No. 19-1004

In The

Supreme Court of the United States

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 P: #52
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 an unreported opinion, the Bankruptcy Court for the District of Moot found both issues in favor of the Debtors, applying § 365(c)(1) under the actual test and applying § 1129(a)(10) on a per plan basis. R. at 2. The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed both rulings of the bankruptcy court. *Id.* Objecting Creditor, Under My Thumb, appealed both issues, and the United States Court of Appeals for the Thirteenth Circuit reversed both decisions in favor the Creditor; its opinion is reproduced as the record in this appeal. R. at 2, 21.

STATEMENT OF JURISDICTION

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

STATEMENT OF THE FACTS

Tumbling Dice, Inc. ("TDI"), a holding company, its eight casino and resort subsidiaries, and it's one software-licensee, holding subsidiary, Tumbling Dice Development, LLC ("Development"), filed for chapter 11 bankruptcy on January 11, 2016. R. at 3-4. The cases for each entity (collectively, "the Debtors") were jointly administered in accordance with Federal Rule of Bankruptcy Procedure 1015(b). R. at 3. Eight years prior to declaring bankruptcy, TDI arranged for software development firm, Under My Thumb ("UMT"), to develop a specialized customer loyalty program that would be provided through a non-exclusive license to Development. R. at 4. Development would reimburse UMT for some of the development costs of the loyalty program software through a seven-million dollar unsecured promissory note ("R & D Note"). R. at 4. The license agreement (the "Agreement") furnishing the customer loyalty software license to Development, provided that Development could "extend the benefits of the Agreement to its affiliated entities only" and broadly prohibited the sublicensing or assigning of any rights of the software license to other parties without UMT's written consent. R. at 5. Along with payment through the R & D Note, Development promised through the Agreement to pay UMT a monthly fee based on the spending activities of customers who participated in the customer loyalty program. R. at 5. UMT's customer loyalty software tripled membership in TDI's customer loyalty program, and spending increased as well. R. at 5. UMT benefited greatly from the software as well when it licensed similar versions of the software to third parties and received higher than expected payments from Development due to the increased popularity of TDI's customer loyalty program. R. at 5.

In 2011 TDI was acquired by a hedge fund, Start Me UP, Inc. ("SMU"), through a leveraged buy-out. R. at 6. Saddled with substantial and unserviceable debt from the leveraged

buy-out transaction, TDI and its subsidiaries were forced to enter bankruptcy in January of 2016. R. at 6. Development remained current with payments on the R & D note until June 2015 and was current with payments under the Agreement until Development's declaration of bankruptcy. R. at 6.

With the goal of negotiating a deal with their lenders, TDI and all of its subsidiaries developed a joint plan of reorganization. R. at 6. Under this plan, SMU would inject new capital into TDI and its subsidiaries and a sixty-six million dollar distribution would be paid to unsecured creditors, including UMT for the balance of its R & D note. R. at 7. However, the plan stated that each Debtor's estate would not be substantively consolidated, and no debtor would become liable for the obligations of another. R. at 7.

Upon receipt of ballots for the adoption of the plan, TDI found that every creditor aside from UMT, Development's only impaired class, voted in favor of adopting the plan. R. at 9. UMT had become suspicious of the Plan after discovering that the private equity fund, Sympathy for the Devil ("SFD"), which carries a direct competitor of UMT in its portfolio, would fund more than half of the distribution to unsecured creditors in exchange for a 51% voting bloc in and several seats on the board of the reorganized TDI. R. at 8. UMT then objected to the plan on the grounds that the proposed assumption of the Agreement by the Debtors was impermissible under 11 U.S.C. § 365(c)(1) and that the Plan was not confirmable under 11 U.S.C. § 1129(a)(10) because no impaired class of Development had voted to accept it. R. at 8. However, UMT did not object on substantive consolidation grounds. R. at 8. The Bankruptcy Court and the Bankruptcy Appellate Panel for the Thirteenth Circuit ruled in favor of the Debtors on both issues. R. at 9. The United States Court of Appeals for the Thirteenth Circuit reversed the lower courts' rulings on both issues. R. at 21.

SUMMARY OF THE ARGUMENT

I. Every principle and policy of bankruptcy law favors permitting a reorganized debtor to keep the assets it had on the day it filed for bankruptcy. It consequently stands to reason that a debtor in possession should be able to assume an executory contract that it was a party to pre-petition. Congress codified this power to assume executory contracts in 11 U.S.C. § 365 and provided for minor restrictions to this power through 11 U.S.C. § 365(b), (c), and (d). These restrictions were put in place so that parties would retain the benefit of their bargain. This priority is acknowledged under the "actual test" approach to interpreting § 365.

Nevertheless, some courts when interpreting § 365(c) have adopted a hyper-technical, "hypothetical test", which decisively oversteps Congress's intent for the provision. Under a superficial reading of the code, these courts have taken the disjunctive "assume or assign" language of the statute and applied it equally to both trustees and debtors in possession. These courts have improperly designated the "plain" meaning of the statute to be in favor of the "hypothetical test" without acknowledging ambiguities in the statute's language. Even if the meaning of the statute was "plain", the "hypothetical test" still results in outcomes that can be characterized as absurd and demonstrably at odds with clearly expressed congressional intent. It is unquestionably the case that the "hypothetical test" deprives debtors of their commonsense right to assume a contract they were already a party to pre-petition.

Even more, the "hypothetical test" fails to clarify ambiguous language in the very same provision used to justifies its own existence. Typically, under the Code, the term debtor in possession can be substituted interchangeably with the term trustee. Nevertheless, § 365(c) is an exception to the rule, since both terms are used in the same provision giving each a distinct meaning. Therefore, substituting "debtor in possession" for "trustee" in § 365(c), as dictated by

the "hypothetical test", produces a grammatically and logically absurd result. Congress clearly meant to align the debtor in possession with the pre-petition debtor rather than the trustee.

Application of the "hypothetical test" also produces surplusage under § 365(c) and directly conflicts with § 365(f). Under § 365(c), the "hypothetical test" gives no meaning to the term "or assign" since any debtor in possession who might assign an executory contract would have already been prevented from assuming it. Even more, the "hypothetical test" fails to reconcile § 365(c) with § 365(f) where the use of the term "applicable law" in both provisions invariably renders the latter superfluous. The "hypothetical test" completely fails in its ability to draw any continuity between the provisions, while the "actual test" serves a slight improvement.

Beyond all the ambiguity the "hypothetical test" introduces, it contradicts legislative history that Congress intended to use § 365 to preserve the benefit of the bargain for both the debtor and the non-debtor party, rather than to create a new right for the non-debtor party to terminate that benefit. Moreover, the legislative history out of the 1980 Congress indicates that § 365(c) was never meant to apply equally between trustees and debtors in possession.

Finally, the "hypothetical test" clearly ignores accepted bankruptcy policy favoring the debtor. While some provisions of the Code are used to protect the interests of non-debtor parties, no provision creates rights beyond those held pre-petition. The rigid approach of the "hypothetical test" allows non-debtor parties to back out of contracts while threatening the potential success of reorganization efforts.

This Court should not adopt the hyper-technical approach of the "hypothetical test", an interpretation of the law justified solely by a superficial reading of 11 U.S.C. § 365(c). Instead, it should adopt the "actual test" which provides for the equitable right of a debtor in possession to assume a role which that debtor rightfully had prior to declaring bankruptcy.

II. The text, structure, history, and policies underlying the Bankruptcy Code all point to reading § 1129(a)(10) on a per plan basis; satisfied where at least one impaired class accepts the plan across all debtors under a joint, multi-debtor plan. This case should begin and end with the plain text as it is unambiguous here and does not produce an absurd result like application of the "hypothetical test" under § 365(c). Section 1129(a)(10) clearly uses the singular form of "plan," but even amending the singular to include the plural in conformance with section 102(7), the reading of the provision does not change. Only one impaired class of claims need accept the plan, and, here, every impaired creditor, except the one holdout, UMT, has accepted the Plan. The Respondent, however, would have this Court extend § 102(7) beyond its intended scope by adding a prepositional phrase to subsection (a)(10), where none exists, so that the statute reads—"at least one class of claims ***of each debtor*** that is impaired under the plan has accepted." But, courts are not in the business of rewriting statutes in the interest of interpreting them. Moreover, there is no support under the statutory backdrop of § 1129(a) that this section and all its subsections should be read on a per debtor basis. To the contrary, each subsection uses varying language. For example, § 1129(a)(7) uses the language, "each impaired class," yet, § 1129(a)(10) uses the language "at least one [impaired] class." There is no clear statutory scheme that would favor the per debtor approach.

While this Court need not concern itself with other interpretative tools given the lack of ambiguity in the plain text, the legislative history and the underlying bankruptcy policy implications support rather than undermine the thesis that § 1129(a)(10) should be read on a per plan basis. The per plan approach supports the Congressional purpose in encouraging reorganization and preserving jobs, whereas the per debtor approach departs from this purpose in forcing the sale of assets for scrap in a liquidation scenario or in permitting a holdout creditor to

hold the Debtors hostage for more value under the joint plan. There is no legislative history whatsoever on the purpose of § 1129(a)(10); let alone any indication that Congress intended to confer a confirmation veto power on holdout creditors or any other substantive protection. In fact, impaired creditors have several substantive protections, including § 1129(a)(7), which provides that all creditors receive value equal to or greater than the amount creditors would receive under a chapter 7 liquidation scenario, and § 1129(b)(1), which requires that a plan must be nondiscriminatory and fair and equitable in the context of a cramdown. Moreover, impaired creditors can object to a plan on the grounds of substantive consolidation to the extent they feel the degree of entanglement between the estates unfairly prejudices them. Here, the impaired creditor, UMT, was not prejudiced in any way and did not object on substantive consolidation grounds. In fact, UMT stood to gain more value where the distributions of the separate Debtor entities were pooled than segregated with its pro rata distribution under the Plan greatly exceeding the value of its Debtor's, Development LLC's, assets.

Finally, § 1129(a)(10) is not a substitute for an objection on substantive consolidation grounds as this Court should not be swayed to read a corporate entity separateness principle into § 1129(a)(10) where the impaired Creditor failed to properly object. Moreover, § 1129(a)(10) is not an end-run around the rigorous requirements for substantive protection because something short of substantive consolidation, like many deemed consolidations, can satisfy § 1129(a)(10) on a per plan basis without running afoul of the stringent requirements for substantive consolidation. Finally, the intended purpose of substantive consolidation in maintaining the value of recovery for each creditor is preserved, here, as the Creditors are neither receiving less value than they would have received in a segregated entity, liquidation nor are they forfeiting any pre-petition rights by virtue of the pooled distribution. The recovery, here, has not been diluted.

ARGUMENT

I. UNDER THE PROPER APPLICATION OF 11 U.S.C. § 356(C), THE DEBTOR IN POSSESSION *CAN* ASSUME AN EXECUTORY CONTRACT OVER THE OBJECTION OF A NON-DEBTOR PARTY

Every principle of bankruptcy law and policy favors the view that a reorganized debtor should be able to keep the assets that the prepetition debtor had on the day it filed for bankruptcy. In harmony with these principles and policies, section 365 of the Code provides trustees and debtors in possession with the power to assume valuable executory contracts. While there are some restrictions on this power as presented in 11 U.S.C. § 365(b), (c), and (d), a debtor in possession should certainly be able to assume such an agreement that it was a party to as a prepetition debtor. The only contrary view relies on the "hypothetical test", a hyper-technical reading of the statutory language, that conflicts with other principles of statutory construction and runs directly counter to bankruptcy policy and commonsense. The language relied upon in the "hypothetical test", 11 U.S.C. § 365(c)(1), specifically provides that:

> The trustee may not ***assume or assign*** any executory contract … of the debtor, whether or not such contract or lease prohibits or restricts assignment… if -
>
> (1)(A) applicable law excuses a party, other than the debtor, to [such executory 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) (emphasis added). While a superficial reading of this language may provide some support for the view that the Agreement may not be assumed by Development in its role as the representative of the estate, anything more than a cursory analysis of the statutory language shows the deeply flaws in the "hypothetical test" construction of the statute.

To be sure, this Court has mandated a presumption "that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). But where this statutory text is sufficiently ambiguous on its face, this type of truism provides little guidance in ascertaining Congress's intentions. *See* Michelle Morgan Harner, et al., *Debtors Beware: The Expanding Universe of Non-Assumable/Non-Assignable Contracts in Bankruptcy*, 13 AM. BANKR. INST. L. REV. 187, 239 (Spring 2005). Here, the plain text meaning of section 365(c) leaves room for interpretation, evidenced by the circuit split on the issue. *Compare RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257 (4th Cir. 2004); *Perlman v. Catapult Entm't, Inc. (In re Catapult Entm't, Inc.)*, 165 F.3d 747 (9th Cir. 1999); *In re West Elec., Inc.*, 852 F.2d 79 (3d Cir. 1988); *with Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489 (1st Cir. 1997). Alternatively, if the meaning of 11 U.S.C. § 365(c)(1) were "plain", this Court has made clear that when a statute's plain language generates a disposition that is absurd or "'demonstrably at odds' with clearly expressed congressional intent to the contrary, courts ought to avoid such absurdity by construing the statute to avoid such a result." *Lamie v. U.S. Trustee.*, 540 U.S. 526, 534 (2004); *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 304 (4th Cir. 2000) (internal citations omitted).

Consequently, this Court should employ traditional tools of statutory interpretation to determine whether to allow debtors in possession to adopt executory contracts when applicable law excuses the counter-party from accepting or rendering performance under 11 U.S.C. § 365(c). These principles counsel strongly in favor of the "actual test", an approach that permits a debtor in possession to assume a contract it was already party to prior to its declaration of bankruptcy, without triggering prohibitive language in 11 U.S.C. § 365(c)(1). Beyond plain language ambiguity present in 11 U.S.C. 365(c), three principles of statutory interpretation,

namely the rule against surplusage, consideration of legislative history, and deference to bankruptcy policy all support the adoption of the "actual test".

A. The Use of Both the Terms "Trustee" and "Debtor in Possession" Imply that the Limitations Set by § 365(c) are Dependent on the Identity of the Individual Running the Bankruptcy Trust, Further Evidencing Ambiguity in the Text's Plain Language

The "hypothetical test" relies almost entirely on a definitive plain language meaning of 11 U.S.C. § 365(c) where the term trustee used at the start of the statutory provision can be substituted with the term debtor in possession. This would normally be a reasonable replacement, as it is commonly assumed by bankruptcy practitioners that "the terms 'trustee' and 'debtor in possession,' as used in the Bankruptcy Code, are … essentially interchangeable." *Cybergenics Corp.*, 226 F.3d at 243. Nevertheless, when the Bankruptcy Code refers to the trustee and the debtor in possession in the same statutory provision, the two words are ascribed different meanings. Given the divergence among courts as to the plain text meaning of these terms in context, an ambiguity arises in the Bankruptcy Code when both are used in the same provision. *See* Michelle Morgan Harner, *et al.*, *Debtors Beware: The Expanding Universe of Non-Assumable/Non-Assignable Contracts in Bankruptcy*, 13 AM. BANKR. INST. L. REV. 187, 239 (Spring 2005).

When one substitutes the term trustee with debtor in possession, § 365(c)(1) reads "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*…" *In re Footstar, Inc.*, 323 B.R. 566, 570-71 (Bankr. S.D.N.Y. 2005). This substitution leads to a logically and grammatically absurd result whereby a debtor in possession is prohibited from assuming a contract in bankruptcy, which is contrary to the result

outside of bankruptcy. Given this result, Congress must have intended for the terms "trustee" and "debtor in possession" not to be applied interchangeably in this context. *Id*.

Relying on the use of the disjunctive "assume or assign" language in 11 U.S.C. § 365(c)(1), the Third Circuit, the Fourth Circuit, and the Ninth Circuit have adopted the "hypothetical test" and therefore apply 11 U.S.C. § 365(c) equivalently to trustees and to debtors in possession. *See, e.g.*, *In re Sunterra Corp.*, 361 F.3d 257; *In re Catapult Entm't, Inc.*, 165 F.3d 747; *In re West Elec., Inc.*, 852 F.2d 79. However, by exclusively focusing on the term "or," these courts overlook the identity of the estate representative who is actually seeking to assume the executory contract. Other courts in the First Circuit have adopted the "actual test", which allows courts to assess whether the debtor party will be the party who *actually* assumes the executory contract. *See Institut Pasteur*, 104 F.3d at 489. In short, courts following the "hypothetical test" prioritize adherence to the disjunctive "or" in section 365(c) and courts following the "actual test" prioritize a coherent relationship between the terms "trustee" and "debtor in possession" as used in the statute. Given the divergence among the courts as to the statute's plain meaning, it may be that section 365(c)(1) is simply ambiguous and the plain text does not provide a dispositive interpretation demanding the employ of other traditional statutory interpretation tools. *See* Michelle Morgan Harner, *et al.*, *Debtors Beware: The Expanding Universe of Non-Assumable/Non-Assignable Contracts in Bankruptcy*, 13 AM. BANKR. INST. L. REV. 187, 239 (Spring 2005).

B. Improper Application of § 365 Using the "Hypothetical Test" Renders Language in § 365(c)(1)(A) and § 365(f) as Surplusage

Even if the terms trustee and debtor in possession are defined identically in § 365(c), the "hypothetical test" interpretation of § 365(c) fails to give meaning to the remainder of the statute's text. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (citations omitted) (finding that

the Court has a duty to "give effect, if possible, to every clause and word" of a statute). More specifically, language in the remainder of § 365(c)(1) and in § 365(f) are left either as surplusage or in conflict with § 365(c). Despite the leanings of a superficial interpretation of the code, courts should be "reluctant to treat statutory terms as surplusage in any setting" and should refrain from rendering statutory language "insignificant, if not wholly superfluous." *See TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal citations and quotations omitted).

In reviewing the statutory context of § 365(c), it becomes immediately apparent that Congress intended for the assumption of an executory contract to be a necessary prerequisite to that contract's assignment under § 365. 11 U.S.C. §§ 365(c), 365(f)(2)(A). If a trustee or debtor in possession is unable to assume a contract because of § 365(c), then through restrictions set in place by § 365(f), they are inherently precluded from the assignment of such a contract. Nevertheless, § 365(c) includes the language "or assign". Under the "hypothetical test", this creates a redundancy because a trustee or debtor in possession who is restricted from assuming an executory contract due to § 365(c) could never assign it and the "or assign" language goes unused. *See Summit Inv. & Dev. Corp. v. Leroux*, 69 F.3d 608, 613 (1st Cir. 1995). Whereas under the "actual test", when the debtor in possession seeks to assume, but not assign, an executory contract, the applicable law referenced in 11 U.S.C. § 365(c)(1) is not triggered and the provision remains consistent. *Id.*

The second statutory conflict arises out of § 365(f). Section 365(f) permits the assignment of executory contracts "except as provided in subsections (b) and (c) of this section, notwithstanding a provision … in applicable law, that prohibits, restricts, or conditions the assignment of such contract…" 11 U.S.C. § 365(f)(1). When one considers this permission in the frame of the "hypothetical test", applicable law that restricts the assignment of an executory

contract through § 365(c) would preclude § 365(f) from its sole function of disregarding that very same applicable law.

The Fourth, Sixth, and Ninth Circuits have concluded that the term "applicable law" in § 365(c) is more specific and provides for an exception based on a legal excuse as opposed to the applicable law in § 365(f), which is more generally based on prohibitions and assignability. *In re Sunterra Corp.*, 361 F.3d at 266-67. Given this logic it would appear that only "anti-assignment law predicated on the rationale that the identity of the contracting party is material to the agreement is resuscitated by 365(c)(1)". *Id.* While immediately appealing, this argument fails to determine to what extent the identity of the contracting party must be material in order to trigger section 365(c). Modern courts have universally and broadly applied section 365(c) to franchise agreements, partnership agreements, government contracts, and intellectual property licenses as the case at hand does. *See In re Headquarters Dodge Inc.*, No. 92-1030, 1992 U.S. Dist. LEXIS 18640, at *15 (D.N.J. Nov. 25, 1992); *see also Texaco Inc. v. La. Land & Exploration Co.*, 136 B.R. 658, 670-71 (M.D. La. 1992). With such a broad scope for § 365(c), the materiality of the identity of the contracting party becomes a murkier concept and courts begin to treat any anti-assignment law as applicable law for the purposes of section 365(c). As this trend progresses, section 365(c) begins to envelop all of section 365(f).

To be sure, even courts that have adopted the "actual test" have to address the overlap of § 365(c) and § 365(f). Their explanation is rooted in the "whether or not" language under § 365(c), which these courts interpret as distinguishing between the reference to "applicable law" in each section. From their view, section 365(c) is triggered by applicable law that applies "whether or not" a contract is silent on assignability whereas section 365(f) permits assignability notwithstanding both applicable law that applies *whether or not* the contract is silent about

assignability and applicable law that applies only to enforce contractual provisions on assignability. *See In re Pioneer Ford Sales, Inc.*, 729 F.2d 27, 29 (1st Cir. 1984); *Murray v. Franke-Misal Techs. Grp., L.L.C. (In re Supernatural Foods, L.L.C.)*, 268 B.R. 759, 788 (Bankr. M.D. La. 2001). While this interpretation creates a more distinct scope for § 365(c), courts in other jurisdictions have noted that "there is simply nothing in the language of § 365(f) which supports the limitation read into it…"). *See Rieser v. Dayton Country Club Co. (In re Magness)*, 972 F.2d 689, 695 (6th Cir. 1992).

Both potential attempts at reconciling § 365(c) and § 365(f) have major shortcomings that lead to the effective obsolescence of significant language under § 365(f). 11 U.S.C. § 365. To be sure, this conflict impacts the arguments for both the "actual test" and the "hypothetical test". Nevertheless, a potential solution exists in an argument made under the former test. *See e.g. In re Raby*, 139 B.R. 833, 835-36 (Bankr. N.D. Ohio 1991; *In re Sunrise Rests., Inc.*, 135 B.R. 149, 154 (Bankr. M.D. Fla. 1991). These courts adopting the "actual test" never applied § 365(c) to debtors in possession, even when the debtor in possession attempts to assume and assign the executory contract. *Id.* Although this approach was rejected in several courts, it is the only way to fully make sense of major sections of § 365. *See In Re Magness*, 972 F.2d at 699. While this solution does not directly align with the reasoning behind the "actual test" in a case where the debtor in possession attempts to assume *and* assign, it most definitely opposes outcomes of the "hypothetical test" where a debtor in possession is restricted from both assuming and assigning. Indeed, there may be no way to fully reconcile § 365(c) and § 365(f). *See Breeden v. Catron (In re Catron)*, 158 B.R. 629, 637 (E.D. Va. 1993). Nevertheless, the dubious explanations made in an attempt to create a coherent relationship between the two subsections under the "hypothetical test" require absurd mental gymnastics to make any sense of the provisions. While the "actual

test" does not provide a perfect explanation for the statutory questions present in § 365, it suffers from far fewer and far less troubling conflicts.

C. The Legislative History of § 365 Clearly Indicates that Congress Did Not Intend for the § 365(c) Restriction on the Adoption of An Executory Contract by a Trustee to Apply to Debtors in Possession

The legislative history of § 365 provides the most definitive insight into how far the "hypothetical test" strays from Congress's intended use of § 365(c). When the modern Bankruptcy Code was adopted in 1978, a Senate Judiciary Committee report indicated that in enacting § 365, Congress was concerned with preserving the benefits of a parties' bargain rather than with creating a new right to terminate a contract upon a entering into bankruptcy. *See Institut Pasteur*, 104 F.3d at 493; S. Rep. No. 95-989, at 59 (1978). Congress, therefore, envisioned a case-by-case analysis of who would *actually* be assuming the executory contract, which is contrary to the hyper-technical, "hypothetical test".

From 1978 until 1984, the language in § 365(c) provided that a 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). In 1980, the House Judiciary Committee published a report for the Technical Correction Act of 1980. H.R. Rep. No. 96-1195, at 57 (1980). In that report, the committee proposed to amend § 365(c) by replacing "the trustee" with "an entity other than the debtor or the debtor in possession." *Id*. The report reasoned:

> "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. Not only does this indicate that Congress never intended for a debtor in possession to be restricted from assuming an executory contract through § 365(c), it also indicates that Congress only intended for § 365(c) to apply to contracts of a personal services nature, not potentially delegable intellectual property licenses. Both of these revelations potentially deal fatal blows to the use of the "hypothetical test".

Despite this language not making it into the final version of the Technical Correction Act of 1980, the language was still adopted in the Bankruptcy Amendments and Federal Judgeship Act of 1984 with no further discussion of the issue that indicated contrary intent or meaning. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, § 362(a) (1984).

The only legislative history used to argue against the "actual test" is found in the history of § 1107 which outlines the rights, powers, and duties of a debtor in possession. The Senate Judiciary Committee in 1978 commented: "This section places a debtor in possession in the shoes of a trustee in every way… He is also subject to any limitations on a chapter 11 trustee…" S. Rep. No. 95-989 at 116. Nevertheless, given the nature of a debtor in possession, some distinctions must be made. For example, an appointed trustee must be a disinterested party. 11 U.S.C. § 1104(b). On the other hand, a debtor in possession is not disqualified for employment by a debtor in possession. 11 U.S.C. § 1107(b). Indeed, the officers and directors of a debtor in possession are inherently interested parties, as the officers in charge of the debtor corporation are compensated through stock of the organization itself. *See Wolf v. Weinstein*, 372 U.S. 633 (1963). Unlike a trustee, a debtor in possession is one and the same as the prepetition debtor and an assignment from the debtor to the debtor in possession does not occur upon the commencement of a chapter 11 case. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528

(1984). Indeed, this is conceptually impossible as the debtor in possession is the exact same party that was contracted with in the initial contract. *Id*. Proponents of the "hypothetical test" have to take considerable logical jumps to avoid the clearly expressed Congressional intent contrary to their position. While the legislative history in support of the "actual test" may lack definitive authority on the topic, the void of legislative history in support of the "hypothetical test" speaks volumes about the legitimacy of its foundation.

D. The "Hypothetical Test" Ignores a Fundamental Objective of Facilitating Reorganization within the Code and Instead Confers Windfalls on Creditors Who Would Otherwise Be Unable to Avoid Certain Contracts with a Debtor

Unlike the "actual test", outcomes from the "hypothetical test" directly conflict with the basic principles and purpose of the Bankruptcy Code. *See Bildisco & Bildisco*, 465 U.S. at 528 (stating that 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"). The deviation from this purpose apparent in the "hypothetical test" has even driven the American Bankruptcy Institute to advocate for a realignment of 11 U.S.C. § 365(c) with the rest of the Bankruptcy Code. *See* American Bankruptcy Institute Commission to Study the Reform of Chapter 11, 2012-2014 Final Report and Recommendations 124 (2014). To be sure, it is not the responsibility of the courts to determine bankruptcy policy. *See Sigmon Coal Co.*, 226 F.3d at 308. Nevertheless, the general policy set forth in the Bankruptcy Code provides insight regarding what Congress intended for certain sections of the code to mean.

The Bankruptcy Code is generally favorable to debtors. 11 U.S.C. § 101 et seq. Acknowledging that the purpose of chapter 11 reorganization under the Bankruptcy Code is to prevent a debtor from going into liquidation, policy considerations clearly support the adoption of the "actual test". Section 365 in particular was put in place to provide chapter 11 trustees increased flexibility through an option to assume or reject executory contracts. Applying the

"hypothetical test" would run contrary to the policy supporting flexibility for the debtor, even giving *non-debtor* parties an option to cancel an otherwise binding obligation because the debtor entered bankruptcy. This creates a concerning windfall in favor of the non-debtor party when that party is able to reassign the rights otherwise provided under the executory contract through a more lucrative deal. *See N.C.P. Marketing Grp., Inc. v. BG Star Prods.*, *Inc.*, 129 S. Ct. 1577 (2009). Further, the "hypothetical test" creates a policy that clearly conflicts with the established principle against waiver of a debtor's rights upon entry into bankruptcy. Rules against ipso facto clauses for example, exist in multiple provisions. 11 U.S.C. 365(b)(2)(B), 11 U.S.C. 365(e)(1)(B), 11 U.S.C. 1124(2)(A) and 11 U.S.C. 541(c).

In addition to windfalls, following the "hypothetical test" creates more troubling issues. As in the case at hand, following the "hypothetical test" invites certain non-debtor parties to hold-out against an otherwise probable reorganization plan or extort additional concessions in exchange for a vote in favor of the plan. While these situations are not always entirely fatal to an estate, they unnecessarily impair, if not destroy, many debtor's opportunities to reorganize under chapter 11. Under these circumstances, the policy outcome of the "hypothetical test" is clearly and demonstrably at odds with congressional intent.

Every principle of bankruptcy law and policy favors the view that a reorganized debtor should be able to keep the assets that the prepetition debtor had on the day it filed for bankruptcy. Regardless of whether a trustee could assign a valuable executory contract to a third party, a debtor in possession should certainly be able to assume such an agreement itself. The only contrary view, the "hypothetical test" relies on a hyper-technical reading of the statutory language, disregards relevant principles of statutory construction, and runs directly counter to all

common sense. For this reason, the court should reject the "hypothetical test" and adopt the "actual test".

II. THE TEXT, HISTORY, STRUCTURE, AND PURPOSE OF THE CODE MAKES CLEAR THAT THE TECHNICAL REQUIREMENT, SECTION 1129(A)(10), SHOULD BE READ ON A PER PLAN BASIS; SATISFIED WHERE AT LEAST ONE IMPAIRED CLASS ACCEPTS THE PLAN ACROSS ALL DEBTORS IN THE JOINT, MULTI-DEBTOR PLAN

A. The Unambiguous Plain Text of Subsection 1129(a)(10) and the Structure of Section 1129(a) Both Favor the Per Plan Approach

Statutory interpretation must begin with the text itself, and § 1129(a)(10) is unambiguous in that it should be read on a per plan basis. This Court in *Lamie v. U.S. Trustee* reiterated that "when a 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." 540 U.S. 526, 534 (2004). Moreover, "[w]here the statutory text is unambiguous, we don't need to look to other interpretative tools, including the legislative history." *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (In re Transwest Resort Props., Inc.)*, 881 F.3d 724, 727 (9th Cir. 2018) (referencing *Exxon Mobil Corp. v. Allapattah Servs. Inc.,* 545 U.S. 546, 567 (2005)). In other words, "Congress says in a statute what it means and means in a statute what it says." *Hartford Underwriters Insurance Company v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000).

Section 1129(a)(10) reads 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 an insider." 11 U.S.C. § 1129 (emphasis added). The key word is the singular "plan," used three times in the provision. The provision plainly does not use the plural of plans. Here, there was only *one* plan proposed on behalf of all the Debtors and

considered for confirmation—a joint multi-debtor plan ("the Plan").[1] Given that "the Plan, [here,] had near universal support from all creditor groups" with each of the TDI and the Operating Debtors having at least one impaired accepting class of creditors, on the face of the provision, § 1129(a)(10) was met. R. at 8. The lone objection from Development LLC's only impaired creditor class, UMT, does not invalidate § 1129(a)(10). R. at 7. Congress does not distinguish or "reference...the creditors of different debtors under the plan," nor does Congress distinguish between single-debtor or multi-debtor plans. *Transwest*, 881 F.3d at 729 ("Obviously, Congress could have required plan approval from an impaired class for each debtor involved in a plan, but it did not do so."). It is not the judiciary's role to "modify the plain language of a statute by interpretation." *Id.* (citing *King v. Burwell*, 135 S.Ct. 2480, 2489 (2015)).

Without even explaining why § 1129(a)(10) is facially ambiguous, the Respondent, in a seeming attempt to introduce ambiguity, would have this Court apply a statutory rule of construction or canon— "the singular includes the plural"—to the term "plan" under the technical requirement, section 1129(a)(10). 11 U.S.C. § 102(7). Substituting the plural [plans] in place of the singular [plan], however, does not alter the qualifying language that "at least one" class impaired under the plan[s] must accept the plan[s]. 11 U.S.C. § 1129(a)(10). The canon that the singular includes the plural does not change the fact that a multi-debtor plan or multiple plan[s], jointly administered, still only need affirmation from ***one*** impaired class across all debtors. *See Transwest*, 881 F.3d at 729. In stretching the statutory canon beyond its obvious limitations, the Respondent would have this Court read into the provision a prepositional phrase— "at least one class of claims ***of each debtor*** that is impaired under the plan has accepted

[1] In the leading per debtor case, *In re Tribune Co.*, 464 B.R. 126 (Bankr. D. Del. 2011), multiple plans were proposed; not just one.

the plan." 11 U.S.C. § 1129(a)(10) (altered); R. at 27. However, like in *Radlax Gateway Hotel, LLC v. Amalgamated Bank*, where this Court refused to change "or" to "and" under § 1129(b)(2)(A), this Court should also refuse any attempt to rewrite the unambiguous, technical requirement with an additional, unnecessary prepositional phrase. 566 U.S. 639 (2012).

Finally, a plain text analysis is not complete without examining § 1129(a)(10)'s place in the "overall statutory scheme." *E.g.*, *King*, 135 S.Ct. at 2489 ("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."); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("[we must consider] the language itself, the specific context in which that language is used, and the broader context of the statute as a whole"). Respondent would have this Court believe that § 1129(a)(10) must be read on a per debtor basis because the other subsections of § 1129(a) require compliance on a per debtor basis for plan confirmation. The initial premise that the surrounding subsections require compliance on a per debtor basis is unfounded. None of these subsections expressly mention in plain text that each debtor must individually comply with the requirements to confirm a joint, multi-debtor plan. Of particular attention are the requirements mentioned in the leading case, *In re Tribune Co.*, adopting the per debtor approach—§§ 1129(a)(1), (3), (7), and (8). 464 B.R. 126, 183 (Bankr. D. Del. 2011). Section 1129(a)(1) requires that *the plan* comply with the applicable provisions of the Code, but just because one debtor in a multi-debtor bankruptcy does not comply with an applicable provision of a bankruptcy code like fraudulent conveyance, for example, does not hinder plan confirmation. Section 548 has its own remedies apart from the requirements for plan confirmation. 11 U.S.C. § 548. Section 1129(a)(3) requires that *the plan* must be proposed in good faith, but that need not necessarily apply on a per debtor basis. In fact, in the parallel situation where a bankruptcy petition must be filed in good faith, courts have

rejected analyzing good faith on a per debtor basis in favor of a per enterprise basis, balancing "the interests of the [g]roup as a whole." *See, e.g.*, *In re General Growth Properties, Inc.*, 409 B.R. 43, 62 (Bankr. S.D.N.Y. 2009) (finding that bankruptcy *petitions* by solvent subsidiary-debtors of an insolvent parent-debtor were filed in good faith despite their lack of need for bankruptcy relief).

On the other hand, sections 1129(a)(7) and (a)(8) both specify protections for *each class of claims* or, by implication require compliance from each debtor, but neither supports reading § 1129(a)(10) on a per debtor basis, "especially when the Bankruptcy Code phrases each subsection [under 1129(a)] differently." *Transwest*, 881 F.3d at 730; 11 U.S.C. § 1129(a)(7) ("best interests test"); 11 U.S.C. § 1129(a)(8) (consensual plan confirmation requirement). Particularly, sections 1129(a)(7) and (a)(8) reference "each class" whereas section 1129(a)(10) signals just "a class" or "one class." Moreover, there is no support that every subsection under § 1129(a) including the technical requirement (a)(10) must uniformly apply in the same way. *Transwest*, 881 F.3d at 730. And while every attempt should be made to read the statutory scheme "as a whole," where no conflict exists between § 1129(a)(10) and the other subsections, the judiciary should regard each as effective "absent a clearly expressed congressional intention to the contrary." *See King v. St Vincent's Hospital*, 502 U.S. 215, 221 (1991); *but see Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Executives Ass'n*, 491 U.S. 490, 510 (1989). Had Congress wanted to uniformly apply the per debtor principle to each subsection under § 1129(a), it would have done so. *See, e.g.*, R. at 29 ("Congress clearly knew how to cross-reference subsections of 1129(a), as evidenced by [the reference of 1129(a)(8) at 1129(b)]").

B. The Legislative History Promoting Reorganization Under the Code Compared to the Silence on § 1129(a)(10) as a Substantive Creditor Protection Favors the Per Plan Approach

Even though the plain text and statutory context of § 1129(a)(10) clearly favor the per plan approach, a careful review of the legislative history only further supports the per plan approach. The majority in the Thirteenth Circuit acknowledged that the per plan approach "is arguably more consistent with certain acknowledged policies of chapter 11." R. at 20-21. Unlike a liquidation case, reorganization is designed 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." H.R. Rep. No. 95-595, at 5 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6179. The underlying premise supporting this purpose "is that assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap." *Id.* In other words, the restructuring or going concern value (even for allegedly impaired unsecured creditors) is higher than the liquidation value. *See id.* Yet, the per debtor approach would force the Debtors, here, into a chapter 7 liquidation scenario or at the very least force the "problem" Debtor, Development LLC, and its holdout impaired class, UMT, into a chapter 7 liquidation by virtue of being dismissed from the Debtors' chapter 11 case to the detriment of UMT, individually, and the "[TDI] business enterprise on the whole." R. at 5, 32 ("the Software is an essential part of the Debtors' ongoing business model"). Here, UMT was set to retain its monthly licensing revenue stream and receive a pro rata distribution on its Unsecured R&D Note, which greatly exceeded the hypothetical liquidation value, especially given the fact that *its Debtor*, Development LLC, was merely a holding company with little to no assets available for distribution. R. at 7.

Beyond the fact that the per plan approach clearly aligns with the legislative history on the purpose of reorganization, there is no legislative history on the purpose of § 1129(a)(10); let

alone, any indication that it serves as a substantive creditor protection or a confirmation veto power, which would depart from Congress' intent to encourage reorganizations and preserve jobs. *See* Randolph J. Haines, *Bankruptcy Review Commission Fails to Achieve a Significant Chapter 11 Reform*, 1997 NO. 8 NORTON BANKR. L. ADVISER 1 (August 1997); *see also* Scott F. Norberg, *Debtor Incentives, Agency Costs, and Voting Theory in Chapter 11*, 46 U. KAN. L. REV. 507, 537 ("The legislative reports accompanying the 1978 Code shed no light on the purpose of the provision" and the 1984 amendment to § 1129(a)(10)...was not accompanied by any report."). In the absence of legislative history on the purpose of § 1129(a)(10), courts have construed the requirement as a mere technical requirement; not reading a confirmation veto power or other substantive creditor protections into the provision. *See In re 7th Street Beardsley Partnership*, 181 B.R. 426, 431 (Bankr. D. Ariz. 1994) ("Section 1129(a)(10) is a technical requirement for confirmation...the policy underpinnings of the consenting impaired class requirement section are unclear...the relationship between the intended result and the rule is uncertain at best."); *In re Greystone III Joint Venture*, 102 B.R. 560, 566 (Bankr. W.D. Tex. 1989) ("This court cannot find any particular congressional intent, either expressed or implied in Congress' sausage-making exercise, that compels the court to read together the various Code provisions in such a way as to confer on secured creditors in cases such as these the veto power for which (the secured creditor) now lobbies."); *In re LOOP 76, LLC*, 442 B.R. 713, 722 (Bankr. D. Ariz. 2010) (finding no evidence Congress sought to give creditors a "confirmation veto power...solely because it controls the sole impaired class of [one of the many debtors under a joint multi-debtor plan]."); *In re Rhead*, 179 B.R. 169, 177 (Bankr. D. Ariz. 1995) (§ 1129(a)(10) does not confer substantive protections); *In re SGPA, Inc.*, Case No. 1–01–026092, 2001 Bankr. LEXIS 2291, *1, at *19 (Bankr. M.D. Pa. September 28, 2001) ("1129(a)(10) is not an all-

purpose creditor protection mechanism.”). In fact, there are other requirements under § 1129(a) that actually serve as *substantive* creditor protections. For example, § 1129(a)(7) requires that plans protect the creditor’s “best interests” even in a cramdown and § 1129(b)(1) requires that plans be nondiscriminatory and fair and equitable in the context of a cramdown. *In re SGPA, Inc.*, Case No. 1–01–026092, 2001 Bankr. LEXIS 2291, *1, at *19-20 (Bankr. M.D. Pa. September 28, 2001); *see also* Kenneth N. Klee, *Adjusting Chapter 11: Fine Tuning the Plan Process*, 69 AM. BANKR. L.J. 551, 569 (1995) (“There is nothing wrong with confirming a plan based upon compliance with the best interests of creditors test and the absolute priority rule.”). In fact, built into the joint administration rule is a substantive creditor protection: “[p]rior to entering an order the court shall give consideration to protecting creditors of different estates against potential conflicts of interest.” Bankruptcy Rule 1015(b).

In the words of Judge Haines, “[i]t is far from evident why section 1129(a)(10) should exist at all...[as] no case law or commentator has identified any important social or reorganization policy that it serves.” *See* Randolph J. Haines, *Bankruptcy Review Commission Fails to Achieve a Significant Chapter 11 Reform*, 1997 NO. 8 NORTON BANKR. L. ADVISER 1 (August 1997). In fact, many commentators and practitioners have called for the elimination of § 1129(a)(10). *See, e.g.*, *American Bankruptcy Institute Commission to Study the Reform of Chapter 11*, 2012-2014 Final Report and Recommendations 257-61 (2014); *Reforming the Bankruptcy Code: The National Bankruptcy Conference's Code Review Project* 276-77 (1994).

In the absence of any obvious purpose or rationale for § 1129(a)(10), commentators have speculated on the historical backdrop of § 1129(a)(10)’s adoption. This historical context, however, does not warrant adopting the per debtor approach. Congress incorporated § 1129(a)(10) into the 1978 Code without any debate, but “history [speculates]...either... it’s

merely a codification of [a] historical mistake made in *Herweg v. Neuses, et al. (In re Herweg)*, 119 F.2d 941, 943 (7th Cir. 1941), or it is an arbitrary hurdle to cram down that real estate lenders were able to slip in at the last minute." Randolph J. Haines, *Bankruptcy Review Commission Fails to Achieve a Significant Chapter 11 Reform*, 1997 NO. 8 NORTON BANKR. L. ADVISER 1 (August 1997). With respect to the first theory on codification of a historical mistake at the time of adoption, there was a split among courts, pre-1978, over whether debtors could accomplish cram down without at least one impaired accepting class. *Id.* The Bankruptcy Act of 1898 did not require that at least one impaired creditor class must vote to accept the plan, but a few courts, in single asset real estate cases, like *Herweg*, without textual, structural, or legislative support, erroneously construed that a plan for confirmation inherently required some indicia of impaired creditor support and adequate protections under cram down are not a substitute for this support. *See id.* (interpreting the analysis in *Herweg v. Neuses, et al. (In re Herweg)*, 119 F.2d 941, 943 (7th Cir. 1941)); *see also Taylor v. Wood (In re Taylor)*, 458 F.2d 15 (9th Cir. 1972) (affirming, without comment or analysis, the referee's conclusion that "debtor's plan was incapable of confirmation...where the lone creditor affected refused to accept"). Other courts found this implied requirement—the *Herweg* reading—to be nothing more than judicial gloss in the absence of textual, structural, or legislative support and if followed would foreclose reorganization as an option for debtors. *In re Hobson Pike Assocs., Ltd.*, 3 B.C.D. 1205 (Bankr. N.D. Ga. 1977); *In re Marietta Cobb Apartments Co.*, 3 B.C.D. 720 (Bankr. S.D.N.Y. 1977) (The *Herweg* "reading of the Act would foreclose Chapter XII as a vehicle for the rehabilitation of a debtor with one mortgagee-the norm in a large percentage of today's cases."). The second theory for adoption involves a tale about the lobbying efforts of the real estate lending industry to stifle the contrarian viewpoint that impaired creditor acceptance is unnecessary for cramdown,

particularly in single asset real estate cases. Randolph J. Haines, *Bankruptcy Review Commission Fails to Achieve a Significant Chapter 11 Reform*, 1997 NO. 8 NORTON BANKR. L. ADVISER 1 (August 1997). However, the real estate lenders were not primarily concerned with voting as a creditor right, but rather were highly concerned with the "involuntary write down of their secured claims to...a depressed value...during a depressed real estate cycle," which section 1111(b) resolved. *Id.* ("section 1111(b) [was] proposed and adopted at about the same time [as 1129(a)(10).]"). Therefore, it is unclear whether the real estate lobby really sought to imbue § 1129(a)(10) with substantive creditor protections, given § 1111(b), or whether § 1129(a)(10) is just the arbitrary leftover from a lobbying fight.

The best case scenario for the per debtor reading of § 1129(a)(10), given this historical context, is that "for some unexplained reason Congress merely wanted some indicia of creditor support" under the plan. *See* Randolph J. Haines, *Bankruptcy Review Commission Fails to Achieve a Significant Chapter 11 Reform*, 1997 NO. 8 NORTON BANKR. L. ADVISER 1 (August 1997) (referencing the *Herweg* reading). Here, we have more than 'some indicia of creditor support'; in fact, there is almost universal acceptance among the impaired classes across all Debtors with the lone hold-out being UMT.

Finally, in the absence of legislative history supporting the purpose of § 1129(a)(10) as a confirmation veto power or another substantive creditor protection, there are negative policy implications and significant costs associated with adopting the per debtor approach; reinforcing the per plan approach as the favored plain-meaning interpretation of § 1129(a)(10). Nothing under section § 1129(a)(10) stops creditors from buying votes to block plan confirmations and operate as holdouts to extract more value from the reorganized estate, harming other creditors and the debtors in the process. *See* Randolph J. Haines, *Bankruptcy Review Commission Fails to*

Achieve a Significant Chapter 11 Reform, 1997 NO. 8 NORTON BANKR. L. ADVISER 1 (August 1997) ("acceptance by a natural creditor constituency, such as trade debt, is drowned out by the vote of one professional creditor, and is completely lost when that one creditor is permitted to buy votes to control the outcome."); *See American Bankruptcy Institute Commission to Study the Reform of Chapter 11, 2012-2014 Final Report and Recommendations* 260 (2014) (debating the utility of § 1129(a)(10) and "whether the provision protected creditor interests or simply allowed creditors to hold up the confirmation process," the Commissioners discovered multiple cases where larger creditors purchased a "sufficient number of claims in each class to control the plan vote... and block a cramdown."). Even without buying votes, creditors can operate as plan holdouts where they are the only impaired class for a given debtor. This Court has rebuked attempts to hold "debtors and their stakeholders hostage." *Contra Young v. Higbee Co.*, 324 U.S. 204, 211 (1945) (finding that section 203 [the predecessor to 1126(e)] "was intended to apply to...stockholders whose selfish purpose was to obstruct a fair and feasible reorganization in the hope that someone would pay them more than the ratable equivalent of their proportionate part of the bankrupt assets.").[2] It is more likely that § 1129(a)(10) will be used in creditor gamesmanship to hold up legitimate plans than in an attempt to voice the "economic reality...or fairness" of the plan and its "treatment of impaired creditors." *See* Randolph J. Haines, *Bankruptcy Review Commission Fails to Achieve a Significant Chapter 11 Reform*, 1997 NO. 8 NORTON BANKR. L. ADVISER 1 (August 1997) (arguing for repeal of § 1129(a)(10) rather than merely a per plan reading, "[w]e shouldn't keep 1129(a)(10) because we think creditors need to win more issues to balance chapter 11.").

[2] Petitioner acknowledges that Debtors did not raise 1126(e) on appeal.

Furthermore, the tremendous cost of meeting all other confirmation requirements and engaging in lengthy negotiations stifled by impaired class holdouts is magnified in a large, complex multi-debtor plan under the per debtor approach. *In re SGPA, Inc.*, Case No. 1–01–026092, 2001 Bankr. LEXIS 2291, *1, at *20 (Bankr. M.D. Pa. September 28, 2001) ("[the per debtor reading] would inappropriately complicate multi-debtor cases by exalting form over substance and would, in some cases, potentially make a negotiated plan unworkable [without even benefiting the holdout creditors]"). Finally, the per plan approach would dispense with tremendous litigation costs surrounding the technical requirement of § 1129(a)(10), such as disputes over artificial impairment and class specification. The fact that many courts permit artificial impairment further illustrates how § 1129(a)(10) is not a substantive protection, but merely a technical requirement that needs to be checked off. *See, e.g.*, *In re Bataa/Kierland, LLC*, 476 B.R. 558, 56 Bankr. Ct. Dec. (CRR) 275 (Bankr. D. Ariz. 2012) (holding that manufacturing an accepting class "does not exact for the debtor any particular preferential advantage that [it] is not entitled to [given that debtor must still] satisfy the best interest of creditors test, the no unfair discrimination requirement, and the fair and equitable requirement.").

C. Section 1129(a)(10) is Not a Substitute for a Substantive Consolidation *Objection* and the Joint Plan Administration, Here, Does Not Bypass the Rigorous Requirements for Substantive Consolidation

Despite the Respondent's protestations that the per plan view ignores corporate separateness, courts should not be reading a corporate entity separateness requirement into § 1129(a)(10). Consider Judge Friedland's concurrence in *Transwest*, in which she states that while concerned about entanglement in the multi-debtor case before her, she cannot read § 1129(a)(10) on a per debtor basis. 881 F.3d 724, 733. Rather than reading principles and substantive protections into the technical requirements for plan confirmation, where they do not exist, creditors should independently object to substantive or *de facto* consolidation when such

entanglement concerns arise in a joint, multi-debtor bankruptcy. *Id.* ("[I]f a creditor believes that a reorganization improperly intermingles different estates, the creditor can and should object that the plan—rather than the requirements for confirming the plan—results in de facto substantive consolidation."). Given the fact-intensive nature of substantive consolidation review, Judge Friedland attests "[s]uch an approach would allow issue[s] [of entanglement] to be assessed on a case-by-case basis," rather than creating a categorical rule for virtually all business reorganizations given that the majority of large cases are jointly administered. *Id.*

Here, UMT did not object to the Plan on substantive consolidation grounds prior to the bankruptcy court's confirmation and did not raise the objection on appeal, assuming such an objection would survive under the strictest version of the equitable mootness doctrine. R. at 8. Therefore, relying on substantive consolidation concerns in rendering an opinion on the proper interpretation of § 1129(a)(10) would be conflating an equitable doctrine with a technical requirement for bankruptcy and rewriting the law on the sympathies of the factual situation.

Moreover, the joint plan, here, is not an end-run around the rigorous requirements for substantive consolidation. First, because something having the effect of but being short of substantive consolidation can *also* satisfy § 1129(a)(10) on a per plan basis. Second, because substantive consolidation is designed to protect the absolute priority and best interests of creditors, which this Plan preserves.

1. Something short of substantive consolidation can pass muster under § 1129(a)(10) on a per plan basis without being subject to the rigorous requirements for substantive consolidation. Here, the Debtors' joint Plan left the separate estates short of being substantively consolidated and therefore the Plan satisfies § 1129(a)(10) without meeting the rigorous requirements for consolidaton. R at 7. The notion that only substantively consolidated joint,

multi-debtor plans, properly invoked, can satisfy § 1129(a)(10) on a per plan basis is inaccurate.[3] Most joint, multi-debtor plans involve some degree of consolidation and still meet the requirements for plan confirmation; even though, courts hold up substantive consolidation as a rare remedy "to be used sparingly." *In re Owens Corning*, 419 F.3d 195, 208 (3d Cir. 2005) (adopting the most rigorous test for consolidation); Kyu Y. Paek, *The Impaired Accepting Class and the Reorganization of the Business Enterprise*, 28 NO. 1 J. BANKR. L. & PRAC. NL ART. 2 (Feb. 2019) ("...most joint plans in large chapter 11 cases contain some element of consolidation ranging from consolidation of assets and liabilities for distribution purposes to consolidation for classification and voting purposes."). This is evidenced by the number of bankruptcy cases with "deemed consolidations" that satisfy plan confirmation. William H. Widen, *The Reality of Substantive Consolidation*, AM. BANKR. INST. J. 14, 59 (Aug. 26, 2007) ("[o]f the 70 substantive consolidation jumbo cases [between 2000 to 2004], 68 involved a "deemed" consolidation rather than an actual combination of legal entities"). Deemed consolidations treat the separate debtor estates, as if substantively consolidated *only* for plan confirmation purposes such as "valuation and satisfaction of creditor claims, voting for or against a plan, and making distributions for allowed claims." Dennis J. Connolly, *Current Approaches to Substantive Consolidation*, Norton Ann. Surv. Bankr. Law 3 (Aug. 2019); *see also* William H. Widen, *Corporate Form and Substantive Consolidation*, 75 GEO. WASH. L. REV. 237, 254 (2007). Unlike substantive consolidation, "[deemed consolidation] does not result in the actual merger, transfer, or comingling of assets" and the debtor entities retain their separate "organizational structures."

[3] Courts adopting the per debtor view imply that § 1129(a)(10) can only be satisfied on a per plan basis where the plan properly invokes substantive consolidation or impaired creditor classes elect not to vote—i.e. deemed acceptance or consent. *See*, *e.g.*, *Tribune*, 464 B.R. at 183-84.

Dennis J. Connolly, *Current Approaches to Substantive Consolidation*, Norton Ann. Surv. Bankr. Law 3 (Aug. 2019).

Courts have held that deemed consolidations are not *de facto* substantive consolidations, *see In re Genesis Health Ventures, Inc.*, 402 F.3d 416 (3d Cir. 2005); *see also In re Standard Brands Paint Co.*, 154 B.R. 563 (Bankr. C.D. Cal. 1993) (approving a deemed consolidation), and as a result, they satisfy § 1129(a)(10) on a per plan basis without satisfying the rigorous requirements for substantive consolidation. Particularly in *In re Genesis*, Judge Ambro who penned the *Owens Corning* opinion laying out the stringent requirements for substantive consolidation found that "the [d]ebtors' proposed...[r]eorganization [p]lan was several zip (if not area) codes away from anything resembling substantive consolidation," where the plan called for treating separate claims against the separate debtors as if "filed against [one] deemed consolidated debtor" for the purposes of plan voting and funding distributions. 402 F.3d at 423-24 (finding distributions were funded using a "centralized cash management system under which a small number of debtors held bank accounts from which the expenses of all other debtors were paid") (internal quotations omitted). Moreover, the *Genesis* Court added that "the deemed consolidation provisions of the [r]eorganization [p]lan [did not] result in a *de facto* substantive consolidation." *Id.* at 422, 424 (holding that each debtor in the joint, multi-debtor bankruptcy case individually owed quarterly trustee fees pursuant to 28 U.S.C. § 1930(a)(6) and did not meet the U.S. Trustee Manual exception for "substantively consolidated cases subject to only one fee"). Similarly, *JPMorgan Chase Bank, N.A. v. Charter Commc'ns Operating, LLC (In re Charter Commc'ns)* did not find a debtors' plan to be *de facto* substantively consolidated[4] where

[4] While the debtors in *In re Charter Communications* did not label their pooled distribution of funds or their continued "management on an integrated basis" as a *deemed consolidation* of the separate debtor estates, the ingredients of deemed consolidation are present in this case and mirror the ingredients in *In re Genesis*. Moreover, it is uncommon for debtors to actually label their plans as deemed consolidations or use the express terminology in

the plan called for continued use of a centralized cash management system to fund distributions, which was used pre-petition to fund interest payments of each subsidiary. 419 B.R. 221, 234-36, 266 (Bankr. S.D.N.Y. 2009) (holding that evidence of the debtors operating on an integrated basis makes it "administratively convenient to propose a joint plan").

Despite the appearance of a deemed consolidation, the *Charter* Court held that § 1129(a)(10) could be satisfied on a per plan basis. *See* 419 B.R. at 266. And, like in *In re Genesis*, the court in *Charter* did not find the joint plan of 110 debtors to be actually or *de facto* substantively consolidated, despite the fact that some debtors in the joint *Charter* bankruptcy did not have an accepting impaired creditor class. *See id.*

Here, the Debtors' Plan implicitly[5] proposed a deemed consolidated plan for the purpose of distributions "as all creditors regardless of the Debtor against whom their claims arose, would receive distributions under the Plan from the Debtors' reorganized business enterprise on the whole." R. at 30. Moreover, the Debtors had always been managed on an integrated basis. *Id.* In fact, the Debtors, here, just like the debtors in *Genesis* and *Charter* were "authorized by the bankruptcy court to continue using their prepetition cash management system of their integrated business enterprise post-petition." R. at 2-3 ("as is common in multi-debtor chapter 11 cases"). But, being deemed consolidated for the purpose of funding distributions still satisfies § 1129(a)(10) on a per plan basis and does not rise to the level of (de facto) substantive consolidation.

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specific plan provisions. Dennis J. Connolly, *Current Approaches to Substantive Consolidation*, Norton Ann. Surv. Bankr. Law 3 (Aug. 2019) ("deemed consolidation...has become the primary method of consolidations despite the fact that reorganization plans do not expressly use that language").

[5] The Debtors' Plan, here, did not specifically call their pooled distribution a "deemed consolidation."

2. The Plan, here, is not an end-run around the *protection* that substantive consolidation is designed to serve—i.e. to protect the absolute priority and best interests of creditors. Typically, courts are concerned about substantive consolidation because "[c]onsolidation restructures (and thus revalues) the rights of creditors and for certain creditors this may result in significantly less recovery." *E.g.*, *Owens Corning*, 419 F.3d at 205 (denying the equitable remedy of substantive consolidation where the plan proposed to eliminate loan guarantees of the subsidiary debtors on the creditor's unsecured loan to the parent debtor by treating the claims against each subsidiary as claims against the one surviving parent entity). But, here, the objecting impaired Creditor, UMT, will not face the "specter of a significant distribution diminution." *See id.* at 206. In fact, UMT will receive a larger distribution under the joint, multi-debtor Plan than under the alternative scenarios where the estates are not deemed consolidated for the purposes of plan distribution or where the chapter 11 plan had been a chapter 7 liquidation. R. at 7 (UMT initially view the Plan, favorably given its agreement would be assumed and its distribution on account of its unsecured claim greatly exceeding the value of Development's assets). They are certainly not forfeiting any bargained-for substantive rights, unlike the creditors in *Owens Corning*, would have forfeited their loan guarantees and "structural seniority" or "a direct claim against the subsidiary guarantors that other creditors did not have," absent court denial of substantive consolidation *Owens* Corning, 419 F.3d at 212.

What the Creditor, UMT, is really objecting to under the Debtors' Plan, is the change of control, which it fears will result in its Software falling into its competitor's hands. However, bankruptcy is not designed to protect a creditor's software license from falling into the "wrong" hands. This Court in *Butner v. United States* held that "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law." 440 U.S. 48, 55

(1979). The *Butner* Court goes on to find that "unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in the bankruptcy proceeding." *Id.* Under Delaware Law and the ABA's Model Business Corporation Act, in the absence of a specific anti-assignment clause prohibiting the transfer of intellectual property by change of control or merger, broad anti-assignment clauses in patent license agreements are rendered moot in mergers and stock purchase agreements because "[a] merger is not a conveyance, transfer, or assignment." Eleanor Yost, *Patent License Agreement Assignment Provisions: Unforeseen "Licensee"*, Intellectual Property Licensing Strategies, 2015 Edition, 2015 WL 1263729, at * 1, *4 (quoting ABA Official Comment)**;** Mod. Bus. Corp. Act Ann. § 11.07(a)(3) (tracks Delaware Code); 8 *Del. C.* § 259 (observing that property shall be vested in merged entity and shall not be impaired). In other words, a creditor-licensor outside of bankruptcy is subject to the risk that an unwanted competitor could acquire the licensee and indirectly obtain the software since a merger or stock purchase is not an assignment. *See id.* Filing for bankruptcy does not mitigate the risk of an unwanted competitor obtaining access to a license through a stock purchase or merger agreement. *See Butner*, 440 U.S. at 55.

Here, it is of no moment that Sympathy for the Devil—a private equity fund with a portfolio of companies that includes a *competitor of UMT*—purchased or funded part of the pro rata distribution under the Plan in exchange for 51% of the post-bankruptcy reorganized estate and several seats on the new board. Outside of bankruptcy, Sympathy for the Devil would also have been able to purchase the Debtors' stock and obtain unimpaired part-ownership over the assets of the target. Therefore, UMT is in no way prejudiced under this Plan as it is not forfeiting a right it bargained for outside of bankruptcy. R. at 7.

CONCLUSION

For the foregoing reasons, the judgment of the U.S. Court of Appeals for the Thirteenth Circuit should be reversed.

Respectfully submitted,

Dated: 1-21-2020______________________

/s/_____________________________
Team P: #52
Attorneys for Petitioner

APPENDIX A

11 U.S.C. § 365

...

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

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

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

> **(A)** the insolvency or financial condition of the debtor at any time before the closing of the case;
>
> **(B)** the commencement of a case under this title;
>
> **(C)** the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or
>
> **(D)** the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

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

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

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

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

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

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

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

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

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

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

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

...

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

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

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

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

...

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

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

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

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

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

11 U.S.C. § 1129

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

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

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

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

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

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

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

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

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

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

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

(i) has accepted the plan; or

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

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

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

(A) such class has accepted the plan; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

...