congress included in the statute. Second, application of section 102(7) does not modify the plain meaning of section 1129(a)(10). Third, the structure of section 1129 generally supports a "per plan" application of subsection (a)(10). Finally, the purpose and policy considerations behind section 1129(a)(10) support the per plan approach. Therefore, this Court should reverse.

ARGUMENT

The facts of this case are undisputed. (R. at 3 n.3). This appeal presents only questions of law, which are reviewed *de novo*. *Official Comm. of Unsecured Creditors of AppliedTheory Corp. v. Halifax Fund, L.P.* (*In re AppliedTheory Corp.*), 493 F.3d 82, 85 (2d Cir. 2007).

I. 11 U.S.C. § 365(c)(1) does not prohibit a debtor in possession from assuming an executory contract over the objection of the non-debtor party to such contract when applicable non-bankruptcy law excuses the non-debtor party from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession.

A. The Court should not interpret 11 U.S.C. § 365(c)(1) to prohibit a debtor from assuming and performing an executory contract, because such an interpretation would lead to an absurd result and be contrary to the history and purpose of the statute.

Statutory construction involves a more complex analysis than blindly assigning the dictionary definition to the words of a statutory provision. Judicial inquiry must begin with the language of the statute, and when the words of the statute are unambiguous, the judiciary must give effect to their plain meaning. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000); *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). But courts cannot focus on the statutory provisions' words alone. Courts must also consider the broader context in which Congress has placed those statutory provisions to determine the meaning of the statutory provisions. *See King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("oftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So, when deciding whether the language is plain, we must read the words in their context and with a view to their place in the overall statutory scheme.") (internal quotes and citations omitted). When read in their broader contexts, a literal reading of some statutory provisions will lead to absurd results or merely an unreasonable result that is contrary to the purpose of the greater statutory scheme. *United States v.*

Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940) ("even when the plain meaning did not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole this Court has followed that purpose, rather than the literal words.") (internal citations omitted).

Such is the case of a literal reading of section 365(c)(1). A literal reading of section 365(c)(1) in this case will lead to an absurd result that prohibits a debtor that intends to assume and perform an executory contract from doing so, merely because the debtor cannot assign the contract – something that the debtor does not intend to do under any circumstance. Similarly, a literal reading of section 365(c)(1)'s restriction on assumption will lead to an unnecessary obstacle to a debtor's ability to reorganize and maximize value for creditors, key purposes of the Bankruptcy Code. *Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. Lasalle St. P'ship*, 526 U.S. 434, 453 (1999) (recognizing the Bankruptcy Code's dual purposes of (1) preserving going concerns and (2) maximizing property available to satisfy creditors). This Court should therefore reverse the court below.

1. The Court should apply the "actual test" rather than the "hypothetical test" because the hypothetical test produces an absurd result: that a debtor that wants to assume and perform a contract has to be able to assign that contract.

Generally, section 365(a) allows a debtor to assume or reject an executory contract. 11 U.S.C. § 365(a). However, by its terms, section 365(a) is subject to certain exceptions, including the provisions of section 365(c). Section 365(c) provides that:

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

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

11 U.S.C. § 365(c)(1).

Some courts have applied section 365(c)(1) without reference to the overall statutory context. These courts developed the "hypothetical test:" if, hypothetically (that is, without reference to whether the debtor actually intends on assigning the executory contract), the non-debtor party to the executory contract can prevent assignment under applicable non-bankruptcy law, then the debtor cannot assume the contract. This leads to an absurd result that a debtor that intends to assume and perform an executory contract cannot do so because the debtor would not be able to assign the executory contract, something the debtor does not intend to do in any case. When interpreting texts, courts avoid these types of absurd results. *In re Footstar, Inc.*, 323 B.R. 566, 573 (Bankr. S.D.N.Y. 2005).

i. A result is absurd when it is contrary to common sense or Congressional intent.

A result is absurd when it is nonsensical or contrary to Congress' intent. *See generally United States v. Fontaine*, 697 F.3d 221, 228 (3d Cir. 2012); *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998) ("In deciding whether a result is absurd, we consider not only whether that result is contrary to common sense, but also whether it is inconsistent with the clear intentions of the statute's drafters—that is, whether the result is absurd when considered in the particular statutory context."); *In re Spradlin,* 231 B.R. 254, 260 (Bankr. E.D. Mich. 1999) ("A result will only be deemed absurd if it is 'unthinkable, bizarre, or demonstrably at odds with the intentions of its drafters.") (citations omitted). This doctrine has its roots in early American jurisprudence, and some of the early cases provide the simplest examples of its application.

In *United States v. Kirby*, a mail carrier failed to deliver mail because he was arrested on murder charges. *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486–87 (1869). In addition to the murder charges, the government also prosecuted Kirby under a statute that made "obstruction or retarding the passage of the mail" a crime. *Id*. This Court held that the government could not prosecute Kirby under this statute despite the fact that a literal reading of the statute said it could. *Id*. The Court also gave the examples that if a law said "whoever drew blood in the streets should be punished with the utmost severity," such a law would not be applied to a surgeon who performed an emergency procedure to save someone on the street. *Id*. The Court also noted that if a law said that a prisoner who escapes will be hanged, such a law would not be applied to a prisoner who escapes from a jail that was on fire. *Id*.

Similarly, in *Church of the Holy Trinity v. United States*, this Court created a religious exception to a statute passed by Congress preventing individuals and organizations from prepaying transportation expenses of foreign workers coming to perform labor or service of any kind in the United States. 143 U.S. 457, 458, 472 (1892). The Court found that despite the fact that Congress created no exception to the general rule and that the church's actions were prevented by the literal language of the statute, application of the statute to clergy produced an absurd result inconsistent with other laws and social norms. *Id*. at 471–72.

Some more modern examples of this doctrine are found in *Smith v. United States*, limiting the scope of the word "use" in a statute that criminalized the use of a firearm during and in relation to a drug trafficking crime where no such limit was found in the statute; *Zuni Public School District Number 89 v. Department of Education*, holding that the New Mexico Department of Education's spending equalization calculation was permissible even though "the statute's language literally forbids the Secretary to use such a method" because it was consistent with the purpose of the statute; and *Bond v. United States*, holding that although poisoning someone fell within the literal meaning of a statute imposing criminal penalties for possessing and using a chemical weapon, that statute was intended to address terrorism and did not reach the unremarkable local offense of an amateur attempt by a jilted wife to injure her husband's lover. 508 U.S. 223, 237–38 (1993), 550 U.S. 81, 93 (2007), 572 U.S. 844, 860–61 (2014). As noted above, case law is replete with examples of support for this doctrine spanning over 200 years of jurisprudence.

ii. The hypothetical test for interpreting section 365(c)(1) leads to an absurd result because it is nonsensical and is contrary to the Bankruptcy Code's purpose.

When viewed through the more complete lens of statutory construction that gives effect to the plain meaning of the statute in its broader context and avoids absurd results, the hypothetical test interpretation of section 365(c)(1) becomes decidedly less appealing. This section, and all others in Chapter 11, must be consistent with the fundamental purpose of reorganization recognized by Congress and this Court, which is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources. *See NLRB v. Bildisco & Bildisco, 465* U.S. 513, 528 (1984), *H.R. Rep. No. 95-595*, p. 220 (1977).

Under the hypothetical test, every debtor in a Chapter 11 proceeding with executory contracts that are protected from assignment would have to prove assignability in order to assume it, even when the debtor does not intend to assign the contract. *See In re Hernandez,* 285 B.R. 435, 440 (Bankr. D. Ariz. 2002). This testing requirement is nonsensical. It does not make sense for a debtor to have to prove assignability of an unassignable contract when the debtor does not intend to assign the contract under any circumstance. The hypothetical test for interpreting section 365(c)(1) therefore leads to an absurd interpretation and should be rejected.

Furthermore, it imposes a penalty on the debtor that would not exist absent filing for protection under Chapter 11. Under this interpretation, the counterparty to any intellectual property license, any franchise agreement, or any personal services contract is relieved of its obligations to the debtor simply by virtue of the debtor's filing for bankruptcy. *Bonneville Power Admin. v.*

Mirant Corp. (I*n re Mirant Corp.)*, 440 F.3d 238 (5th Cir. 2006) (interpreting § 365(e)(2) instead of § 365(c)(1) but adopting "actual" test; court held that ipso facto provision was not protected by § 365(e)(2) exception). Many of these contracts, such as the Agreement, are essential components of the debtors' ongoing operations without which they will not be able to successfully reorganize. By virtue of establishing Chapter 11 in the first place, Congress established the clear intent to prevent companies from ceasing operations where possible. TDI would not be able to operate profitably without the ability to use the software license from Under My Thumb. Interpreting section 365(c)(1) to impose a requirement that would make reorganization literally impossible for some companies is therefore not simply a harsh result, it is absurd as contemplated by this Court.

The actual test avoids this absurd result. The actual test analyzes whether the debtor intends to actually assume the executory contract and perform it, or whether the debtor actually intends to assign the executory contract. If the debtor actually intends to assume the executory contract and perform, there is no need to inquire into the executory contract's assignability. *In re Footstar, Inc.*, 323 B.R. at 573. The debtor and the non-debtor counter-party will have the same rights and obligations under the executory contract as if there had never been a bankruptcy. *Id*. This result makes sense. Furthermore, the result is in keeping with the intent of the Bankruptcy Code to encourage reorganization.

2. The purpose and legislative history of section 365(c)(1) confirm that Congress intended for debtors in possession to be able to freely assume executory contracts.

An interpretation concluding that Congress would draft a contract assumption provision that rendered some debtors unable to reorganize is both absurd and unlikely. If "'the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters,' ... the intention of the drafters, rather than the strict language, controls." *Ron Pair Enters.*, 489 U.S. at 242 (quoting *Griffin v. Oceanic Contractors*, 458 U.S. 564, 571 (1982)). A review of the legislative history of section 365(c)(1) confirms that the actual test reflects the intent of Congress, while the hypothetical test does not. The original language of section 365(c)(1) under the Bankruptcy Code enacted in 1978 provided that the trustee could not "assume or assign an executory contract [if] applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee…." Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, § 365(c)(1) (1978) (emphasis added).

The legislative history to another provision of section 365 indicates that in this original enactment Congress was concerned with preserving the parties' benefit of their bargain, which is consistent with Chapter 11's purpose of facilitating successful reorganizations. *See Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997); S. Rep. No. 95-989, at 59 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5845. When Congress considered revisions to section 365(c) in the Bankruptcy Technical Correction Act of 1980, the Committee on the Judiciary published a report in which it proposed to amend section 365(c)(1) to replace "the trustee [with] an entity other than the debtor or the debtor in possession." H.R. Rep. No. 96-1195, at 57 (1980). The report explains the reasoning for the change:

> This amendment makes 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.

Id. at 12. Although the Bankruptcy Technical Correction Act of 1980 was not enacted at that time, in 1984 Congress made the exact revision to section 365(c)(1) that was contemplated in 1980. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, § 362(a) (1984). While legislative intent is sometimes difficult to discern based on available records, in this case Congress's intent regarding the purpose of Chapter 11 is explicit, and the foregoing legislative materials confirm that Congress did not in fact intend to include a section within Chapter 11 that rendered that purpose unachievable for some debtors. This section was designed to protect counterparties to an executory contract under which the identity of the debtor was material from having to render performance to a third party, whether that third party was a trustee who assumed the contract or a company to whom the trustee chose to assign the contract. The actual test achieves the desired protection of the counterparty without producing the absurd result that the debtor in possession is somehow rendered a third party to a contract it executed.

B. Sound bankruptcy policy favors allowing a debtor to continue under the terms of executory contracts when no breach has occurred.

Sound bankruptcy policy strongly favors allowing a debtor in possession the option to assume its executory contracts because doing otherwise would make successful reorganization extremely difficult and doing so does not harm the counterparty. "The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." *Bildisco & Bildisco, 46*5 U.S. at 528 (citing H.R. *Rep. No. 95-5*95, 220 (1977)). Furthermore, both of the cases cited in the lower court's opinion as the basis for the hypothetical test that address bankruptcy policy acknowledge that policy considerations favor the results of the actual test.[2] *RCI Tech. Corp. v. Sunterra Corp.* (*In re Sunterra Corp.*), 361 F.3d 257, 268 (4th Cir. 2004) (holding that the result produced by the plain language of the Statute was "quite unreasonable" but not absurd), *Perlman v. Catapult Entm't* (*In re Catapult Entm't*), 165 F.3d 747, 754 (9th Cir. 1999) (calling the policy reasons to prefer the actual test an "appealing argument" but holding that Congress is the policy maker, not the courts). Even the lower court opinion does not contend that the hypothetical test produces an ideal policy

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[2] *In the Matter of West Electronics Inc.* did not address bankruptcy policy considerations. *See generally W. Elecs., Inc.*, 852 F.2d 79, 83–84 (3d Cir. 1988).

outcome, simply concluding "[our] job is to interpret the statute as it *is* written, not as it perhaps *should be* written." R. at 14–15 (emphasis in original). While the court does note that the Bankruptcy Code includes creditor protections and is not always favorable to debtors, the opinion never claims that there is a threat of harm to creditors that is prevented by the hypothetical test.

As discussed at length above, the hypothetical test effectively prevents reorganization of a number of entities, including any that rely on an intellectual property license, personal service contract, government contract, or franchise agreement to maintain ongoing operations. No serious contention has been made by any court or commentator that the result of the hypothetical test is ideal, or even superior to that of the actual test from a policy perspective. The only argument supporting this position is that a literal reading of section 365(c)(1), divorced from its broader context, requires it. Based on the principles of statutory construction above, however, the overwhelming strength of the policy argument against the hypothetical test indicates that Congress did not intend this outcome. Drawing on the precedent established in the numerous cases cited above, this Court should reverse the Thirteenth Circuit on this issue in order avoid the absurd and undesirable result of the hypothetical test by establishing that the actual test is the appropriate interpretation of section 365(c)(1).

C. Given the distinction between a debtor and a trustee, section 365(c)(1) does not apply to a debtor seeking to assume an executory contract.

The second reason literal interpretation of section 365(c) renders analysis of the phrase "assume or assign" wholly unnecessary is because the provisions of section 365 apply specifically to the trustee, not the debtor in possession. Section 1107 grants the rights of a trustee to the debtor-in-possession, placing the debtor-in-possession in the shoes of the trustee "in every way" according to the Senate Report No. 95-989. 25 No. 4 J. Bankr. L. & Prac. NL Art. 4. However, as one bankruptcy court noted:

> Preliminarily, it should be noted that Section 365(c)(1) is quite logical and sensible as written if one construes “trustee”, in accordance with its plain meaning, to mean trustee, not debtor in possession. The basic objective of the limitation under Section 365(c)(1) is vindication of the right under applicable law of a contract counterparty to refuse to accept performance from or render performance to an entity “other than the debtor or the debtor in possession.” A trustee is an “entity other than the debtor or the debtor in possession”—the trustee is an entirely different entity, who has succeeded by operation of the Bankruptcy Code to all the debtor's property including contracts. Since this de facto statutory assignment of the contract to the trustee is in derogation of the basic objective of Section 365(c)(1), it makes perfect sense to say that the trustee may not assume the contract, and also that the trustee may not assign it—hence, “may not assume or assign.” But it makes no sense to read “trustee” to mean “debtor in possession” either in context of the statutory provision or under the plain meaning canon, and nothing in the Bankruptcy Code justifies such a reading. Indeed, where the debtor seeks to assume but not assign a contract, to read the statute to say that “the debtor in possession may not assume ... any contract if ... applicable law excuses [the counterparty] ... from accepting performance from or rendering performance to an entity other than the debtor in possession ...” would render the provision a virtual oxymoron, since mere assumption (without assignment) would not compel the counterparty to accept performance from or render it to “an entity other than” the debtor.

In re Footstar, Inc., 323 B.R. at 573.

Furthermore, this Court has stated that “it is sensible to view the debtor-in-possession as the same ‘entity’ which existed before the filing of the bankruptcy petition, but empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have done absent the bankruptcy filing.” *Bildisco & Bildisco, 46*5 U.S. at 528. This analysis, coupled with the fact that section 365 uses the terms “trustee” and “debtor in possession,” but does not do so interchangeably, supports the conclusion that section 365 was to meant to prevent only trustees, who are in fact third parties to executory contracts between the debtor and a counterparty, from assuming or assigning the debtor’s executory contracts. *See Bildisco & Bildisco, 46*5 U.S. at 517 n.2 (1984) (“[t]he term debtor in possession is not fully interchangeable with the term trustee in bankruptcy under the Bankruptcy Code”); 11 U.S.C. § 1107(a) (providing that debtors in possession are not required to perform those duties of a trustee provided in § 1106(a)(2), (3), and (4)).

Application of this statute to debtors in possession would result in the type of absurd result the *Footstar* and *Bildisco* courts sought to avoid. In this case, there is absolutely no change, material or otherwise, in the parties to the Agreement. Although Under My Thumb may be uncomfortable with a competitor, SFD, acquiring ownership in Development via the reorganization, nothing in the Agreement would allow Development to allow SFD access to the source code for the Software. In fact, doing so would constitute a material breach of the Agreement, and the damages under a breach of contract claim could include cancellation of the contract and monetary damages for any misuse by SFD. There is also no substantial change in the rights or obligations under the Agreement. The only significant change is that Development has filed for reorganization under Chapter 11. As noted above, the intent of Chapter 11 is to "foster, not frustrate, the reorganization and the economic well-being of debtors in possession." *In re Footstar, Inc.*, 323 B.R. at 574. Under the interpretation of section 365(c)(1) promulgated by the Third, Fourth, Ninth, Eleventh, and Thirteenth Circuits, counterparties to executory contracts could terminate those contracts simply by virtue of a Chapter 11 filing, effectively destroying any chance for the debtor's successful reorganization. Because this case presents a perfect example of the harm such an interpretation can have on a debtor's chances for reorganization, this Court should affirm the reasoning in *Footstar* and hold that the plain meaning of section 365 of Chapter 11 applies the statute's restrictions to trustees only, not debtors in possession.

II. The text, structure, purpose, and history of section 1129(a)(10) indicate that a debtor can confirm a joint plan if there is one impaired class of creditors under the plan that votes to accept the plan.

Section 1129(a)(10) of the Bankruptcy Code requires at least one impaired class of claims to vote to accept the plan, stating, "[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." 11 U.S.C. § 1129(a)(10) (emphasis added). By its plain language, the statute requires that a "per plan" interpretation is the appropriate standard by which courts determine whether there is an accepting class of impaired creditors. *JPMCC 2007-C1 Grasslawn Lodging, L.L.C. v. Transwest Resort Props.* (*In re Transwest Resort Props.*), 881 F.3d 724, 729 (9th Cir. 2018). To contort the plain meaning of the statute into a fallacy which Congress did not intend is to rob section 1129(a)(10) of its text and structure and thereby frustrate the purpose and the policy of the statute.

A. The Court should adopt the per plan interpretation because that interpretation applies the text of section 1129(a)(10) as written.

1. The plain meaning of the statute is the foundation of the per plan approach.

As is well-recognized, the first step in understanding the intent of a statute is "the existing statutory text." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). The Supreme Court has stated that "[w]hen the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Id.* Section 1129(a)(10) does not contain any language that is ambiguous. This subsection sets the requirement for acceptance of a plan by only one impaired class. *In re Transwest Resort Props., Inc.*, 881F.3d at 729. This requirement is not qualified by language which would distinguish plans with multiple debtors from those having only a single debtor, nor does the statute set further requirements to obtain acceptance from creditors of multiple debtors under a joint plan. *Id.* By the statute's plain language, "once a single impaired class accepts a plan, section 1129(a)(10) is satisfied as to the entire plan." *Id.*

Had Congress wanted to expand the requirement of acceptance to include an impaired class of each debtor, Congress could have done so. *See generally* 11 U.S.C. § 522(m) (allowing each debtor to avail themselves of exemptions). However, as section 1129(a)(10) does not contemplate such expansion, it is not the role of the Court to modify the statute to create this requirement. *In re Transwest Resort Props., Inc.*, 881F.3d at 729; *See also SCA Hygiene Prods. Aktiebolag v. First*

Quality Baby Prods., L.L.C., 137 S. Ct. 954, 967 (2017) ("we cannot overrule Congress's judgment based on our own policy views"), *United States v. S.B.R. Co.*, 333 U.S. 771, 774 (1948) ("modification should be left to Congress"). Therefore, the Thirteenth Circuit's ruling, in this case, that the statute suggests a per debtor approach is in direct contradiction to the plain meaning of the statute and distorts the requirement Congress included. Since the statute reads "at least one class of claims that is impaired," that is the intent of Congress for section 1129(a)(10), and therefore the per plan approach is intended. *See Hartford Underwriters Ins. Co.*, 530 U.S. at 6.

The Ninth Circuit, in its decision in *In re Transwest Resort Properties, Inc.*, is the only circuit to have addressed the acceptance required to satisfy section 1129(a)(10). *In re Transwest Resort Props., Inc.*, 881F.3d at 729. In *Transwest*, the debtors were five related entities which proposed a jointly administered plan that was not substantively consolidated. *Id.* at 725-26. The single creditor objecting to the proposed plan was a creditor of only two of the five debtors with the loan secured by assets owned by two of the other related entities. *Id.* While one creditor objected to the plan, several other creditors voted their acceptance. *Id.* The Ninth Circuit determined the correct interpretation in evaluating satisfaction of section 1129(a)(10) based on the statute's plain language as per plan. *Id.* at 729. The court reasoned that the statute does not distinguish between the creditors of different debtors under the plan, nor does it make a distinction between single-debtor and multi-debtor plans. *Id*. Because the confirmation requirement does not distinguish separate satisfaction requirements based on the number of debtors to a plan, the plain language of the statute must be applied based on its plain meaning. *Id.*

Just as the Ninth Circuit determined the per plan interpretation was the correct interpretation of section 1129(a)(10), so too should this Court. The case at hand also involves several related entities as parties to a jointly administered plan that is not substantively consolidated with a single rejecting creditor standing in opposition to several accepting creditors. Also of note is the fact that both cases see the opposing creditor looking to the related debtors as the source of recoupment on their claims. The striking similarities in the circumstances surrounding the objections in *Transwest* and the case at bar dictate a similar result. The statute applies to every instance of confirmation regardless of the number of debtors to the joint plan or the number of classes of creditors. When at least one impaired class of creditors votes to accept the plan, section 1129(a)(10) is satisfied over the objection of another impaired class, regardless of which debtor's class of creditors accepted and which did not.

2. The per debtor interpretation incorrectly prioritizes creditor protections in plan confirmation beyond what Congress included in the statute.

Courts that have adopted the per debtor interpretation reason that unless each debtor has at least one impaired class voting to accept the joint plan, then the plan does not satisfy section 1129(a)(10) and is therefore not confirmable. *See, e.g., In re Woodbridge Grp. of Cos., L.L.C.,* 592 B.R. 761 (Bankr. D. Del. 2018).[3] In an early decision adopting the per debtor interpretation, the Bankruptcy Court for the District of Delaware read various considerations into the plain language of section 1129(a)(10): (1) plans not substantively consolidated must be treated as separate claims against each debtor, (2) other provisions of section 1129(a) are applied on a per debtor basis, and so 1129(a)(10) must be applied on a per debtor basis, and (3) convenience alone is not reason enough to allow a per plan interpretation. *In re Tribune Co.*, 464 B.R. 126, 182-83 (Bankr. D. Del. 2011). When each reason is considered, it is plain that the Delaware court's reasoning is incorrect.

The *Tribune* court's reasoning with regard to the separateness of each claim based on the debtor is inconsistent. There, the court suggested that when plans are not substantively

[3] Notably, the Bankruptcy Court for the District of Delaware is the only court to employ the per debtor interpretation.

consolidated, provisions of the plan typically provide "that claims are to be satisfied only from assets of the particular Debtor against which a claim is made, that obligations of any particular Debtor shall remain with that particular Debtor and no Debtor is to become liable for the obligations of another." *Id.* at 182. However, in contrast to this "one debtor-one recovery source" paradigm, the court's opinion goes on to say, "[i]t may be that . . . a single distribution scheme is proposed, in which sources plan funding and distribution are designed without regard to where assets are found or where liabilities lie." *Id.* at 183. But this further shows the problem with the per debtor interpretation: it allows distributions from joint debtors to all classes but demands separate voting for each debtor.

The *Tribune* court's reasoning is likewise flawed with regard to the context of the remainder of section 1129. Just because some provisions of 1129(a) are applied logically to each debtor, does not mean that all provisions of section 1129(a) are applied to each debtor. For example, the Bankruptcy Code does not require, and bankruptcy courts do not look to, plan feasibility – a requirement under section 1129(a)(11) – on a per debtor basis. Rather, if a plan is feasible, it is confirmable. Similarly, when a plan has one accepting class, the plan is confirmable.

Finally, contrary to the *Tribune* court's reasoning, administrative convenience is a basis for interpreting section 1129(a)(10) as a per plan requirement. *See generally JPMorgan Chase Bank, N.A. v. Charter Commc'ns Operating, L.L.C.* (*In re Charter Commc'ns*), 419 B.R. 221, 266 (Bankr. S.D.N.Y. 2009) ("the evidence supports a finding that the business of Charter is managed by CCI on an integrated basis making it reasonable and administratively convenient to propose a joint plan"). In the present case, the Plan proposed is not based solely in convenience but is grounded in the reality that the legally separate entities operate as one functional unit. Development alone is not the sole source Under My Thumb looks to for a return on its investment. TDI and its subsidiaries contribute to Development's repayment to Under My Thumb. It is not out of pure convenience that the Plan is jointly proposed, it is because the revenue stream necessary to recoup Under My Thumb's investment is derived from the functional whole of the legally separate entities.

Further, *Tribune* states that obtaining less than unanimous consent on a per debtor basis implies a plan is proposed in bad faith and discriminates against the opposing creditors. *In re Tribune,* 464 B.R. at 83. It is an oversimplification to say that a plan is prejudiced against a creditor based solely on the reasoning that the creditor did not approve a plan. In the present case, Under My Thumb is in no way prejudiced under the plan. In fact, the Plan resolved to repay Under My Thumb fifty-five percent of the full amount it was owed. Therefore, any claim of less than unanimous consent to the plan does not amount to prejudice as the Delaware court suggests, and the "per debtor" approach proves faulty on yet another ground.

The *Tribune* court states that it "find[s] nothing ambiguous in the language of §1129(a)(10)" and yet the court pushes its own implication upon the statute that "absent substantive consolidation or consent" each debtor to the plan must have its own instance of acceptance by an impaired class of creditors. *Id.* What *Tribune* failed to consider is that that reading the plain language of the statute does not include its own idea of interpretation. *Lamie*, 540 U.S. at 534. Because the plain language of the statute does not include a distinction between single-debtor and multi-debtor plans, section 1129(a)(10) is satisfied by at least one instance of acceptance by an impaired class of creditors, consistent with a per plan interpretation.

B. Application of section 102(7) does not modify the plain meaning of section 1129(a)(10).

The Bankruptcy Code provides a means for statutory interpretation in section 102(7) that says, "the singular includes the plural." 11 U.S.C. § 102(7). Even reading the plain language of section 1129(a)(10) to include the "singular includes the plural," the resulting interpretation is still in keeping with the per plan interpretation. When changed to the plural, the statute reads: [i]f classes of claims are impaired under the plans, at least one of the classes that are impaired under the plans has accepted the plans. This plural substitution does not render a new requirement that each debtor must acquire acceptance from one of its own impaired class of creditors. The standard remains "at least one" class of impaired creditors to satisfy the requirement of acceptance. Any judicial construction that deviates from this specification is in contradiction of this Court's position that implementation of clear statutory text is the role of the Court. *In re Transwest Resort Props., Inc.*, 881F.3d at 729.

C. The structure of section 1129 generally supports a per plan application of subsection (a)(10).

Through Chapter 11 Congress has provided a comprehensive but complex method for resolving the obligations of a reorganizing corporation through a plan. *Jacobson v. AEG Capital Corp.*, 50 F.3d 1493, 1499 (9th Cir. 1995). Many of the various Chapter 11 provisions concern the disclosure of, soliciting of, and confirmation of a plan. Section 1123 of the Bankruptcy Code describes mandatory and permissive plan provisions. Section 1123(a) of the Bankruptcy Code sets forth the required provisions of a plan while section 1123(b) suggests certain discretionary plan provisions. Section 1123(a)(1) of the Bankruptcy Code states that a plan must designate, subject to section 1122, classes of claims. Section 1123(a)(2) of the Bankruptcy Code requires that a plan specify any class of claims or interests that is not impaired under the plan. Section 1124 of the Bankruptcy Code sets forth the ways by which a claim can be left unimpaired under a plan.

Section 1129 fits in this statutory scheme by providing the requirements for plan confirmation. *Bustop Shelters of Louisville, Inc. v. Classic Homes, Inc.*, 914 F.2d 810, 813 (6th Cir. 1990). Section 1129(a)(10) functions to require at least one class of claimants must vote to accept the plan. Thus, a plan must have some support. A debtor can confirm a plan as long as one class of creditors votes to accept that plan. *See In re Transwest Resort Props., Inc.*, 881 F.3d at 730.

Section 1129(a)(10) not only has its purpose in the structure of Chapter 11, but also more specifically with 1129(a). The subsections in 1129(a) are each phrased uniquely, and as such, no conflict of intent can be perceived. Further, other subsections, such as section 1129(a)(3) do not state explicitly that they are to be applied on a per plan basis. *See In re Transwest Resort Props., Inc.*, 881F.3d at 730. If Congress intended the subsections to be grounded in the same requirement, the explicit phrasing of each would reflect such intent. *See id.* (stating that when subsections are phrased differently requirements are not uniformly applied). As section 1129(a)(10) stands, there is no such intent, and, therefore, each is to be read as mutually exclusive, meaning the per plan approach is the requirement for subsection (a)(10).

Furthermore, courts have noted the common practice in Chapter 11 proceedings for corporations with complex structure to file a single, joint plan in keeping with the corporate form. *In re Enron Corp., No. 01-16034 (AJG)*, 2004 Bankr. LEXIS 2549, at *236 (Bankr. S.D.N.Y. July 15, 2004). Therefore, for voting purposes, all debtors are considered a single legal entity, and a single acceptance of a plan can be satisfied by any of the creditors of an individual debtor. *Id.*

The per plan approach was held "appropriate to test compliance with section 1129(a)(10) in *In re Charter Communications*. 419 B.R. at 266. In this case, Charter Communications sought a prearranged bankruptcy to reorganize and recapitalize under a single plan in one of the most contentious and complex confirmation struggles in order to secure roughly $1.6 billion in capital through the removal of over eight billion dollars from Charter's capital structure. *Id.* at 230. At the time, Charter held nearly twenty-two billion dollars in debt, attributable to different limited liability companies within its capital structure. *Id.* at 231. Noteholders of Charter Communications challenged the satisfaction of section 1129(a)(10), but the court found that the acceptance of multiple other impaired classes satisfied the requirement. *Id.* at 265. The court in *Charter* further noted that "the business of Charter is managed . . . on an integrated basis making it reasonable and administratively convenient to propose a joint plan." *Id.* No requirement of acceptance for a creditor of each debtor was made. *Id.*

D. The purpose and policy considerations behind section 1129(a)(10) support the per plan approach.

The sole purpose of section 1129(a)(10) is to provide assurance that there is some creditor support for the debtors' plan. *In re Loop 76, L.L.C.*, 442 B.R. 713, 723 (Bankr. D. Ariz. 2010). Moreover, there is nothing in the legislative history to indicate that the inclusion of this subsection was for the purpose of providing creditors a veto power to override the acceptance of a plan. *See id.* at 722. ("creditors may favor or disfavor the plan for a variety of reasons, many of which have nothing to do with the inherent 'nature' of their claims"). According to *Toibb v. Radloff*, "the purpose of a business reorganization case . . . is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders." 501 U.S. 157, 163-64 (1991). By allowing Under My Thumb to maintain essentially a veto power over TDI's Plan, this Court would obstruct the reorganization that Chapter 11 proceedings were intended to promote and grant creditors rights Congress did not intend with the section 1129(a)(10) requirement. *See Young v. Higbee Co.*, 324 U.S. 204, 211 (1945) (stating stakeholders should not be given the opportunity to obstruct reorganization for their own gain). The reorganization is not prejudiced against Under My Thumb. In fact, the plan is beneficial to Under My Thumb. By granting a per debtor interpretation, this Court would give Under My Thumb the ability to reject TDI's only option to maintain its viability. This in turn would undermine completely the intent of Chapter 11 proceedings. Therefore, this Court should reverse the Thirteenth Circuit.

CONCLUSION

First, as the bankruptcy court noted, Under My Thumb is being asked to do nothing more than honor its existing contractual obligation with Development. Interpreting section 365(c)(1) to require the Debtors to prove that they can assign the Agreement in order to assume the Agreement is an absurd result that is inconsistent with both the stated legislative intent of Congress and sound bankruptcy policy. The actual test avoids this absurd result without placing any burden on creditors beyond the obligations to the parties with whom they originally contracted. Moreover, section 365(c)(1) places restrictions on the assumption or assignment of executory contracts on trustees, not debtors in possession and does not use these terms interchangeably. We therefore ask this Court to conclude that the Debtors may freely assume the Agreement with Under My Thumb and continue using the Software that is an essential component of their ongoing operations.

Second, Congress unambiguously intended that once a single impaired class accepts a plan, section 1129(a)(10) is satisfied as to the entire plan. Unlike section 365(c)(1), there is no statement of Congressional intent that would justify an interpretation of section 1129(a)(10) inconsistent with the statute's plain meaning and giving effect to the statute's plain meaning produces a result entirely consistent with the overall purpose of Chapter 11 and sound bankruptcy policy. Under My Thumb nevertheless asks for de facto veto rights that the text of the Bankruptcy Code says it cannot have, that equity says it cannot have, that a majority of lower courts say it cannot have, and that practical considerations counsel it should not have. But this Court has never sanctioned such a re-write of an unambiguous Code provision. And there is no reason to do so here. Accordingly, this Court should reverse.

APPENDIX A

11 U.S.C. § 102 (2018).

Rules of construction

In this title—

(1) "after notice and a hearing", or a similar phrase—

(A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but

(B) authorizes an act without an actual hearing if such notice is given properly and if—

(i) such a hearing is not requested timely by a party in interest; or

(ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act;

(2) "claim against the debtor" includes claim against property of the debtor;

(3) "includes" and "including" are not limiting;

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

(5) "or" is not exclusive;

(6) "order for relief" means entry of an order for relief;

(7) the singular includes the plural;

(8) a definition, contained in a section of this title that refers to another section of this title, does not, for the purpose of such reference, affect the meaning of a term used in such other section; and

(9) "United States trustee" includes a designee of the United States trustee.

APPENDIX B

11 U.S.C. § 365(a) (2018).

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) (2018).

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; or

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

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

APPENDIX D

11 U.S.C. § 522(m) (2018).

Exemptions

(m) Subject to the limitation in subsection (b), this section shall apply separately with respect to each debtor in a joint case.

APPENDIX E

11 U.S.C. § 1107 (2018).

Rights, powers, and duties of debtor in possession

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

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

APPENDIX F

11 U.S.C. § 1129(a) (2018).

Confirmation of plan

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

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

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

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

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

(5)

(A)

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

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

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

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

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

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

(i) has accepted the plan; or

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

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

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

(A) such class has accepted the plan; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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