No. 19-1004

IN THE

Supreme Court of the United States

IN RE TUMBLING DICE, INC. *et al.*,
Debtors,

TUMBLING DICE, INC. *et al.*,
Petitioners,

v.

UNDER MY THUMB, INC.,
Respondent.

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

BRIEF FOR PETITIONERS

TEAM NUMBER 54
Counsel of Record for Petitioners

QUESTIONS PRESENTED

1. 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 nonbankruptcy 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.
2. 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.

PARTIES TO THE PROCEEDING

Petitioners were the appellees below. They are Tumbling Dice, Inc. and its nine wholly owned subsidiaries: Tumbling Dice Atlantic City, LLC; Tumbling Dice Chicagoland, LLC; Tumbling Dice Detroit, LLC; Tumbling Dice Lake Tahoe, LLC; Tumbling Dice Las Vegas, LLC; Tumbling Dice New Orleans, LLC; Tumbling Dice Palm Springs, LLC; Tumbling Dice Tunica, LLC; and Tumbling Dice Development, LLC.

Respondent Under My Thumb, Inc. was the appellant below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

OPINIONS BELOW

The bankruptcy court and Bankruptcy Appellate Panel for the Thirteenth Circuit answered both questions presented in favor of Petitioners, affirming that (1) 11 U.S.C. § 365(c)(1) permits debtors in possession to assume executory contracts that cannot be assigned under applicable nonbankruptcy law, and (2) 11 U.S.C. § 1129(a)(10) does not require each debtor in a joint, multi-debtor plan to have an approving, impaired class of creditor claims. R. at 3.

The Thirteenth Circuit reversed on both issues. R. at 3. Its opinion has yet to be published but is reproduced as the record in this appeal.

STATEMENT OF JURISDICTION

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

RULES AND STATUTORY PROVISIONS

Relevant rules and statutory provisions are set forth in the Appendix.

STATEMENT OF FACTS

Tumbling Dice, Inc. and its nine affiliates (together, the "Debtors") operate one of the largest casino businesses in the country. Eight of Tumbling Dice's affiliates (collectively, the "Operating Debtors") run luxury casinos and resorts. The remaining affiliate, Tumbling Dice Development, LLC ("Development"), holds a non-exclusive license to software owned by Under My Thumb. Under My Thumb designs software for the hospitality industry, specializing in reservation and loyalty programs.

A significant portion of the Debtors' business depends on the licensed software. The software underlies their popular member loyalty program, Club Satisfaction, which provides members with discounts and other perquisites in proportion to their spending. Club Satisfaction is nearly thirty years old, but its membership tripled after the software upgrade. Post-upgrade, members could play games and make purchases using a single loyalty card, and the Debtors could tailor program offerings to individual preferences.

Club Satisfaction's software is the product of two agreements between Development and Under My Thumb. In the first agreement, Under My Thumb agreed to produce the software in exchange for an unsecured $7 million promissory note ("R&D Note") that would cover 70 percent of its research and development costs. In the second agreement ("Licensing Agreement"), Under My Thumb granted Development a non-exclusive license to the patented and copyrighted software in exchange for a monthly fee that is tied to spending by Club Satisfaction members.

Under My Thumb has profited under the Licensing Agreement. Because of Club Satisfaction's increased popularity, Under My Thumb has received higher than expected monthly payments. Development is current on these payments. Under My Thumb also possesses the right to restrict Development from licensing the software to entities other than Tumbling Dice and the

Operating Debtors, and the right to license a demonstrably successful program to third parties.

In January 2016, the Debtors filed for bankruptcy under Chapter 11. Despite Club Satisfaction's success, they could no longer service the debt that they had incurred in a leveraged buy-out four years earlier. That transaction occurred in December 2011, when a hedge fund named Start Me Up, Inc. bought Tumbling Dice for $3 billion. It financed the purchase with a loan from a group of lenders that was secured by the assets of Tumbling Dice and its Operating Debtors. When the Debtors filed for bankruptcy, Tumbling Dice and the Operating Debtors still owed the lenders roughly $2.8 billion. The Debtors also owed about $120 million to unsecured creditors, including $6 million that Development owed to Under My Thumb under the R&D Note.

After almost eight months of negotiations with various interested parties that included the unsecured creditors' committee, the Debtors filed a single joint plan (the "Plan") under Chapter 11 of the U.S. Bankruptcy Code (the "Code"). The Plan still enjoys near-unanimous support from creditors, as it did when first proposed. The Plan features a statement explaining that it does not substantively consolidate the Debtors' estates, and it provides for a 55 percent pro rata distribution to unsecured creditors (including Under My Thumb) that is funded by capital injections from Start Me Up and a private equity group, Sympathy for the Devil. Under the Plan, Start Me Up retains 49 percent of the voting equity in Tumbling Dice, and Sympathy for the Devil receives the remaining 51 percent as well as seats on Tumbling Dice's board.

The Plan's terms are favorable to Under My Thumb, and Under My Thumb initially supported it. The Plan proposes to assume the Licensing Agreement, which would ensure that Under My Thumb continues to receive monthly payments for the software license. The 55 percent distribution to unsecured creditors guarantees that Under My Thumb will receive $3.3

million of the $6 million remaining on its unsecured R&D Note, far in excess of what Under My Thumb would have received if Development had been liquidated.

Under My Thumb retracted its support for the Plan after learning from the disclosure statement that one of its competitors is owned by Sympathy for the Devil. Believing it had an opportunity to squander a competitor's investment opportunity, Under My Thumb and its class of claims voted against the Plan. Under My Thumb proceeded to object to the Plan it once supported on numerous grounds, only two of which it continued to appeal.

Recognizing that the Plan had near-unanimous support from creditors, including from numerous impaired classes of claims, and that it merely asked Under My Thumb to continue performing under the existing Licensing Agreement, the bankruptcy court approved the Plan over Under My Thumb's objections. On appeal, the Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court's rulings. Under My Thumb appealed again, and it received favorable rulings from the Thirteenth Circuit on both issues. Debtors timely appealed the Thirteenth Circuit's determinations to this Court.

SUMMARY OF THE ARGUMENT

Congress enacted Chapter 11 to enable debtor reorganization, not to help creditors gain leverage over their commercial competitors. The decision by the court below supports the latter at the expense of the former. The Thirteenth Circuit's ruling on both questions presented provides individual creditors—particularly those that are party to non-assignable contracts—with extraordinary leverage over reorganization and thereby risks the interests of every stakeholder invested in a debtor's restructuring.

Under My Thumb's claim that the language of § 365(c)(1) prevents debtors in possession from assuming non-assignable executory contracts fails for two reasons. First, the limitation on a trustee's power in § 365(c) does not extend to debtors in possession. Section 365(c) mentions

both trustees and debtors in possession, which indicates Congress' intent to treat them distinctly, but only limits the assumption powers of trustees. Treating debtors in possession and trustees as distinct entities fits § 365(c)'s purpose of preventing the assignment of contracts for which the identity of the debtor is crucial to the contract's value.

Second, regardless of whether debtors in possession and trustees are treated as distinct entities, legislative history and public policy favor the "actual test" for interpreting § 365(c). The "actual test" focuses on whether a debtor in possession actually intends to assign a contract it assumes, rather than the hypothetical inquiry of whether a contract might be assigned. Because Tumbling Dice intends to assume the Licensing Agreement without assigning it, this Court should not bar that assumption. Holding otherwise would jeopardize the Debtors' business, as the Licensing Agreement is crucial to its operation. More broadly, holding otherwise would grant parties to intellectual property contracts an unjustified means of avoiding performance and would penalize businesses for attempting to reorganize.

Under My Thumb's claim that § 1129(a)(10) requires an impaired accepting class for *each debtor* under a multi-debtor plan also fails. Numerous courts have rejected this "per debtor" interpretation in favor of the "per plan" approach, reading § 1129(a)(10) as requiring exactly what it says: that "at least one class of claims that is impaired under the plan has accepted the plan," without regard to the number of debtors. The majority below also misreads the text of § 1129(a)(10) when it finds that the provision implicates voting rights. In fact, § 1129(a)(10) promises creditors nothing more than that a plan passed over their objection will have some creditor support. In misreading the protections of § 1129(a)(10), the Thirteenth Circuit offers Under My Thumb a unilateral veto over Tumbling Dice's reorganization and, more generally,

increases the likelihood that structurally complex debtors with positive going concern value will be relegated to liquidation.

This Court should reverse the Thirteenth Circuit and find that (A) 11 U.S.C. § 365(c) does not prevent debtors in possession from assuming non-assignable executory contracts over the objection of non-debtor parties, and (B) 11 U.S.C. § 1129(a)(10) only requires one impaired accepting class of claims per plan, even in a jointly administered case where a single plan applies to multiple debtors.

ARGUMENT

I. Section 365(c)(1) allows a debtor in possession to assume an executory software license over the objection of the licensor.

The Thirteenth Circuit Court of Appeals incorrectly concluded that § 365(c)(1) of the Bankruptcy Code prevents Tumbling Dice from assuming the Licensing Agreement without Under My Thumb's consent. R. at 15. The court's ruling adopts the "hypothetical test"—which ignores actual facts—and in so doing, severely jeopardizes the ability of debtors to reorganize. This Court should overrule the Thirteenth Circuit's holding because the text and purpose of § 365(c), as well as its legislative history and the pro-reorganization policy of Chapter 11, favor allowing debtors in possession to assume non-assignable executory contracts over the objection of contract counterparties.

A. Section 365(c) limits the power of a trustee, not the power of a debtor in possession, to assume an executory contract.

When interpreting a provision of the Bankruptcy Code, a court should begin by analyzing the provision's text. *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1661 (2019). It should be wary of interpretations that leads to absurd results, *see Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004), and may resolve uncertainty in the statue's language by examining its purpose, *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) ("[T]he court will not look merely to a

particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law.").

Section 365 of the Bankruptcy Code allows a bankruptcy trustee to assume—that is, to undertake the obligations and to receive the benefits of—executory contracts. 11 U.S.C. § 365. This power is not without restrictions. Under § 365(c), a trustee may not assume or assign executory contracts if nonbankruptcy law renders them non-assignable and the non-debtor party does not consent to their assumption or assignment. The statute reads, in pertinent part:

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

11 U.S.C. § 365(c).

Federal intellectual property law normally renders non-assignable non-exclusive licenses to use copyrighted or patented material absent the licensor's consent. *See In re Golden Books Family Entm't, Inc.*, 269 B.R. 311, 314 (Bankr. D. Del. 2001) ("Under copyright law, a nonexclusive licensee . . . has only a personal and not a property interest in the intellectual property, which cannot be assigned unless the intellectual property owner authorizes the assignment . . . .") (internal citations and brackets omitted). *See also Unarco Indus., Inc. v. Kelley Co.*, 465 F.2d 1303, 1306 (7th Cir. 1972) ("The long standing federal rule of law with respect to the assignability of patent license agreements provides that these agreements are personal to the licensee and not assignable unless expressly made so in the agreement."). Federal intellectual property law excuses Under My Thumb—whose software is copyrighted and patented—from accepting performance under the Licensing Agreement from entities other than Development and its affiliates.

Within bankruptcy, however, federal law and § 365(c) do not combine to prevent Tumbling Dice from assuming its own pre-petition contract with Under My Thumb. The Thirteenth Circuit's argument to the contrary relies on the incorrect assumption that "trustee" and "debtor in possession" are interchangeable terms in § 365(c). *See* R. at 9-10. While it is true that, with few exceptions, 11 U.S.C. § 1107(a) grants a debtor in possession the same powers as a Chapter 11 trustee,[1] § 1107(a) does not foreclose the possibility that a debtor in possession has rights that a trustee does not. 11 U.S.C. § 1107(a). Section 365(c) should be read as preventing only a trustee—not a debtor in possession—from assuming a non-exclusive intellectual property license, as this reading is faithful to the text and purpose of § 365(c).

1. The terms "trustee" and "debtor in possession" both appear in § 365(c), and they are not interchangeable.

Congress used both "trustee" and "debtor in possession" in section 365(c), which implies that the terms have distinct meanings and should not be read as synonyms. *See Bates v. United States*, 522 U.S. 23, 29-30 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). The introductory language of § 365(c) describes limitations on the trustee's assumption power—the "trustee may not assume or assign any executory contract"—whereas subsection (1)(A) states that "applicable law" excuses a non-debtor party from accepting performance "from an entity other than the debtor in possession." 11 U.S.C. § 365(c). Congress could have used the phrase "a debtor or possession or a trustee" instead, but it did not.

As further evidence that "trustee" and "debtor in possession" are not interchangeable,

[1] Section 1107 does not grant a debtor in possession the right to compensation, the right to file the "list, schedule, and statement required under section 521(a)(1)," or the right to investigate the debtor's business under §§ 1106(a)(3) and (4). 11 U.S.C. § 1107. These rights are the trustee's alone. *Id*.

substituting "trustee" for "debtor in possession" produces an absurd result. *See* R. at 23 (Jones, C.J., dissenting). When "debtor in possession" is replaced with "trustee" in § 365(c), the statute effectively reads: "The debtor in possession may not assume or assign any executory contract if applicable law excuses [the counterparty] from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession." If applicable law excuses a party from contracting with an entity *other than* the debtor in possession, then there is no need to prohibit the debtor in possession from assuming the contract. *See In re Footstar, Inc.*, 323 B.R. 566, 573 (Bankr. S.D.N.Y. 2005).

2. The purpose of § 365(c) supports reading "trustee" and "debtor in possession" as distinct terms.

Section 365(c)'s purpose explains why its text distinguishes between trustees and debtors in possession. The statute prevents the assignment of contracts for which the identity of the debtor is crucial to the contract's value. *See In re Pioneer Ford Sales, Inc.*, 729 F.2d 27, 29 (1st Cir. 1984) (noting that, in enacting § 365(c), Congress contemplated "instances in which assigning a contract may place the other party at a significant disadvantage"). *See generally* 3 Collier on Bankruptcy ¶ 365.07 (16th 2019) ("When an executory contract is based upon the provision of personal services or skills, or upon personal trust or confidence, or otherwise requires the debtor's performance rather than any substitute performance, the trustee has traditionally been unable to assume or assign the rights of the debtor in such contract."). It follows that the provision should not apply if the identity of the debtor is not crucial to the contract's value, or if there is effectively no difference between the debtor and a substitute party. A debtor in possession's assumption of a debtor's pre-petition contract falls into the latter category.

A debtor in possession is effectively the same entity as the pre-petition debtor. *See N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). *See also* 7 Collier on Bankruptcy ¶ 1101.01[3] (16th 2019) ("The better view is to regard . . . the debtor and the debtor in possession as the same entity acting in separate capacities."). When a corporation files for bankruptcy under Chapter 11 and becomes a debtor in possession, the pre-petition activities of the corporation continue under the same management. *See* 7 Collier on Bankruptcy ¶ 1104.02[1] (16th 2019). Therefore, a non-debtor party is not materially disadvantaged when the debtor in possession assumes its contract; it merely receives what it contracted for.

The "hypothetical test" cannot withstand the fact that debtors in possession are not materially different from pre-petition debtors. The logic of the "hypothetical test" relies on the claim that a Chapter 11 filing creates a separate entity—the debtor in possession—such that post-petition assumption by this new entity would effectively constitute assignment. *See In re West Electronics, Inc.*, 852 F.2d 79, 83 (3d Cir. 1988) (justifying application of the hypothetical test on the grounds that "a solvent contractor and an insolvent debtor in possession going through bankruptcy are materially distinct entities.").

This "separate entity" justification for the "hypothetical test" runs against this Court's precedent. The *Blidisco* Court rejected arguments that, for the purpose of federal labor laws, a debtor in possessor is a new entity. *See Bildisco*, 465 U.S. 513 at 528. If the debtor in possession were a new entity, the Court reasoned, it would be unnecessary for § 365 to allow the debtor in possession to reject executory contracts, as it would not be bound by the contracts of the pre-petition debtor. *See id.* ("For our purposes, 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."). Given the Supreme Court's analysis in *Blidisco*, the separate entity theory—and therefore the "hypothetical test"—should be rejected.

Unlike a debtor in possession, a trustee is a materially different entity than the pre-petition debtor. A trustee is a single person elected or appointed to manage a corporation's bankruptcy in place of its current managers. *See* 7 Collier on Bankruptcy ¶¶ 1104.02[1], [5]. Since a trustee is a different entity from the pre-petition debtor, assumption by a trustee is effectively an assignment of contract rights. *See In re Footstar*, 323 B.R. at 573. Given that assumption and assignment are paired when a trustee controls, it makes sense for § 365(c) to pair assumption and assignment in its text: "The trustee may not *assume or assign* any executory contract . . . ." 11 U.S.C. § 365(c) (emphasis added).

Acknowledging that § 365(c) does not limit the power of debtors in possession to assume executory contracts does not contravene anti-assignment policy by allowing debtors in possession to assign otherwise non-assignable contracts. Section 365(f)(2)(B) prevents assignment unless "adequate assurance of future performance by the assignee of such contract or lease is provided," 11 U.S.C. § 365(f)(2)(B). There cannot be adequate assurance of future performance if, in a contract where the identity of the debtor is crucial to its value, the identity of the debtor changes. *Cf. In re Adelphia Commc'ns Corp.*, 359 B.R. 65, 73 (Bankr. S.D.N.Y. 2007) (section 365(f) implements a congressional policy determination that the value of executory contracts should inure to the benefit of the estate except in cases where "the realization of their value gives rise to material prejudice to the contract counterparty"). Although § 11 U.S.C. 365(f) also uses the term "trustee," it does not use the term "debtor in possession," so the distinction between the two terms does not arise. *See Footstar*, 323 B.R. at 572 (noting that elsewhere in §

365, statutory limitations on the powers of a trustee "appl[y] equally to debtors in possession as matter of simple logic and common sense").

Under My Thumb can raise no plausible concern that Tumbling Dice's assumption of the Licensing Agreement amounts to or will amount to *de facto* assignment. Tumbling Dice has no incentive to assign the Licensing Agreement—the licensed software is crucial to its business—and neither the leveraged acquisition nor the post-petition financing are *de facto* assignments. Stock purchases are not considered assignments outside of bankruptcy, *see Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 494 (1st Cir. 1997) (rejecting arguments that a stock sale was an effective assignment to another entity), and stock issuances under a Chapter 11 plan should not be considered *de facto* assignments either. The leading treatise on bankruptcy made this point in relation to *In re West Electronics*:

> In fact, if all of the stock of the debtor in *West Electronics* had been purchased by a third party, which then took control of the debtor, the government should not have been able to terminate the contract based on an assignment, because the contract itself *would not have been assigned*.

3 Collier on Bankruptcy ¶ 365.07[1][d][ii] (16th 2019) (emphasis added). When Tumbling Dice assumes the Licensing Agreement, Under My Thumb will be party to the same contract that it bargained for pre-petition.

B. The legislative history of § 365(c) and Chapter 11's pro-reorganization policy endorse the "actual test."

Even if the text of § 365(c) were ambiguous, congressional intent favors adopting the "actual test." When text is ambiguous, courts may look at other sources to determine Congress' intent, including legislative history and the policy animating the statute. *See G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 621-22 (3d Cir. 2015) ("[L]legislative history can "play a confirmatory role in resolving ambiguity. . . ." (citing *Gen. Dynamics Land Sys. v. Cline,* 540 U.S. 581, 586–91 (2004))); *Kokoszka*, 417 U.S. at 650 ("[T]he court will not look merely to a

particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law."). Both the legislative history of § 365(c) and the policy animating Chapter 11 indicate that congressional intent supports the "actual test."

1. The legislative history of § 365(c) unambiguously supports the "actual test."

In the first iteration of the modern Bankruptcy Code, Congress envisioned that § 365(c) would prompt courts to engage in a fact-intensive analysis of whether, under an assumed executory contract, a non-debtor party would be harmed by assignment:

> [T]his section *will require the courts to be sensitive to the rights of the non-debtor party* to executory contracts and unexpired leases. If the trustee is to assume a contract or a lease, the court will have to *ensure that the trustee's performance under the contract or lease gives the other contracting party the full benefit of his bargain*.

S.Rep. No. 989, 95th Cong., 2d Sess. 59 (1978), *reprinted in* 1980 U.S.C.C.A.N. 5787, 5845 (emphasis added). The call for courts to "ensure that the trustee's performance" would give the non-debtor party the "full benefit of his bargain" anticipated a factual inquiry similar to the "actual test," rather than the blanket denial of assumption that the "hypothetical test" ensures for non-assignable contracts.

In 1984, Congress amended § 365(c) to allow the debtor in possession to assume executory contracts in circumstances where a third-party trustee would be unable to do so. Prior to the amendment, § 365(c) prevented the assumption of executory contracts if applicable law excused the counterparty "from accepting performance from or rendering performance to the trustee or assignee of such contract or lease." Pub. L. No. 95–598 (1978). When Congress amended this provision in 1984, it removed reference to "the trustee" and substituted the

provision's current language: "an entity other than the debtor or the debtor in possession."[2] Pub. L. No. 98-353, § 362(a) (1984). The purpose of amending § 365(c) was to avoid precluding debtors in possession from assuming non-assignable contracts:

> This amendment makes it clear that the prohibition against a trustee's power to assume an executory contract *does not apply where it is the debtor that is in possession* and the performance to be given or received under a personal service contract will be the same as if no petition had been filed . . . .

H.R.Rep. No. 1195, 96th Cong., 2d Sess. § 27(b) (1980) (emphasis added). This legislative history demonstrates that the purpose of the amendment was to allow debtors in possession to assume their own pre-petition contracts. Indeed, "there seems to be little reason for the amendment unless there was an intention to permit a debtor in possession to assume otherwise non-assignable contracts." 3 Collier on Bankruptcy ¶ 365.07[1][d][ii] (16th 2019). Given the strong evidence of congressional intent, this Court should adopt the "actual test."

2. The policy animating Chapter 11 unambiguously supports the "actual test."

The "actual test" better accords with the pro-reorganization policy animating Chapter 11. *Crandon v. United States*, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy."). As this Court has recognized, "[t]he object of Chapter 11 of the Bankruptcy Code is to empower a debtor with going concern value to reorganize its operations to become solvent once more." *N.C.P. Mktg. Grp., Inc. v. BG Star Prods.*, 556 U.S. 1145, 1146 (2009) (Kennedy, J., concurring in denial of certiorari).

The Thirteenth Circuit's interpretation of § 365(c) thwarts Chapter 11's goal of achieving an effective reorganization in two ways. First, under the "hypothetical test," § 365(c) operates as

[2] The phrase "assignee of such contract or lease" was removed in 1986 to prevent redundancy. Pub. L. No. 99-554, § 283(e)(1).

an *ipso facto* clause, or a clause that penalizes debtors for filing for bankruptcy. This is contrary to other sections of § 365 that prohibit *ipso facto* clauses. *See* 11 U.S.C. § 365(b)(2) (excusing a debtor from having to cure defaults based the debtor's insolvency, or the fact they filed bankruptcy); 11 U.S.C. § 365(e) (invalidating contract provisions that condition rights upon the debtor's insolvency, or the fact that the debtor has filed for bankruptcy protection).

Like a standard *ipso facto* clause, § 365(c) interpreted according to the "hypothetical test" penalizes debtors from attempting to reorganize by prohibiting them from assuming valuable executory contracts. *See* 3 Collier on Bankruptcy ¶ 365.07[d] (16th 2019) ("Section 365(e) prevents a party to a contract from terminating the contract merely because the debtor has commenced a bankruptcy case, and section 365(c) should not be interpreted to provide a means around that provision or its underlying policy."). In cases like the one at bar, where a substantial portion of the debtor's going concern value is embodied in a licensing agreement, *see* R. at 5 (describing the software as "an essential part of the Debtors' ongoing business model"), the "hypothetical test" leaves debtors with no choice but to liquidate. *See N.C.P. Mktg. Grp.*, 556 U.S. at 1145 (Kennedy, J., concurring in denial of certiorari) ("[T]he hypothetical test may prevent debtors-in-possession from continuing to exercise their rights under nonassignable contracts, such as patent and copyright licenses. Without these contracts, some debtors-in-possession may be unable to effect the successful reorganization that Chapter 11 was designed to promote.").

Second, the "hypothetical test" privileges creditors that are party to non-assignable executory contracts with bankrupt debtors over other creditors. Under the "hypothetical test," debtors in possession may only assume non-assignable executory contracts if they obtain the counterparty's consent. This gives creditors like Under My Thumb far greater leverage over

reorganization than unsecured creditors with assignable contracts, even if both creditors have claims of similar size. *See N.C.P. Mktg. Grp.*, 556 U.S. at 1147 (Kennedy, J., concurring in denial of certiorari). Providing individual creditors with such extreme leverage opposes Chapter 11's goal of effective reorganization.

II. Under a jointly administered, multi-debtor plan, § 1129(a)(10) does not require each debtor to have an impaired accepting class of claims.

When the court below held that 11 U.S.C. § 1129(a)(10) requires each debtor under a multi-debtor plan to have an impaired accepting class of claims, R. at 21, it gave a single creditor inordinate leverage over other stakeholders in a restructuring negotiation. Under the per debtor approach, creditors holding a relatively small amount of unsecured debt can block fair, equitable, and generous reorganization plans—like the one at bar—for suspect reasons, as Under My Thumb attempts to do here. The per debtor interpretation of § 1129(a)(10) is contrary to the provision's text, its statutory context, and the policies underlying Chapter 11.

This Court should hold, as the Ninth Circuit and a majority of lower courts have held, that § 1129(a)(10) does not require each debtor in a multi-debtor plan to have an impaired accepting class of claims. *See In re: Transwest Resort Properties, Inc.*, 554 B.R. 894, 901 (D. Ariz. 2016), *aff'd sub nom. JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc.* (*In re Transwest Resort Props., Inc.*), 881 F.3d 724, 729-30 (9th Cir. 2018); *In re Charter Commc'ns*, 419 B.R. 221, 266 (Bankr. S.D.N.Y. 2009); *In re Station Casinos, Inc.*, 2010 WL 11492265, at *23 (Bankr. D. Nev. Aug. 27, 2010); *In re SPGA, Inc.*, 2001 WL 34750646, at *6-7 (Bankr. M.D. Pa. Sept. 28, 2001).[3] Doing so would not violate substantive creditor rights; it

[3] The majority below finds three cases to support its per debtor position, all from a single court: *In re Tribune Co.*, 464 B.R. 126 (Bankr. D. Del. 2011); *In re Woodbridge Grp. of Cos., LLC*, 592 B.R. 761 (Bankr. D. Del. 2018); and *In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293 (Bankr. D. Del. 2011). The strength of these citations is greater in number than in substance: *Tribune* and *Woodbridge* are written by the same judge, and any support of the

would protect them as Congress intended, while allowing structurally complex, multi-entity debtors to reorganize.

A. The plain language of § 1129(a)(10) demands the per plan approach.

As was the case with § 365(c), the process of determining § 1129(a)(10)'s meaning begins with evaluating its text. *See Lamie v. U.S. Tr.*, 540 U.S. at 534. This Court has consistently stated that "when 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.* (citation and internal quotations omitted).

The plain language of § 1129(a)(10) requires the per plan approach. Section 1129(a)(10) states that "at least one" impaired class must approve "the plan," and does not mention debtors:

> (a) The court shall confirm a plan only if all of the following requirements are met . . . (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 U.S.C. § 1129(a)(10). Of the classes of claims impaired under a given plan, only one of them must approve the plan to satisfy § 1129(a)(10), regardless of the number of debtors involved. *See In re Transwest Resort Props., Inc.*, 881 F.3d 724 at 729.

Had Congress wished to make the number of debtors involved material to satisfying § 1129(a)(10), it would have mentioned debtors in the provision's text. *See In re Transwest Resort Props., Inc.*, 881 F.3d at 729. It could have written the statute as the court below wishes to interpret it: "If a class of claims is impaired under the plan, at least one class of claims *of each debtor* that is impaired under the plan has accepted the plan . . . ." *See* R. at 27 (Jones, C.J.,

---

per debtor approach in *Woodbridge* and *JER/Jameson* is dicta. In *Woodbridge*, the court held that acceptance by a single impaired class satisfied § 1129(a)(10), as the plan provided for substantive consolidation. 592 B.R. at 778. In *JER/Jameson*, the court dismissed the debtors' reorganization plan for lack of good faith. 461 B.R. at 304. It based its determination on several factors, one of which was that the debtors did not have an impaired accepting class of claims for each debtor. *Id.* at 302.

dissenting). Instead, the plain language of § 1129(a)(10) only mentions plans and impaired classes as relevant factors for analysis. Given these textual constraints, the per plan approach is the only valid interpretation of § 1129(a)(10).

The Thirteenth Circuit tacitly recognizes that the text of § 1129(a)(10) does not support the per debtor approach. In its discussion of the statute's plain meaning, the majority below avoids analyzing the statue's unadulterated text. R. at 19. Instead, to prevent the statue's language from immediately foreclosing the per debtor approach, the majority invents a legal fiction of multiple, hypothetical plans and then uses the rule in § 102(7) that "the singular includes the plural" to make § 1129(a)(10) compatible with its creation. *Id.*

The Thirteenth Circuit states that, in jointly administrated proceedings where one plan applies to multiple debtors and does not substantively consolidate them, there is not one plan, but one plan per debtor. In the court's own words, "[b]ecause the Debtors were not substantively consolidated, the Plan actually consists of ten different plans, one for each of the Debtors." R. at 19. The majority below needs this legal fiction to save the per debtor approach from the plain language of § 1129(a)(10). If one plan governs multiple debtors, § 1129(a)(10) simply requires that one class impaired under *the* plan to accept *the* plan. *See In re Transwest Resort Props., Inc.*, 881 F.3d at 729.

The majority below forms multiple plans out of whole cloth, despite the fact that only one plan was ever filed with the court. This theory has no textual basis and is nonsensical. If debtors truly had their own separate plans, each debtor would be able to proceed with its plan whether or not the other debtors confirmed theirs. *See* Alexander J. Gacos, *Reconciling the "Per-Plan" Approach to 11 U.S.C. S 1129(a)(10) with Substantive Consolidation Principles Under in Re Owens Corning*, 14 Seton Hall Circuit Rev. 295, 312 (2018). Since the plans are not truly

separate, however, any debtor without an impaired accepting class would have to be excluded from the plan. *See In re Tribune Co.*, 464 B.R. at 184 ("[A] plan proponent could, in light of objections to a proposed 'per plan' scheme, drop from a proposed joint plan those debtors that do not or cannot meet the § 1129(a)(10) requirement.").

To make § 1129(a)(10) compatible with its legal fiction, the court below invokes the canon of construction in § 102(7) that "the singular includes the plural." R. at 19. To avoid the reality that separate plans do not exist for each debtor, "section 1129(a)(10) must be read, *as section 102(7) allows it to be*, to require the use of the *per debtor* approach." *Id.* (first emphasis added). The Thirteenth Circuit's invocation of § 102(7) reveals the fictionality of its one-plan-per-debtor invention. If there were one plan per debtor, then the confirmation requirements in § 1129 would apply to each plan separately, and there would be no need to pluralize "plans" in § 1129(a)(10).

Even after making "the singular include the plural" in § 1129(a)(10), the per plan approach still prevails.[4] Altering § 1129(a)(10) to pluralize both "class" and "plan," the modified section would read: "If classes of claims are impaired under the plans, at least one of the classes of claims that are impaired under the plans have accepted the plans . . . ." Here, there are multiple classes of claims that could be impaired by multiple plans, which provides no information about the mapping between classes and plans. Regardless, it does reiterate that § 1129(a)(10) is satisfied so long as one of the impaired classes accepts whichever plan impairs it. *See* R. at 28. On its face, the modified section cannot be read to support the per debtor approach.

[4] Excluding "insider," there are two singular nouns in § 1129(a)(10): "class" and "plan." Therefore, there are three possible applications of the rule that the singular includes the plural: to make "class" plural, to make "plan" plural, or to make both "class" and "plan" plural. It is worth examining all three options since neither the opinion below nor the opinion it relies on explain which permutation allegedly supports the per debtor approach. R. at 19 (citing *In re Tribune Co.*, 464 B.R. at 182).

If § 102(7) is inconsistently applied to "class" but not "plan," the statute reads: "If classes of claims are impaired under the plan, at least one of the classes of claims that are impaired under the plan have accepted the plan . . . ." The meaning of this rephrasing is identical to the statute's plain meaning, which supports the per plan approach. If § 102(7) is applied to "plan" but not "class," § 1129(a)(10) reads: "If a class of claims is impaired under the plans, at least one class of claims that is impaired under the plans has accepted the plans . . . ." This phrasing is also consistent with the per plan approach, as it is still the case that only one impaired class need accept the plan that impairs it. *See In re Transwest Resort Props., Inc.*, 881 F.3d at 730. Given that none of these interpretations supports the per debtor approach, the Thirteenth Circuit's reliance on § 102(7) to support its per debtor position fails.

B. Reading § 1129(a)(10) in its statutory context does not support the per debtor approach.

To the extent that this Court finds § 1129(a)(10) ambiguous, it may examine the provision's words or phrases in the context of "the overall statutory scheme." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (internal citations omitted). Whether examined in isolation or in context, however, the meaning of § 1129(a)(10) is the same. The surrounding statutory provisions do not foreclose the per plan approach—they support it.

Four subsections are typically cited as supporting the per debtor approach: 11 U.S.C. § 1129(a)(1) ("The plan complies with the applicable provisions of this title."); 11 U.S.C. § 1129(a)(3) ("The plan has been proposed in good faith and not by any means forbidden by law."); 11 U.S.C. § 1129(a)(7) (best interest of creditors requirement); and 11 U.S.C. § 1129(a)(8) (acceptance by all impaired classes). *See, e.g.*, *In re Tribune Co.*, 464 B.R. at 183. Proponents of the per debtor approach argue that § 1129(a)(10) requires an approving impaired class from each debtor because §§ 1129(a)(1) and (3) cannot be satisfied unless every debtor

satisfies them, and §§ 1129(a)(7) and (8)'s requirements cannot be met unless each impaired class of every debtor satisfies them as well. *Id.* Not so.

The subsections surrounding § 1129(a)(10) do not mandate the per plan approach for two reasons. First, § 1129(a)(10) need not be interpreted on a per debtor basis simply because surrounding sections are so interpreted. *See Pittsburgh & Lake Erie R.R. Co. v. Ry. Labor Executives' Ass'n*, 491 U.S. 490, 492 (1989) (citation omitted) ("[W]e are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."). Second, neither §§ 1129(a)(1), (3), (7), nor (8) mention debtors, and even where they require some measure of debtor compliance, they do not conflict with a per plan interpretation of § 1129(a)(10). *See In re Transwest Resort Props., Inc.*, 881 F.3d at 730.

Section 1129(a)(1) is a per plan requirement. It states that "(a) [t]he court shall confirm a plan only if . . . (1) [t]he plan complies with the applicable provisions of this title." 11 U.S.C. 1129(a)(1). This section requires courts to determine compliance with § 1129(a)(1) by analyzing the plan, not debtors. *See, e.g.*, *In re W.R. Grace & Co.*, 729 F.3d 311, 319 (3d Cir. 2013). *See generally* 7 Collier on Bankruptcy ¶ 1129.02[1] (16th 2019) ("The legislative history suggests that the applicable provisions [referenced in § 1129(a)(1)] are those governing the plan's internal structure and drafting.").

Applying § 1129(a)(1) on a per debtor basis would make § 1129(a)(2) mere surplusage, which violates a longstanding rule of statutory construction, *Hibbs v. Winn*, 542 U.S. 88, 89 (2004) ("[T]he rule against superfluities instructs courts to interpret a statute to effectuate all its provisions . . . ."). Section 1129(a)(2) states that "(a) [t]he court shall confirm a plan only if . . . [t]he proponent of the plan complies with the applicable provisions of this title." 11 U.S.C. §

1129(a)(2). It is the analogous provision to § 1129(a)(1), but it applies to proponents of plans instead of plan features. *See, e.g.*, *In re PWS Holding Corp.*, 228 F.3d 224, 243, 248 (3d Cir. 2000) (examining plan compliance under § 1129(a)(1) and debtor compliance under § 1129(a)(2)); *In re Armstrong World Indus., Inc.*, 348 B.R. 136, 163 (D. Del. 2006) (same). *See generally* 7 Collier on Bankruptcy ¶ 1129.02[2] (16th 2019) ("Where section 1129(a)(1) focuses on the form and content of the actual plan, section 1129(a)(2) focuses on the activities of the plan proponent."). If § 1129(a)(1) applied to debtors as well as to plan features, then § 1129(a)(2)—another section covering debtors—would be unnecessary.

Though § 1129(a)(2) may apply to some debtors, it is not a per debtor requirement. Rather, it applies to "proponents of plans." 11 U.S.C. § 1129(a)(2). Proponents of plans may be debtors or creditors, 11 U.S.C. § 1121(c), and not all debtors or creditors affected by the plan must be involved in its drafting or proposal.[5] Unlike the per debtor approach to § 1129(a)(10), section § 1129(a)(2) may not apply to any debtor, let alone every debtor.

Section 1129(a)(3) is similar to § 1129(a)(2) because it requires compliance by plan proponents, though courts primarily assess compliance with § 1129(a)(3) based on a plan's content. The provision states, "(a) [t]he court shall confirm a plan only if . . . (3) [t]he plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. 1129(a)(3). Interpretations of the good faith requirement focus on whether the plan's intent, which derives from the proponent's intent, fit with the Bankruptcy Code's objectives. *See* 7 Collier on Bankruptcy ¶ 1129.02[3] (16th 2019).

In practice, discerning the plan's intent depends on "the plan itself and whether such plan

[5] It would be illogical to argue that § 1129(a)(2) is not surplusage under the per debtor view of § 1129(a)(1) simply because it applies to creditors and § 1129(a)(1) does not. If, as the court below states, § 1129(a)(1) applies to debtors because it cannot be satisfied if fewer than all debtors comply with the Bankruptcy Code, R. at 19, then it follows that § 1129(a)(1) could not be satisfied if fewer than all creditors complied with the Bankruptcy Code.

will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code." *In re Madison Hotel Assocs.*, 749 F.2d 410, 425 (7th Cir. 1984) (overturning *In re Madison Hotel Assocs.*, 29 B.R. 1003, 1009 (W.D. Wis. 1983)), which construed the good faith requirement as "requir[ing] the bankruptcy court to evaluate the debtor's pre-filing conduct as well as the feasibility of the plan itself."). *See also In re Sylmar Plaza, L.P.*, 314 F.3d 1070, 1074 (9th Cir. 2002) ("A plan is proposed in good faith where it achieves a result consistent with the objectives and purposes of the Code") (internal citation omitted). The case law supports what the text plainly states: § 1129(a)(3) operates on *plan* proponents, not debtors.

Proponents of the per debtor approach also claim that §§ 1129(a)(7) and (8) are per debtor requirements. With regard to § 1129(a)(7), their argument is that if it is not applied on a per debtor basis, then some dissenting creditors will receive less than their hypothetical distribution under liquidation. The plain text suggests otherwise—it applies "with respect to *each* impaired class" of claims or interests. 11 U.S.C. § 1129(a)(7). With regard to § 1129(a)(8), their argument is the same: if it does not apply on a per debtor basis, then some creditor classes will not receive the protection of § 1129(a)(8). Again, this argument fails because the text of the statute requires the approval of each class or each impaired class. Under the per plan approach, no creditors can avoid the scrutiny of §§ 1129(a)(7) or (8), regardless of who their debtors are.

C. The per plan approach does not violate Under My Thumb's substantive rights.

The Thirteenth Circuit argues that the per plan approach results in jointly administered cases being *de facto* substantively consolidated because a single plan cannot reorganize multiple debtors without implicating substantive creditor rights under § 1129(a)(10).[6] R. at 17-21. It

[6] *De facto* substantive consolidation occurs when a jointly administered, multi-debtor plan impacts the substantive, as opposed to the procedural, rights of the parties without the court engaging in the proper fact-intensive inquiry. R. at 20.

grounds its support for the per plan approach in the misguided notion that § 1129(a)(10) grants each creditor a substantive voting right, and then fabricates multiple, hypothetical plans for each debtor to avoid impairing this right. *Id*. When § 1129(a)(10) is properly understood, however, this extra-statutory construction is unnecessary. Jointly administered multi-debtor plans do not abrogate § 1129(a)(10) rights, which makes the Thirteenth Circuit's textual gymnastics unnecessary. In any case, *de facto* substantive consolidation and creditor voting rights were not raised on appeal, and thus are not before this Court.

Joint administration without substantive consolidation is only cause for concern if it affects substantive rights, and courts dispute whether § 1129(a)(10) implicates a substantive right at all. *See In re Rhead*, 179 B.R. 169, 177 (Bankr. D. Ariz. 1995) ("Section 1129(a)(10) is a technical requirement for confirmation. It is an obligation for the proponent to fulfill; it is not a substantive right of objecting creditors"); *In re Greystone III Joint Venture*, 102 B.R. 560, 566 (Bankr. W.D. Tex. 1989) (contrasting "the stringent requirements of cram-down imposed by Section 1129(b)" with the "hyper-technical (and largely impractical) requirements of Section 1129(a)(10)."). If § 1129(a)(10) is merely a technical requirement, rather than a substantive right, then its violation would not result in *de facto* substantive consolidation. However, this Court need not decide whether the right granted under § 1129(a)(10) is substantive or procedural; the per plan approach does not violate any form of the right granted under § 1129(a)(10).

Whatever the nature of the right protected by § 1129(a)(10), it does not guarantee creditor voting rights, as the majority below implies. Section 1129(a)(10) promises creditors nothing more than that a plan confirmed over their objection will have been accepted by "at least one class of creditors impaired under that plan." 11 U.S.C. § 1129(a)(10). The Plan respects the right granted in § 1129(a)(10), as it has "some indicia of support . . . by affected creditors" in both

letter and spirit. *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 243-44 (3d Cir. 2004) (citations omitted). In fact, the Plan has the support of nearly all creditors. R. at 8. Any allegation that the Plan abrogates the right granted by § 1129(a)(10) is not supported by facts and mischaracterizes the law. Moreover, any allegation that the Plan affects creditor voting rights should be raised under 11 U.S.C. § 1126(a), where Congress granted creditors the right to vote for or against a plan. Under My Thumb never claimed that it was deprived of § 1126 voting rights. That issue is, therefore, not properly before this Court.

The Thirteenth Circuit's view of § 1129(a)(10) effectively provides creditors like Under My Thumb with the right to unilaterally veto plan proposals. This view of § 1129(a)(10) is untenable. The majority below recognizes that "section 1129(a)(10) was included in the Bankruptcy Code in part to *encourage* consensus in the reorganization process." R. at 16 (emphasis added). It should also recognize that Congress never *required* consensus, which is why cramdown under § 1129(b)(1) replaces § 1129(a)(8)'s requirement of approval by all impaired classes under a plan with § 1129(a)(10)'s less stringent requirements. If Congress had intended § 1129(a)(10) to grant each impaired creditor the right to unilaterally veto a plan of reorganization, it could have said so when it amended § 1129(a)(10) five years after its initial adoption. *See* Pub. L. No. 98-353, § 512(a)(9) (1984) (adding the requirement to § 1129(a)(10) that the approving class be impaired).

If Under My Thumb had concerns that jointly administering this case creates *de facto* substantive consolidation, then it should have raised those concerns at the joint administration order. The majority below notes that "[j]oint administration cannot be used to bypass the necessarily rigorous requirements for substantive consolidation[,]" citing Bankruptcy Rule 1015(b)'s instructions to bankruptcy judges to "give consideration to protecting creditors of

different estates against potential conflicts of interest[]" for support. R. at 20; Fed. R. Bankr. P. 1015(b). But Rule 1015(b) instructs bankruptcy judges to give consideration to protecting creditors *prior* to ordering joint administration. There is no evidence or allegation that the bankruptcy court's consideration of creditor protection was deficient when it ordered joint administration. In any event, Under My Thumb never objected to the order, or at least did not raise the issue of *de facto* substantial consolidation on appeal. This Court should not contort the plain text of the Code to avoid an issue that was not properly raised. *See In re Transwest Resort Props., Inc.*, 881 F.3d 731-34 (Friedland, C.J., concurring).

To the extent that the court below was concerned that the per plan approach weakens creditor protections, it should have recognized that Congress did not hang creditors out to dry in Chapter 11. In fact, the Code contains many protections for creditors. *See, e.g.*, 11 U.S.C. § 1129(a)(1) (requiring plans to comply with the Code); 11 U.S.C. § 1129(a)(2) (requiring plan proponents to comply with the Code); 11 U.S.C. § 1129(a)(3) (requiring plans be made in good faith), 11 U.S.C. § 1129(a)(7) (the "best interests" test); 11 U.S.C. § 1129(b)(1) (requiring plans confirmed over objecting creditors to be "fair and equitable" to such creditors). Under My Thumb declined to object to Tumbling Dice's plan under any of these sections, and for good reason: "With its Agreement being assumed, and its distribution on account of its unsecured claim greatly exceeding the value of Development's assets, Under My Thumb initially viewed the Plan favorably." R. at 7.

Under My Thumb's rights have not been violated and the interests it seeks to protect are not cognizable policy objectives of the Code. Its concerns do not relate to the plan's likelihood of success, the size of its distribution, its treatment *vis-à-vis* other creditors, or any other interest recognized and protected by the Code. Rather, Under My Thumb aims to sink the plan it once

supported in order to thwart a competitor's investment. The Code does not permit creditors to co-opt a bankrupt debtor's reorganization for their own commercial purposes. Neither should this Court.

CONCLUSION

This Court should reverse the decision below.

Respectfully submitted,

TEAM NUMBER 54
Counsel of Record for Petitioners

January 21, 2020

APPENDIX

TABLE OF CONTENTS

11 U.S.C. § 102. Rules of construction

(1) [Omitted.]

(2) [Omitted.]

(3) [Omitted.]

(4) [Omitted.]

(5) [Omitted.]

(6) [Omitted.]

(7) the singular includes the plural;

(8) [Omitted.]

(9) [Omitted.]

11 U.S.C. § 365. 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.

(b)

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

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

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

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

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

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

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

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

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

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

(A) [Omitted.]

(B) [Omitted.]

(C) [Omitted.]

(D) [Omitted.]

(4) [Omitted.]

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

(1)

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

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

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

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

(d)

(1) [Omitted.]

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

(3) [Omitted.]

(4) [Omitted.]

(5) [Omitted.]

(e)

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

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

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

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

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

(A)

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

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

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

(f)

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

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

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

> **(B)** adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.
>
> **(3)** Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) [Omitted.]

(h) [Omitted.]

(i) [Omitted.]

(j) [Omitted.]

(k) [Omitted.]

(l) [Omitted.]

(m) [Omitted.]

(n) [Omitted.]

(o) [Omitted.]

(p) [Omitted.]

11 U.S.C. § 1107. 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) [Omitted.]

11 U.S.C. § 1121. Who may file a plan

(a) [Omitted.]

(b) [Omitted.]

(c) Any party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may file a plan if and only if—

> **(1)** a trustee has been appointed under this chapter;
>
> **(2)** the debtor has not filed a plan before 120 days after the date of the order for relief under this chapter; or
>
> **(3)** the debtor has not filed a plan that has been accepted, before 180 days after the date of the order for relief under this chapter, by each class of claims or interests that is impaired under the plan.

(d) [Omitted.]

(e) [Omitted.]

11 U.S.C. § 1129. 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.

(b)

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

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

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

(i)

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

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

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

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

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

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

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

estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

(C) With respect to a class of interests—

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

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

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

(d) [Omitted.]

(e) [Omitted.]

Fed. R. Bankr. P. 1015(b). Consolidation or Joint Administration of Cases Pending in the Same Court

(a) CASES INVOLVING SAME DEBTOR. If two or more petitions by, regarding, or against the same debtor are pending in the same court, the court may order consolidation of the cases.

(b) CASES INVOLVING TWO OR MORE RELATED DEBTORS. If a joint petition or two or more petitions are pending in the same court by or against (1) spouses, or (2) a partnership and one or more of its general partners, or (3) two or more general partners, or (4) a debtor and an affiliate, the court may order a joint administration of the estates. Prior to entering an order the court shall give consideration to protecting creditors of different estates against potential conflicts of interest. An order directing joint administration of individual cases of spouses shall, if one spouse has elected the exemptions under §522(b)(2) of the Code and the other has elected the exemptions under §522(b)(3), fix a reasonable time within which either may amend the election so that both shall have elected the same exemptions. The order shall notify the debtors that unless they elect the same exemptions within the time fixed by the court, they will be deemed to have elected the exemptions provided by §522(b)(2).

(c) [Omitted.]