NO. 18-0918

IN THE

Supreme Court of the United States

OCTOBER TERM, 2019

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

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

V.

UNDER MY THUMB, INC., RESPONDENT.

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

BRIEF FOR PETITIONER

TEAM P8

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

1. Does 11 U.S.C. § 365(c)(1) permit a debtor in possession to assume an executory contract over a non-debtor's objections when applicable law would excuse the non-debtor party from rendering performance to a party other than the debtor or debtor in possession?

2. In confirming a joint, multi-debtor reorganization plan, does 11 U.S.C. § 1129(a)(10) require acceptance from only a minimum of one impaired class of claims under the plan, or acceptance from one impaired class of claims of each debtor under the plan?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW viii

STATEMENT OF JURISDICTION viii

STATUTORY PROVISIONS viii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 7

I. SECTION 365(C) AUTHORIZES A DEBTOR IN POSSESSION TO ASSUME NON-EXCLUSIVE LICENSES. 7
- A. Section 365 Exists as a Means of Allowing Reorganizing Businesses to Succeed 7
- B. The Plain Language of § 365(c) Demands Adopting the "Actual Test." 9
  - *1. The plain language of § 365(c)(1) limits only the trustee's ability to assume or assign executory contracts* 9
  - *2. Where performance is being rendered to the debtor in possession, § 365(c)(1) has no effect* 13
  - *3. The "hypothetical test" violates the rule against surplusage* 15
- C. The "Actual Test" Is Consistent With the Legislative History of § 365(c). 16
- D. The "Actual Test" Best Effectuates the Purposes of § 365 and Chapter 11. 19

II. CLASS ACCEPTANCE UNDER § 1129(A)(10) SHOULD BE DETERMINED ON A PER PLAN BASIS 22
- A. The Plain Language of § 1129(a)(10) Requires Analyzing Plan Approval on a "Per Plan" Basis. 23
  - *1. The plain language of § 1129(a)(10) does not require "per-debtor" approval* 23
  - *2. The bankruptcy rules of construction, and particularly § 102(7), do not alter the plain meaning of § 1129(a)(10) to require "per debtor" approval* 24
  - *3. The "per plan" approach has widespread approval* 26

B. The "Per Plan" Approach to § 1129(a)(10) Is Compatible With the Remaining Requirements In § 1129(a) 26
C. The "Per Plan" Approach Does Not Result In Substantive Consolidation and Is More Consistent With Joint Administration 28
1. The "per plan" approach does not result in de facto substantive consolidation, nor does it violate principles of entity separateness 28
2. The "per plan" approach is more consistent with joint administration of bankruptcy estates 31
D. Section 1129(a)(10) Is Purely a Technical Requirement for Plan Confirmation That Does Not Provide Substantive Protections to Creditors. 32
E. The Goals Behind Chapter 11 Reorganization Plans Are Better Advanced by the "Per Plan" Approach. 34

CONCLUSION 35

APPENDIX A I

APPENDIX B II

APPENDIX C III

APPENDIX D V

APPENDIX E VI

APPENDIX F VII

APPENDIX G VIII

APPENDIX H IX

APPENDIX I X

APPENDIX J XI

APPENDIX K XII

TABLE OF AUTHORITIES

CASES Page(s)

Bates v. U.S.,
522 U.S. 23 (1997) 23, 25

Connecticut Nat'l Bank v. Germain,
503 U.S. 249 (1992) 10

Duncan v. Walker,
533 U.S. 167 (2001) 13, 14, 15, 16

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,
530 U.S. 1 (2000) 25

Alexander v. Compton (*In re Bonham*),
229 F.3d 750 (9th Cir. 2000) 29, 30, 31

Bunker v. Peyton (In re Bunker),
312 F.3d 145 (4th Cir. 2002) 29, 30

F.D.I.C. v. Colonial Realty Co.,
966 F.2d 57 (2nd Cir. 1992) 30

Genesis Health Ventures, Inc. v. Stapleton (In re Genesis Health Ventures, Inc.),
402 F.3d 416 (3d Cir. 2005) 29

In re Augie/Restivo Baking Co., Ltd.,
860 F.2d 515 (2nd Cir. 1988) 29, 30

In re Auto–Train Corp.,
810 F.2d 270 (D.C. Cir. 1987) 30

In re Cardinal Indus.,
116 B.R. 964 (Bankr. S.D. Ohio 1990) 13, 15, 20

In re Catapult Entm't, Inc.,
165 F.3d 747 (9th Cir. 1999) 9, 14, 15

In re Chateaugay Corp.,
10 F.3d 944 (2d Cir. 1993) 8, 11

In re Combustion Eng'g, Inc.,
391 F.3d 190 (3d Cir. 2004) 31, 34

In re Cybergenics Corp.,
226 F.3d 237 (3d Cir. 2000) 10

In re Enron Corp., No. 01-16034,
2004 Bankr. LEXIS 2549 (Bankr. S.D.N.Y. July 15, 2004) 26

In re Footstar, Inc.,
323 B.R. 566 (Bankr. S.D.N.Y. 2005) 10, 11, 12

In re Hartec Enters., Inc.,
117 B.R. 865 (Bankr. W.D. Tex. 1990) 20

In re JER/Jameson Mezz Borrower II, LLC,
461 B.R. 293 (Bankr. D. Del. 2011) 26

CASES—CONTINUED:

In re Johnston,
21 F.3d 323 (9th Cir. 1994) 27
In re LOOP 76, LLC,
442 B.R. 713 (Bankr. D. Ariz. 2010) 34
In re Mirant Corp.,
440 F.3d 238 (5th Cir. 2006) 8
In re Owens Corning,
419 F.3d 195 (3rd Cir. 2005) 29, 30, 31
In re Rhead,
179 B.R. 169 (Bankr. D. Ariz. 1995) 31, 32
In re SGPA, Inc., No. 01-02609,
2001 WL 34750646 (Bankr. M.D. Pa. Sept. 28, 2001) 26
In re Trenton Ridge Investors, LLC,
461 B.R. 440 (Bankr. S.D.Ohio 2011) 27
In re Tribune Co.,
464 B.R. 126 (Bankr. D. Del. 2011) 24, 26
In re Woodbridge Grp. of Cos., LLC,
592 B.R. 761 (Bankr. D. Del. 2018) 26
In re: Transwest Resort Properties, Inc. ("Transwest II"),
554 B.R. 894 (D.Ariz. 2016) 26
Institut Pasteur v. Cambridge Biotech Corp.,
104 F.3d 489 (1st Cir. 1997) 8, 16, 20
JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (In re Transwest Resort Props., Inc.) ("Transwest III"),
881 F.3d 724 (9th Cir. 2018) .... Passim
JPMorgan Chase Bank, N.A. v. Charter Commc'ns Operating, LLC (In re Charter Commc'ns),
419 B.R. 221 (Bankr. S.D.N.Y. 2009) 26
Lamie v. U.S. Trustee,
540 U.S. 526 (2004) 23
Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,
523 U.S. 26 (1998) 31
Michigan v. Bay Mills Indian Community,
572 U.S. 782 (2014) 23
Morton v. Mancari,
417 U.S. 535 (1974) 27, 28
N.C.P. Mktg. Grp., Inc. v. BG Star,
556 U.S. 1145 (2009) 7, 9, 17, 20
N.L.R.B. v. Bildisco & Bildisco,
465 U.S. 513 (1984) 11, 14, 20, 22
RadLAX Gateway Hotel, LLC v. Amalgamated Bank,
566 U.S. 639 (2012) 27
Ransom v. FIA Card Services, N. A.,
562 U.S. 61 (2011) 23

CASES—CONTINUED:

Reider v. Fed. Deposit Ins. Corp. (In re Reider),
31 F.3d 1102 (11th Cir. 1994) 30
Rowland v. California Men's Colony, Unit II Men's Advisory Council,
506 U.S. 194 (1993) 12
Summit Inv. & Dev. Corp. v. Leroux,
69 F.3d 608 (1st Cir. 1995) .... Passim
Tapia v. United States,
564 U.S. 319 (2011) 16
Toibb v. Radloff,
501 U.S. 157 (1991) 22, 23
TRW Inc. v. Andrews,
534 U.S. 19 (2001) 15, 16
United States v. Hoang,
636 F.3d 677 (5th Cir. 2011) 17
United States v. Hubbard,
480 F.3d 341 (5th Cir. 2007) 12, 13
United States v. Monsanto,
491 U.S. 600 (1989) 17
United States v. Ron Pair Enterprises, Inc.,
489 U.S. 235 (1989) 16
Von Weise v. Comm'r of Internal Revenue,
69 F.2d 439 (8th Cir. 1934) 12, 13
Waggoner v. Gonzales,
488 F.3d 632 (5th Cir. 2007) 12

STATUTES

11 U.S.C. 1124(1) 22
11 U.S.C. § 102 25
11 U.S.C. § 102(7) 24, 25, 26
11 U.S.C. §§ 323(a) 11
11 U.S.C. § 365(a) 7, 8
11 U.S.C. § 365(c) .... Passim
11 U.S.C. § 365(c)(1) .... Passim
11 U.S.C. § 365(e)(1) 21
11 U.S.C. § 365(e)(2) 8
11 U.S.C. § 365(f)(2)(A) 15
11 U.S.C. § 1107 10
11 U.S.C. § 1107(a) 7, 10
11 U.S.C. § 1123(a)(5)(C) 29
11 U.S.C. §§ 1129(a)(1), (3) 28
11 U.S.C. § 1129(a)(7) 32, 33
11 U.S.C. § 1129 (a)(8) 27, 28
11 U.S.C. § 1129(a)(10) .... Passim
11 U.S.C. § 1129(b) 33

STATUTES—CONTINUED:

11 U.S.C. § 1129(b)(1) 27, 28

RULES

Federal Rule of Bankruptcy Procedure 1015 29

LEGISLATIVE DOCUMENTS

95 P.L. 598, 92 Stat. 2549 (1978) 19
Fed. R. Bankr. P. § 1015 advisory committee's notes 29, 30
H.R. Rep. No. 95-595 23
H.R. Rep. No. 96-1195, at 12 19
H.R. Rep. No. 96-1195, at 55 .... 18, 19
H.R. Rep. No. 96-1195, at 57 17
Pub. L. No. 95-598, 92 Stat. 2549, § 365(c)(1) (1978) 17
Pub. L. No. 98-353, 98 Stat. 333, § 365(c) (1984) 18
Pub. L. No. 99-554, 100 Stat. 3088, § 283 19
S.Rep. No. 989, 95th Cong., 2d Sess. 59 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5845). 21

OTHER AUTHORITIES

3 COLLIER ON BANKRUPTCY ¶ 365.07(i) (16th ed. 2019) 13
3 COLLIER ON BANKRUPTCY ¶ 365.07(ii) (16th ed. 2019) 19
3 COLLIER ON BANKRUPTCY ¶ 365.07(d) (16th ed. 2019) 20

OPINIONS BELOW

The Bankruptcy Court overruled Under My Thumb's objections to the Plan under 11 U.S.C. § 365(c)(1) and 11 U.S.C. § 1129(a)(10) and confirmed the Plan. R. at 8. Under My Thumb then appealed this decision to the Bankruptcy Appellate Panel for the United States Court of Appeals for the Thirteenth Circuit. R. at 9. The Bankruptcy Appellate Panel affirmed the Bankruptcy Court on both issues. R. at 9. Under My Thumb then appealed to the United States Court of Appeals for the Thirteenth Circuit. R. at 3. The Thirteenth Circuit reversed and Under My Thumb prevailed on both issues, allowing their objections to the Plan to be upheld. R. at 3. The Supreme Court of the United States has now granted certiorari and the Thirteenth Circuit's opinion has been reproduced as the record in this appeal.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

The relevant statutory provisions are listed below. The text of each provision is reproduced in Appendices A through K.

11 U.S.C. § 102 (2018)

11 U.S.C. § 105(a) (2018)

11 U.S.C. § 323 (2018)

11 U.S.C. § 365(a) (2018)

11 U.S.C. § 365(c) (2018)

11 U.S.C. § 365(e) (2018)

11 U.S.C. § 365(f) (2018)

11 U.S.C. § 1015(b) (2018)

11 U.S.C. § 1101(1) (2018)

11 U.S.C. § 1107(a) (2018)

11 U.S.C. § 1123(a) (2018)

11 U.S.C. § 1124 (2018)

11 U.S.C § 1129(a) (2018)

11 U.S.C § 1129(b) (2018)

STATEMENT OF THE CASE

Pre-petition

The Debtors' Bankruptcy Case is being held captive by a single creditor with an unreasonable and unwarranted amount of power. Tumbling Dice, Inc. and its affiliated entities ("the Debtors") are the owners and operators of eight casino and resort properties throughout the United States. R. at 4. Tumbling Dice operates as a holding company of the Debtors. *Id*. One debtor-subsidiary, Tumbling Dice Development ("Development"), contracted with Under My Thumb ("UMT") to modernize and create a software for its loyalty program, Club Satisfaction. *Id.*

The purchase of the software was financed through a $7 million promissory note. *Id.* In exchange for the promissory note, under which Development agreed to pay a monthly fee based on the profits of Club Satisfaction, UMT developed the new software and granted a license extending the benefits of the software agreement to "affiliated entities" of the Development (the "Agreement"). R. at 4–5. Once in place, the new loyalty program was enormously successful and generated high revenue for both the Debtors and UMT. R. at 5. Both parties agree that the software is an "essential" part of the Debtors' business model. *Id.* In fact, UMT benefited from the software more than it anticipated through additional licensing to other parties and higher-than-expected revenues. R. at 5–6. This profitable arrangement lasted until June of 2015. R. at 6.

In December 2011, Start Me Up, Inc. purchased the stock of Tumbling Dice through a leveraged buyout. *Id*. As a result of this Buyout, the Debtors granted first priority liens in exchange for a loan of $3 billion. *Id*. Eventually this debt load contributed to the Debtors filing for chapter 11 bankruptcy. *Id*.

Post-petition

Upon filing, the Debtors collectively owed $2.8 billion to their various lenders, including more than $6 million to UMT for the promissory note. R. at 6. The Debtors were current on their payments to UMT under the Agreement. *Id.* In pursuit of restructuring or refinancing their debt, the parties negotiated a plan support agreement that was to be jointly administered. R. at 7. Initially, this agreement seemed to please all of the parties involved, including UMT. *Id.* This initial agreement specified that UMT would continue to receive the same revenues as before and honored the full sum of the $6 million still owed to UMT under the promissory note. *Id.* Essentially, UMT would receive the same benefits as it would have before bankruptcy, and certainly received better treatment that it would have under a liquidation plan. *See id.*

However, despite faring the same or better than it would otherwise, UMT voted to reject the Plan. R. at 7–8. UMT changed its mind upon learning that Sympathy For the Devil, a private equity group and competitor to UMT, would be taking 49% ownership of the Debtors. R. at 8. Because UMT was the only creditor to Development, Development had no impaired class of creditors to accept the Plan. *Id*. The Plan otherwise had widespread approval; Tumbling Dice, Inc. and its other subsidiaries each had at least one impaired class of creditors voting to accept the Plan. *Id.*

UMT rejected the Plan on various grounds, including the two issues on appeal. *Id*. The bankruptcy court overruled the objections and held that UMT was merely being required to honor its contract under the same terms it had agreed to pre-petition. R. at 9. Unsatisfied with this reasonable conclusion, UMT appealed and the Thirteenth Circuit eventually reversed the bankruptcy court's decision. *Id.* This resulted in the present

appeal—an appeal considering whether an unprejudiced creditor may weaponize the Bankruptcy Code to terminate an otherwise valid contract.

SUMMARY OF THE ARGUMENT

Section 365 of the Bankruptcy Code exists to ensure that debtors plunged into bankruptcy are empowered to assume their pre-petition contracts and continue their operations. These assumed contracts are often essential to the debtor's business and can be the difference between a successful reorganization and liquidation. Currently, courts are split as to whether § 365(c) bars assumption of an executory contract when the DIP would be barred from assigning the contract but wishes to assume the contract for its own benefit. Under the "actual test," the DIP may assume the executory contract so long as the DIP does not intent to assign the contract. The "hypothetical test," on the other hand, focuses on whether the DIP would be prohibited from assigning the contract under applicable non-bankruptcy law. The plain language of § 365(c), its legislative history, and the underlying purposes of § 365(c) and the Bankruptcy Code as a whole, confirm that the "actual test" should be adopted.

First, the plain language of § 365(c) requires that "actual test" be adopted. The language of § 365(c) refers only to the trustee, not a DIP, so its limitations should only apply to a trustee, not a DIP. This is true despite that the "debtor in possession" and "trustee" are often treated as the same entity. While the trustee and DIP are frequently subject to similar limitations, there is no provision in the Code or elsewhere stating the terms are always interchangeable, particularly in a part of the Code that refers to each of the entities separately throughout its provisions.

Additionally, § 365(c) is meant to protect a creditor from having to render performance to an entity with which it did not originally contract, i.e. an entity other than the debtor. The trustee certainly meets this definition because the trustee is an entirely separate entity. The same would apply to a non-debtor third-party assignee. However, the DIP and debtor are, by definition, the same entity in bankruptcy. Thus, the protection of § 365(c)(1) is not triggered when the DIP seeks to have performance rendered to itself. Attempting to broaden § 365(c)(1) to bar assumption by the DIP violates the idea that the debtor and DIP are the same entity, and conflating the debtor and DIP in an effort to prevent contract assumption would be an absurd result.

Furthermore, adopting the "hypothetical test" would violate the rule against surplusage. Specifically, the language "assume" in § 365(c) would be rendered wholly superfluous by operation of the "hypothetical test." Because § 365(f) requires that a contract must first be assumed before it is assigned, Congress could have simply said that the "trustee may not assign an executory contract if. . ." But Congress did not say that, instead it bifurcated the actions of assumption and assignment. The "hypothetical test," however, presumes that both assumption and assignment will occur, rendering Congress's bifurcation ineffective. Therefore, adopting the "hypothetical test" would eliminate the need for the word "assume" in violation of the rule against surplusage.

Second, the legislative history of § 365(c) confirms that Congress drafted § 365(c)(1) to operate in accordance with the "actual test." Specifically, the original language adopted in 1978, and a series of amendments following the initial enactment of § 365(c) that led to the current statutory, clarify Congress's intent. That intent, expressed clearly in the legislative history of § 365(c), was to prohibit the trustee or assignee from

assuming executory contracts. It is equally clear from the history that Congress did not intend that prohibition to apply to the DIP. In other words, this history implicitly supports an adoption of the "actual test."

Finally, adopting the "actual test" is more consistent with the purposes of chapter 11. Specifically, the purpose of reorganization is to allow debtors to restructure their debt to keep the business afloat, all while paying creditors more than they would receive under chapter 7 liquidation. Here, the "hypothetical test" thwarts those goals. Though only one creditor opposes the Plan, they hold the power to unilaterally end restructuring and likely push the Debtors into liquidation under the "hypothetical test." The "actual test," however, ensures that one disgruntled creditor cannot bring the bankruptcy a halt by shirking duties to which it obligated itself to pre-bankruptcy. Therefore, because adopting the "hypothetical test" is singlehandedly preventing a successful restructuring and is inconsistent with chapter 11 policies, the "actual test" should be adopted.

Section 1129(a)(10) dictates that confirmation should be determined on a "per plan" basis. First, the plain language of § 1129(a)(10) clearly calls for at least one class of impaired claims per plan. The "per debtor" approach impermissibly reads in language that does not exist in the statute, altering its original language and meaning. Further, § 102(7)'s rule of construction "the singular includes the plural" does not alter the plain requirement that only one impaired class of claims is required for confirmation of a plan; in fact, the rule is inapplicable to § 1129(a)(10) in a case such as this where a single joint plan was created for all of the Debtors. Additionally, this plain reading of § 1129(a)(10) in support of the "per plan" approach is more widely adopted than the "per debtor" approach—including by the Ninth Circuit, the only circuit court to rule on the issue.

Second, the "per plan" approach is consistent with the remainder of the language in § 1129(a) because fulfillment of § 1129(a)(10) is necessarily fulfilled by § 1129(a)(8) in a consensual confirmation, and § 1129(a)(8) is omitted in a cramdown scenario. Hence, adopting such an approach does not violate other applicable provisions of the Bankruptcy Code.

Third, the "per plan" approach does not result in substantive consolidation of the Debtors' individual estates. Joint administration of the Debtors' estates is expressly provided for in § 1015. Substantive consolidation, rather, is a judicially created mechanism rooted in equity and meant to be used sparingly. The use of joint administration does not affect the substantive rights of a debtor or its creditors; it is, by design, meant to promote efficiency in bankruptcy proceedings. Further, the "per plan" approach to confirmation of a joint plan does not result in de facto substantive consolidation because it does not involve comingling of assets or claims of the multiple debtors. Hence, the assertion that the "per plan" approach impermissibly violates the principle of entity separateness is in error.

Next, § 1129(a)(10) is a purely technical requirement for plan confirmation. It does not provide substantive rights to objecting creditors. Creditors have multiple other alternatives to dispute a chapter 11 reorganization plan. Specifically, § 1129(a)(7) and § 1129(b) expressly lay out potential objections for creditors who dispute the substance of a reorganization plan, both of which protect them from an inequitable cramdown. Creditors should not be able to resort to creating a technical ambiguity where it does not exist in order to object to an otherwise equitable and confirmable reorganization plan.

Finally, the "per debtor" approach allows a single creditor to hold a perfectly legitimate reorganization plan hostage. The purpose of a business reorganization case is to restructure the business's finances so that it may continue its operations. Allowing one creditor to prevent a plan from being confirmed where at least one similarly situated creditor has approved of the plan– as the statute plainly requires– would thwart the interests of fairness and efficiency that the Bankruptcy Code seeks to promote and would unnecessarily hinder judicial expediency.

ARGUMENT

I. SECTION 365(C) AUTHORIZES A DEBTOR IN POSSESSION TO ASSUME NON-EXCLUSIVE LICENSES.

A business in chapter 11 must be given every opportunity to "reorganize its operations" and "become solvent once more." *N.C.P. Mktg. Grp., Inc. v. BG Star Prods.*, 556 U.S. 1145, 1145 (2009) (Kennedy, J., Statement respecting the denial of certiorari). Congress intended to facilitate these opportunities when it included § 365 in the Bankruptcy Code (the Code), which allows debtors in possession[1] or trustees to assume or assign "executory contracts" necessary to the business's successful operation. 11 U.S.C. § 365(a) (2018). Allowing a DIP to assume non-exclusive intellectual property licenses fulfills this purpose and is consistent with the plain meaning of the statute. *See* 11 U.S.C. § 365(c).

A. Section 365 Exists as a Means of Allowing Reorganizing Businesses to Succeed.

Accessibility to the benefits of § 365 bears directly on the success of a reorganization. Section 365(a) authorizes "the trustee, subject to the court's approval, [to]

[1] In chapter 11, the debtor takes on the title of "debtor in possession." 11 U.S.C. § 1101(1). The debtor in possession, generally, possesses all the rights and powers of a trustee. § 1107(a).

assume or reject any executory contract[2] or unexpired lease of the debtor." 11 U.S.C. § 365(a). This provision affords debtors the power to "force others to continue to do business with it when the bankruptcy filing might otherwise make them reluctant to do so." *In re Chateaugay Corp.*, 10 F.3d 944, 955 (2d Cir. 1993). Without this power, a debtor's attempt to reorganize may be unreasonably impeded by creditors and counterparties wielding protections they were never meant to receive.

The power to "assume or assign" executory contracts is limited by § 365(c), which provides:

> (c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor . . . if—
> (1)(A) applicable law excuses a party, other than the debtor . . . 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). Essentially, where applicable non-bankruptcy law would excuse the performance of the non-debtor party to the contract, the "trustee" may not assume or assign the contract. *Id.*; *see also* R. at 11–12 (describing the operation of the limitation § 365(c)(1)). Yet § 365(c)(1) does not necessarily prevent a DIP from assuming a contract where applicable law would excuse the non-debtor party from rendering performance. Rather, a DIP's power to assume an executory contract under § 365(c)(1) is only limited where the DIP actually intends to assign the contract without the non-debtor party's consent. *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997); *accord In re Mirant Corp.*, 440 F.3d 238, 248 (5th Cir. 2006) (adopting a similar test for purposes of section 365(e)(2)).

[2] UMT does not assert that the license at issue is not "executory contract." R. at 8.

While this “actual test” represents a correct mechanism for interpreting and applying § 365(c)(1), some circuits rely on the a so-called “hypothetical test.” *See N.C.P. Mktg. Grp., Inc.,* 556 U.S. at 1145 (noting the split of authority between the “actual” and “hypothetical” tests). In contrast to the “actual test,” courts applying the “hypothetical test” hold that when the DIP seeks to assume a contract under § 365(c)(1), then that DIP must be treated as though it also seeks to assign the contract to an entity other than the debtor. *See In re Catapult Entm't, Inc.*, 165 F.3d 747, 750 (9th Cir. 1999) (describing the “hypothetical test”). Under the “hypothetical test,” if the DIP would be prohibited from assigning the contract to a hypothetical third-party, then it also prohibited from assuming the contract. *See id.* Thus, even if the DIP has no intention of assigning the contract, the “hypothetical test” precludes assumption. *See id.* However, an application of the “hypothetical test” frustrates Congress’s intended operation of § 365(c)(1) and unmoors it from the statutory language.

Therefore, because the “actual test” is consistent with the plain language, purpose, and legislative history of § 365, it is the correct interpretation of § 365(c)(1). Additionally, the “actual test” is the interpretation that gives a business its best chance to reorganize.

B. The Plain Language of § 365(c) Demands Adopting the “Actual Test.”

Section 365(c) prevents the *trustee* from “assuming or assigning” executory contracts when “applicable law would excuse a party, other than the debtor . . . from rendering performance to an entity *other than the debtor or debtor in possession* . . . .” 11 U.S.C. § 365(c)(1) (emphasis added). Here, there is no trustee and performance would be

rendered to the debtor, not a third-party. R. at 7. Thus, the plain language of § 365(c)(1) confirms that the executory contract at issue is assumable by the debtor.

1. The plain language of § 365(c)(1) limits only the trustee's ability to assume or assign executory contracts.

Section 365(c) explicitly restricts the trustee's ability to "assume or assign" an executory contract but contains no mention of limitations on the DIP. 11 U.S.C. § 365(c). When a statute's language is plain and unambiguous, it is given effect according to its express terms. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). Thus, because Congress has been clear that § 365(c) limits the "trustee['s]" power, Congress meant to limit *only* the trustee's power. *Id.; see also In re Footstar, Inc.,* 323 B.R. 566, 570-71 (Bankr. S.D.N.Y. 2005).

Even though "trustee" and "debtor in possession" are often used interchangeably throughout the Code, it does not follow that "trustee" in § 365(c) is interchangeable with "debtor in possession." Section 1107 is often cited as authorizing the terms "trustee" and "debtor in possession" to be used interchangeably. *See In re Cybergenics Corp.*, 226 F.3d 237, 243 (3d Cir. 2000); *see also* 11 U.S.C. § 1107 (2018). Section 1107 provides that "a debtor in possession shall have all the rights . . . and powers, and shall perform all the functions and duties . . . of a trustee." 11 U.S.C. § 1107(a). However, § 1107 does not expressly require that terms be interchanged, nor does it make the terms synonymous. *See id.*

Section 1107 grants the DIP all the rights of the trustee "[s]ubject to any limitations on a trustee" serving in chapter 11. *Id.* Here, § 365(c) is a limitation on the power of the trustee, which would also limit the DIP. 11 U.S.C. § 365(c); 11 U.S.C. § 1107(a). However, it does not follow that the DIP's power to "assume or assign"

contracts is restricted in the same way a trustee's power to "assume or assign" is restricted. *See, e.g.*, *Footstar*, 323 B.R. at 573–75. After all, while "trustee" and "debtor in possession" are frequently interchanged when the Code is applied, they do not refer to the same entity. *Id.* at 571; *see also* 11 U.S.C. §§ 323(a) (establishing that the trustee is the representative of the estate), 1101(1) (defining "debtor in possession" as the "debtor" except when a trustee is serving), 1107 (imbuing the DIP with all the rights and powers of the "trustee"). The stark distinction between these entities is exemplified when "debtor in possession" is substituted for the term "trustee" in § 365(c)(1).

If the "hypothetical test" were applied to this construction of the statute (where "debtor in possession" is substituted for "trustee"), absurdity would result. The absurdity inherent in this construction of § 365(c)(1) is that the DIP would be prohibited from assuming a contract even though the DIP would be the entity to which the performance would be rendered. In short, the DIP would be barred from compelling the non-debtor party to render performance to the itself. *See Footstar*, 323 B.R. at 573.

Prohibiting a DIP from compelling a non-debtor party to render performance on a contract to the DIP itself cannot be characterized as a logical or sensible construction of § 365(c)(1). After all, the purpose of § 365 is to empower a debtor to force reluctant businesses to continue working with the reorganizing debtor. *Chateaugay Corp.*, 10 F.3d at 955. Additionally, treating the "debtor in possession" as if it were the "trustee" under § 365(c)(1) would undermine a well established characteristic of the DIP: that "the debtor-in-possession [is] the same 'entity' which existed before the filing of the bankruptcy petition, but [is] empowered by virtue of the Bankruptcy Code to deal with its contracts" in a way it could not have pre-bankruptcy. *N.L.R.B. v. Bildisco & Bildisco*, 465

U.S. 513, 528 (1984). Therefore, applying the "hypothetical test" to § 365(c)(1) produces an absurd result by treating the DIP the same as a "trustee," and then ignores the DIP's status as the same entity it was pre-petition. But a statute cannot be interpreted in a way that produces an absurd result. *See Waggoner v. Gonzales*, 488 F.3d 632, 638 (5th Cir. 2007); *accord Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 200 (1993). Consequently, the "hypothetical test" cannot be used to construe § 365(c)(1).

Additionally, this absurdity results only when "debtor in possession" is substituted for "trustee" and the distinction Congress placed in § 365(c) is ignored. *See Footstar*, 323 B.R. at 571 ("[W]hen the Bankruptcy Code refers to both "trustee" and "debtor" (or "debtor in possession") in the same statutory provisions, the two terms are invariably invested with quite different meanings."). The terms "debtor in possession" and "trustee" are both used throughout § 365. *See* 11 U.S.C. § 365(c), (e), (f) (referring the "trustee" and the "debtor" (or "debtor in possession")). While it is true that sometimes "trustee" and "debtor in possession" are interchanged, their use in the same statutory provisions is significant. *See United States v. Hubbard*, 480 F.3d 341, 348 (5th Cir. 2007) (holding that, absent an indication to the contrary, terms in a statute are to be given their "generic" meaning); *Von Weise v. Comm'r of Internal Revenue*, 69 F.2d 439, 441 (8th Cir. 1934) (same). Additionally, Congress did not provide an indication that the terms *should not* be given their "generic" or "definitional" meanings. *Hubbard*, 480 F.3d at 348; *Von Weise*, 69 F.2d at 441. In fact, by using both "debtor in possession" and "trustee" in the same statutory provision, Congress indicated that the terms refer to separate entities and were not meant to be used interchangeably. *Footstar*, 323 B.R. at

571; *accord Hubbard*, 480 F.3d at 348; *Von Weise*, 69 F.2d at 441. Thus, "debtor in possession" cannot be substituted for "trustee" in § 365(c) as the "hypothetical test" requires. Instead, the "actual test" should be adopted because it avoids an absurd result and recognizes the distinction between the DIP and trustee that Congress intended.

2. Where performance is being rendered to the debtor in possession, § 365(c)(1) has no effect.

Even if the terms "debtor in possession" and "trustee" are considered interchangeable, the "actual test" alone gives effect to *all* the language in § 365(c). *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (stating that the court has a duty to "give effect, if possible, to every clause and word" of a statute) (internal citations omitted). Section 365(c)(1) uses the term "applicable law" and refers to a "party other than the debtor or debtor in possession." The purpose of this language is to protect a non-debtor party from having to render performance to a trustee or other third party when they ordinarily would not have to do so under applicable law. 3 COLLIER ON BANKRUPTCY ¶ 365.07(i) (16th ed. 2019).

However, these protections under "applicable law" are inapplicable when the assuming party is the DIP. Congress drafted § 365(c) to indicate that applicable law should protect third parties from rendering performance to parties "other than the debtor or debtor in possession." 11 U.S.C. § 365(c). When the party is a debtor in possession, this protection is not triggered because the party is not "other than the debtor or debtor in possession." *See id.* Had Congress intended to prevent assumption or assignment by the debtor in possession, it could have excluded the phrase "or the debtor in possession" in the statute; a change that would place debtors in possession into the category of third parties "other than the debtor." *In re Cardinal Indus.*, 116 B.R. 964, 979 (Bankr. S.D.

Ohio 1990). Therefore, applying the "hypothetical test" would render the language "or the debtor in possession" in § 365(c)(1) ineffective by erasing the distinction between third parties "other than the debtor or debtor in possession" and the DIP that Congress placed in the statute. *Contra Duncan*, 533 U.S. at 174.

Additionally, this construction of the statute ignores the principle that the debtor and debtor in possession are the same entity. *See Bildisco & Bildisco*, 465 U.S. at 528 (noting that the DIP is the same entity that existed pre-bankruptcy). When the "hypothetical test" is applied, the DIP is prohibited from assuming a contract if it could not *hypothetically* assign the contract to a third-party under "applicable law." *See Catapult Entm't*, 165 F.3d at 750 (describing the "hypothetical test"). However, where the DIP intends to assume the contract, the DIP seeks to have performance rendered to itself, an act that would not trigger the "applicable law" referenced in § 365(c)(1). *Summit Inv.*, 69 F.3d at 613. Applied in this way, the "hypothetical test" would prevent the DIP from assuming the contract; essentially preventing the DIP from having performance rendered to itself. *Catapult Entm't*, 165 F.3d at 750.

Such a result cannot be squared with the language of the statute. Specifically, the "applicable law" clause of the statute would not be triggered when performance *would not* be rendered to a party "other than the debtor or the debtor in possession." *See* 11 U.S.C. § 365(c)(1); *Summit Inv.*, 69 F.3d at 613. Thus, the "hypothetical test," by preventing assumption, improperly renders parts of § 365(c)(1) ineffective by ignoring the clause "or the debtor in possession" and ignoring the DIP's status as the same entity as the debtor. Applied here, UMT does not qualify for the protections of § 365(c)(1) because they are only dealing with Development, the party that they contracted with

under the original agreement. R. at 5. Therefore, Development is not precluded from assuming the contract under § 365(c)(1).

3. The "hypothetical test" violates the rule against surplusage.

Relatedly, applying the "hypothetical test" to § 365(c) renders the word "assume" as surplusage. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (describing the rule against surplusage (citing *Duncan*, 533 U.S. at 174)). The rule against surplusage provides that courts should be "reluctant to treat statutory terms as surplusage in any setting" and should refrain from interpreting statutory language to render parts of a statute "insignificant, if not wholly superfluous." *Id.* (quoting *Duncan*, 533 U.S. at 174). Here, the "hypothetical test" violates the rule against surplusage by rendering a part of § 365(c) wholly superfluous.

A portion of § 365(c) is rendered "wholly superfluous" by the "hypothetical test" because it conflates assumption with assignment in § 365(c). Section 365(f)(2)(A) provides that an executory cannot be assigned unless it is first assumed, or in other words, that assumption is a prerequisite to assignment. 11 U.S.C. § 365(f)(2)(A). The "hypothetical test" precludes a DIP from assuming a contract if it could not be assigned to a *hypothetical* third-party. *Catapult Entm't*, 165 F.3d at 750. By doing so, the "hypothetical test" necessarily presumes that any contract that is assumed will also be assigned. *See id.* This presumption eliminates the need for the distinction made in § 365(c), that a contract may not be "assume[d] or assign[ed]," unless certain conditions are met. *See* 11 U.S.C. § 365(c). *See In re Cardinal Indus.*, 116 B.R. at 977. Thus, in light of § 365(f)(2)(A), all Congress needed to say in § 365(c) to make it consistent with the "hypothetical test" is: The trustee may not *assign* any executory contract. *Id.* But

Congress did not say that; instead, it included "*assume*." *See* 11 U.S.C. § 365(c). Therefore, using the "hypothetical test" to interpret § 365(c) violates the rule against surplusage by rendering the word "assume" as mere surplusage. *TRW*, 534 U.S. at 31.

In contrast, the "actual test" gives effect to both "assume" and "assign." *Duncan*, 533 U.S. at 174. Because the "actual test" requires a determination of whether the DIP actually intends to assign the contract after assuming, it maintains the distinction Congress wrote into the statute. *Institut Pasteur*, 104 F.3d at 493 (stating that the actual test involves a case-by-case inquiry). Under the "actual test," a DIP may "assume" a contract if it does not intend to subsequently assign the contract. *Id.* However, a DIP would be precluded from assigning the contract if "applicable law" excused the counterparty from rendering performance to the intended assignee. 11 U.S.C. § 365(c)(1). These results are consistent with and give effect to all of the words Congress wrote in § 365(c)(1).

Therefore, the plain language of § 365(c) does not preclude Development from assuming the software license because Develop does not *actually* intend to assign the license.

C. The "Actual Test" Is Consistent With the Legislative History of § 365(c).

Not only does the plain language support using the "actual test," so too does the legislative history of § 365(c). Congress expresses its intent through the plain and unambiguous language of the statute. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41 (1989). Here, the plain language of § 365(c) supports using the "actual test" and the legislative history can be used to inform an interpretation of statutory language. *See, e.g., Tapia v. United States*, 564 U.S. 319, 331–32 (2011) (relying on

legislative history to confirm the proper interpretation of a federal sentencing statute); *accord United States v. Monsanto*, 491 U.S. 600, 611 (1989) (noting that legislative history is useful in "close cases" of statutory interpretation). Legislative history is particularly instructive when statutory language is susceptible to multiple interpretations. *United States v. Hoang*, 636 F.3d 677, 682 (5th Cir. 2011). Therefore, the legislative history can be used to aid the interpretation of § 365(c) because of the recognized divergence in its interpretation. *See N.C.P. Mktg. Grp.,* 556 U.S. at 1145 (recognizing the circuit split on the interpretation of § 365(c)).

The legislative history behind § 365(c) unequivocally confirms that a DIP may assume an executory contract consistent with the "actual test." *Summit Inv. & Dev. Corp.*, 69 F.3d at 613. When originally drafted in 1978, the language of § 365(c)(1) barred assumption of an executory contract or lease if applicable law relieved the non-debtor party "from accepting performance from or rendering performance *to the trustee or an assignee of such contract or lease.*" Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, § 365(c)(1) (1978) (emphasis added). By barring assumption only when performance would be rendered to the "trustee or an assignee," Congress inherently endorsed the "actual test." Under this original construction of the statute, a DIP would have only been barred from assuming a contract if the contract were actually assigned to a party, to which the non-debtor party would be excused from rendering performance. Thus, the original version of § 365(c) effectuated the "actual test."

Congress again endorsed the "actual test" when it considered revising § 365(c) as part of the Bankruptcy Technical Correction Act of 1980. H.R. Rep. No. 96-1195, at 57 (1980). This proposed revision would have replaced the term "trustee" with "an entity

other than the debtor or the debtor in possession," the term used today. *Id.* The justification for this revision was to:

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

Id. at 12. Essentially, this proposed revision was intended to clarify that the result of an application of § 365(c) to a DIP should be the same result reached under the present-day "actual test." Thus, the result under this proposed revision would have allowed the DIP to assume an executory contract, absent intent to assign the contract.

While the 1980 proposed revision was not enacted, Congress reaffirmed its endorsement of the "actual test" in 1984. Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984, which revised the language of § 365(c). Pub. L. No. 98-353, 98 Stat. 333, § 365(c) (1984). This 1984 revision of § 365(c)(1) barred assumption of contracts if applicable law excused a party "from accepting performance from or rendering performance to an entity *other than the debtor or the debtor in possession or an assignee* of such contract or lease." *Id.* (emphasis added). This language mirrors that of the proposed-1980 revision, which was meant to clarify that § 365(c)'s prohibition did not apply to a DIP attempting to assume a contract for its own benefit. *Compare* H.R. Rep. No. 96-1195, at 55 (1980), *with* 98 P.L. 353, 98 Stat. 333 (1984).

Finally, in 1986, the present statutory language was adopted, which bars the assumption of an executory contract if applicable law excuses a party "from accepting performance from or rendering performance to *an entity other than the debtor or the debtor in possession.*" *See* Bankruptcy Judges, United States Trustees, and Family

Farmer Bankruptcy Act of 1986*,* Pub. L. No. 99-554, 100 Stat. 3088, § 283 (eliminating "or an assignee of such contract or lease."). However, this revision was not intended to have any more significance than a mere correction of an oversight in the previous revision. 3 COLLIER ON BANKRUPTCY ¶ 365.07(ii) (16th ed. 2019). What is significant about this revision, and the current version of § 365(c), is that the language again mirrors that of the proposed-1980 revision. *Compare* H.R. Rep. No. 96-1195, at 55 (1980), *with* 99 P.L. 554, 100 Stat. 3088 (1986). Therefore, the legislative history of the proposed-1980 revision indicates that Congress intended to effectively write the "actual test" into the statute's subsequent revisions.

Throughout the legislative history of § 365(c)(1), support for the "actual test" is found. In fact, the exact language proposed to clarify that the "prohibition against a trustee's power to assume an executory contract" is inapplicable to DIPs was eventually adopted. H.R. Rep. No. 96-1195, at 12 (1980). From its inception, § 365(c) was intended to ensure that DIPs are authorized to assume executory contracts in chapter 11. 95 P.L. 598, 92 Stat. 2549 (1978); *see also id.* However, using the "hypothetical test" to interpret § 365(c) effectively strangles the DIP's authority to assume executory contracts, and there is nothing in the legislative history to support such a suffocation of authority. Instead, relying on the "hypothetical test" would contravene the stated intent of Congress.

Therefore, the legislative history of § 365(c) confirms that the plain language of the statute demands an application of the "actual test."

D. The "Actual Test" Best Effectuates the Purposes of § 365 and Chapter 11.

Congress's intent to empower a DIP to assume an executory contract like the one at issue in this case is unsurprising given the purpose of § 365 and chapter 11. The

fundamental purpose of chapter 11 reorganization is to "prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." *Bildisco & Bildisco*, 465 U.S. at 528. The hopeful end result is a successfully reorganized and solvent debtor. *N.C.P. Mktg. Grp.*, 556 U.S. at 1145. The rigidity of the "hypothetical test" and its abstract application conflicts with these policy aims by barring a debtor from the benefits of a contract simply because they could not hypothetically assign it to a third party. *See In re Cardinal Indus.*, 116 B.R. at 982 ("[T]he means for reorganization [should not be] taken away because of *ipso facto* bankruptcy termination provisions either in executory contracts or in nonbankruptcy law."); *accord* 3 COLLIER ON BANKRUPTCY ¶ 365.07(d) (16th ed. 2019). Conversely, the "actual test" considers the facts and circumstances of each case to determine whether the contract will *actually* be assigned. *See Institut Pasteur*, 104 F.3d at 493. This approach balances the goals of reorganization with the rights of the non-debtor party for every given contract. *In re Hartec Enters., Inc.*, 117 B.R. 865, 873 (Bankr. W.D. Tex. 1990), *judgment vacated by settlement,* 130 B.R. 929 (W.D. Tex. 1991). The factual situation here is illustrative of the superiority of the "actual test."

Development and UMT contracted for a software license that was essential to Development's business. R. at 6. Development honored the terms of the contract by making the agreed upon monthly payments. R. at 5–6. Upon declaring bankruptcy, Development proposed to continue using the same vital software license so that it could pay its creditors through a reorganization plan and keep its business afloat. R. at 6–7. The original bargain would have been kept in place and both Development and UMT would have received the benefits of their original bargain. *Id.*

However, because Development may have "hypothetically" been barred from assigning the contract to a third party, it could be prevented from assuming a contract that it never breached in or out of bankruptcy. Essentially, the "hypothetical test" allows UMT to unilaterally decide the fate of a reorganization plan simply because Development filed for bankruptcy. This result is not only completely opposed to the policies of bankruptcy, but also directly opposes another section of the Bankruptcy Code.

Specifically, § 365(e)(1)(B) provides that "executory contract . . . may not be terminated . . . solely because of a provision in such contract . . . that is conditioned on . . . the commencement of a case under this title." *See* 11 U.S.C. § 365(e)(1). Section 365(e) essentially preempts the effect *ipso facto* clause that would result in a termination of the executory contract solely because the debtor filed for bankruptcy. *Summit Inv. & Dev.*, 69 F.3d at 610. These clauses are invalidated because they "'frequently hamper rehabilitation efforts' by depriving the chapter 11 estate of valuable property interests at the very time the debtor and the estate need them most." *Id.* (citing S.Rep. No. 989, 95th Cong., 2d Sess. 59 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5845). Here, the "hypothetical test" gives UMT an even greater power than that prohibited by § 365(e). Rather than a provision allowing the termination of a contract upon bankruptcy or insolvency, UMT is being given free rein to terminate the contract for any reason at all after filing, simply because Development may not *hypothetically* assign the contract. This is not only at odds with the purpose of § 365(c) and (e); it could prevent Development from being able to reorganize at all.

Under the "hypothetical test," UMT is essentially been granted what § 365(e) prevents, an *ipso facto* power. While Development entered bankruptcy, the contract will

not be reassigned, and Development is the same entity with which UMT originally contracted. *Bildisco & Bildisco*, 465 U.S. at 528. Yet adopting the "hypothetical test" would grant UMT the ability to rescind a contract it would be required to perform if Development had never entered bankruptcy. Not only does the "hypothetical test" operate as a *de facto ipso facto* clause, it gives UMT the power to create an *ipso facto* clause.

Adopting the "hypothetical test" will give creditors the ability to rescind a contract or hold a restructuring plan hostage simply because of restrictions on a *hypothetical* assignment. To expand the powers of creditors in such a way sets a dangerous precedent and injects uncertainty into both pre-petition contracting and into the restructuring process as a whole. Therefore, the "actual test" should be adopted because it is the test that best serves the purposes of § 365 and chapter 11.

II. CLASS ACCEPTANCE UNDER § 1129(A)(10) SHOULD BE DETERMINED ON A PER PLAN BASIS.

The Plan was properly confirmed in accordance with § 1129(a)(10) through the support of at least one impaired class of creditors. Section 1129(a) of the Bankruptcy Code provides sixteen requirements that must be satisfied for a restructuring plan to be confirmed. *See* 11 U.S.C. § 1129(a). One of these requirements states: "If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by an insider." 11 U.S.C. § 1129(a)(10). An impaired class is one whose legal, equitable, or contractual rights are altered by a plan. *See* 11 U.S.C. 1124(1).

Importantly, "[t]he purpose of a business reorganization case . . . is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders." *Toibb v. Radloff*, 501 U.S.

157, 163-64 (1991); *see also* H.R. Rep. No. 95-595, at 5 (1978), as reprinted in 1978 U.S.C.C.A.N. 5963, 6179. The "per plan" approach reconciles the purpose of business reorganization through the bankruptcy proceedings with optimal procedural efficiency, and should be adopted by this Court.

A. The Plain Language of § 1129(a)(10) Requires Analyzing Plan Approval on a "Per Plan" Basis.

1. The plain language of § 1129(a)(10) does not require "per-debtor" approval.

A proper interpretation of the Bankruptcy Code begins "where all such inquiries must begin: with the language of the statute itself." *Ransom v. FIA Card Services, N. A.*, 562 U.S. 61, 69 (2011). As this Court has stated, "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." *Lamie v. U.S. Trustee,* 540 U.S. 526, 534 (2004). Therefore, where the language of the statute is clear, courts do not add to it in order to read words in that do not appear on its face. *See Bates v. U.S.*, 522 U.S. 23, 29 (1997).

Section 1129(a)(10) is plain and unambiguous on its face and should be interpreted in accordance with its plain and unambiguous language. The section states that "where at least one class of claims that is impaired under the plan has accepted the plan," this procedural requirement for plan confirmation has been fulfilled. *See* 11 U.S.C. § 1129(a)(10). To read in "per debtor" where it does not exist would effectively rewrite the statute, which is solely reserved to Congress. *See JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (In re Transwest Resort Props., Inc.) ("Transwest III")*, 881 F.3d 724, 729 (9th Cir. 2018); *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 794 (2014) ("[T]his Court does not revise legislation . . .").

The plain language is dispositive: where at least one impaired class of creditors has accepted the plan, § 1129(a)(10) is satisfied. *See Transwest III*, 881 F.3d at 729 ("The plain language of the statute supports the "per plan" approach."). The statute makes no mentions of "per debtor" approval. It only requires that "the plan" be approved. *See* 11 U.S.C. § 1129(a)(10).

2. The bankruptcy rules of construction, and particularly § 102(7), do not alter the plain meaning of § 1129(a)(10) to require "per debtor" approval.

The Bankruptcy Code's Rules of Construction do not alter the plain meaning of § 1129(a)(10). Proponents of the "per debtor" approach incorrectly employ § 102(7) of the Rules of Construction in the Bankruptcy Code to alter the plain meaning of the statute. *See In re Tribune Co.*, 464 B.R. 126, 182 (Bankr. D. Del. 2011). Section 102(7) provides that "the singular includes the plural." 11 U.S.C. § 102(7). Courts adopting the "per debtor" approach apply this rule to § 1129(a)(10) to come to an unconvincing result; the application of § 102(7), they argue, modifies the word "plan" in the statute to "plans," meaning an impaired class of creditors for each of the "plans" must vote to accept their respective plan. *See, e.g., In re Tribune Co.,* 464 B.R. at 182 ("the fact that § 1129(a)(10) refers to "plan" in the singular is not a basis, alone, upon which to conclude that, in a multiple debtor case, only one debtor . . . must satisfy this standard.").

However, § 102(7) does not alter the plain meaning of § 1129(a)(10). Applying § 102(7) to § 1129(a)(10) so that "the singular includes the plural" results in the following statutory language: "If classes of claims are impaired under the *plans*, at least one of the classes that are impaired under the *plans* has accepted the *plans*". *See Transwest III*, 881 F.3d at 729-30 (emphasis added). Hence, even addressing the contention that there are

multiple reorganization plans for each debtor, the plain language of § 1129(a)(10) only requires, at the very least, a single impaired class's approval to confirm each respective plan. *See id.* Therefore, even reading the statute so that the "singular includes the plural" does not necessitate adopting the "per debtor" approach because the plain language still reads, "at least one of the impaired classes under the "plans" will have accepted the plans." *See id.* To say otherwise ignores the plain language of the statute when § 102(7) is applied.

Additionally, the application of § 102(7) in support of the "per debtor" approach alters the meaning of § 1129(a)(10) far beyond its plain meaning. Reconciling the "per debtor" approach with the language of § 1129(a)(10) essentially requires adding the clause "of each debtor" so that the statute would read "at least one class of claims *of each debtor* that is impaired under the plan[s] has accepted the plan[s]." *Contra* 11 U.S.C. § 1129(a)(10) (adding "of each debtor"). No provision in the Rules of Construction specifies that clauses may be added to a statute. *See* 11 U.S.C. § 102. To add such a clause under the guise of § 102(7) violates well-established canons of construction. *See Bates*, 522 U.S. at 29 ("Where the language of the statute is clear, courts do not add to it in order to read words in that do not appear on its face."); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (Congress "says in a statute what it means and means in a statute what it says there.").

Regardless, § 102(7) is inapplicable to § 1129(a)(10) in the case of a single joint plan. Specifically, in a jointly administered chapter 11 proceeding, there is a single plan for the Debtor and its subsidiaries. *See* R. at 3. Nowhere in § 102(7) does it state that the singular *must* include the plural. *See* 11 U.S.C. § 102(7). Therefore, there is no need for

the term “plan” in § 1129(a)(10) to become the term “plans” because there is only one plan being approved on behalf of all of the debtors and creditors.

3. The “per plan” approach has widespread approval.

Finally, as opposed to the “per debtor” approach, the “per plan” approach has been more widely adopted by courts interpreting § 365(c)’s plain meaning. To date, three bankruptcy courts, one district court, and the Ninth Circuit have issued opinions adopting the “per plan” approach, similarly based on a plain reading of the statute. *See, e.g., Transwest III*, 881 F.3d at 729; *In re: Transwest Resort Properties, Inc. (“Transwest II”),* 554 B.R. 894 (D.Ariz. 2016); *JPMorgan Chase Bank, N.A. v. Charter Commc’ns Operating, LLC (In re Charter Commc’ns),* 419 B.R. 221, 266 (Bankr. S.D.N.Y. 2009); *In re Enron Corp.*, No. 01-16034, 2004 Bankr. LEXIS 2549 at *234-35 (Bankr. S.D.N.Y. July 15, 2004); *In re SGPA, Inc.,* No. 01-02609, 2001 WL 34750646 at *13-17 (Bankr. M.D. Pa. Sept. 28, 2001). The Bankruptcy Court for the District of Delaware adopted “per debtor” approach for the first time only in 2011. *See In re Tribune Co.,* 464 B.R. at 126. In fact, this court is the only one to adopt the “per debtor” approach at all. *See also In re Woodbridge Grp. of Cos., LLC,* 592 B.R. 761, 778 (Bankr. D. Del. 2018); *In re JER/Jameson Mezz Borrower II, LLC,* 461 B.R. 293, 302 (Bankr. D. Del. 2011). Since Delaware’s divergence from established interpretation, the Ninth Circuit—the only circuit to rule squarely on the issue—has rejected the “per debtor” approach. *Transwest III*, 881 F.3d at 729.

B. The “Per Plan” Approach to § 1129(a)(10) Is Compatible With the Remaining Requirements In § 1129(a).

Additionally, the “per plan” approach is consistent with the remainder of the language in § 1129(a). Section 1129(a) requires the bankruptcy court to confirm a chapter

11 plan that meets certain requirements—these requirements vary depending on whether the plan is consensual or non-consensual. *See In re Trenton Ridge Investors, LLC*, 461 B.R. 440, 455 (Bankr. S.D.Ohio 2011) (describing the methods through which a chapter 11 reorganization plan may be confirmed under § 1129). In a consensual plan, all sixteen requirements of § 1129(a) must be satisfied. *See* 11 U.S.C. § 1129(a). This includes the requirement that each class of impaired creditors votes to accept the plan. *See* 11 U.S.C. § 1129 (a)(8) (2018). In a non-consensual "cramdown," the court shall confirm the plan 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. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 641–42 (2012); 11 U.S.C. § 1129(b)(1). All requirements under § 1129(a) also must be fulfilled to confirm a plan under a cramdown scenario, save and except for the requirement that each class of impaired creditors accepts the plan. *See* 11 U.S.C. § 1129(b)(1). In other words, the plan is "crammed down the throats of objecting classes." *In re Johnston*, 21 F.3d 323, 329 (9th Cir. 1994) (explaining the origin of the term "cramdown.")

The "per plan" approach to § 1129(a)(10) is consistent with the requirements of plan confirmation in both a consensual and cramdown scenario. When construing a statute, there is a well-established principle that the Bankruptcy Code should be read as a comprehensive scheme. *See RadLAX*, 566 U.S. at 645. This principle has been erroneously applied to find that §§ 1129(a)(1), (3), and (8) irreconcilably conflict with the "per plan" approach to § 1129(a)(10). *See* R. at 19–20. However, while it is correct that statutory schemes should be preserved, "per debtor" proponents make the mistake of finding conflicting language where there is none. *See Morton v. Mancari,* 417 U.S. 535,

551 (1974) ("[W]hen two statutes are capable of coexistence, it is the duty of the courts . . . to regard each as effective.").

For instance, if § 1129(a)(8) is satisfied (in that each class of claims that is impaired has accepted the plan) in a consensual plan confirmation, then it follows that § 1129(a)(10) will necessarily also have been satisfied, because at least one impaired class of creditors will have accepted the plan. *See* §§ 1129(a)(8), (10). Alternatively, in a cramdown scenario, each mandatory confirmation requirement enumerated in § 1129(a) similarly must have been met, save and except § 1129(a)(8). *See* 11 U.S.C. § 1129(b)(1). It follows, then, that § 1129(a)(10)'s requirement that at least one impaired class per plan has accepted the plan does not conflict with § 1129(a)(8), as § 1129(a)(8) is inapplicable in a cramdown scenario. *See* 11 U.S.C. § 1129(b)(1). Hence, requiring at the very least one impaired class per plan for confirmation "complies with applicable provisions" of chapter 11 and fulfills the requirement that the plan is proposed "in good faith and not by any means forbidden by law." *See* §§ 1129(a)(1), (3). Therefore, finding that the "per plan" approach inappropriately alters the statutory scheme or renders parts of §§ 1129(a) and (b) ineffective without "clearly expressed congressional intent" is incorrect. *See Morton,* 417 U.S. at 551. Adopting the "per plan" approach is entirely consistent with the language of § 1129(a) and the rest of the Bankruptcy Code.

C. The "Per Plan" Approach Does Not Result In Substantive Consolidation and Is More Consistent With Joint Administration.

1. The "per plan" approach does not result in de facto substantive consolidation, nor does it violate principles of entity separateness.

Confirmation of a plan by a single class of impaired claims does not result in deemed consolidation of the Debtors' estates. Substantive consolidation is a judicially created

mechanism and is not expressly enumerated in the Bankruptcy Code.[3] *In re Augie/Restivo Baking Co., Ltd.*, 860 F.2d 515, 518 (2nd Cir. 1988) (explaining the judicial creation of substantive consolidation). It "treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities . . . The result is that claims of creditors against separate debtors morph to claims against the consolidated survivor." *Genesis Health Ventures, Inc. v. Stapleton (In re Genesis Health Ventures, Inc.),* 402 F.3d 416, 423 (3d Cir. 2005). It is an extraordinary remedy rooted in equity and should be used sparingly. *See Alexander v. Compton* (*In re Bonham*), 229 F.3d 750, 771 (9th Cir. 2000); *accord In re Owens Corning*, 419 F.3d 195, 205 (3rd Cir. 2005). As the Third Circuit advised, consolidation in this manner is "one of last resort after considering and rejecting other remedies." *In re Owens Corning*, 419 F.3d at 209-211.

On the other hand, joint administration of a bankruptcy estate is expressly provided for in the Bankruptcy Code. *See* Fed. R. Bankr. P. 1015(b). If a joint petition or two or more petitions are pending in the same court by or against a debtor and an affiliate, the court may order a joint administration of the estates. *Id.* Substantive consolidation is neither authorized nor prohibited by § 1015 because the appropriateness of consolidation depends on substantive considerations and affects the substantive rights of the creditors of the different estates. *See* Fed. R. Bankr. P. § 1015 advisory committee's notes to 1983 amendment. The use of joint administration, however, does not affect the substantive rights of either the debtor or its creditors. *See Bunker v. Peyton*

[3] The Code enumerates equitable powers of the courts in §§ 1123(a)(5)(C) ("Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall provide adequate means for the plan's implementation, such as . . . consolidation of the debtor with one or more persons.") and 105(a) ("The court may issue any order . . . that is necessary or appropriate to carry out the provisions of this title."). 11 U.S.C. §§ 1123(a)(5)(C), 105(a) (2018). These provisions are sometimes cited as statutory bases for substantive consolidation where equity so requires.

(In re Bunker), 312 F.3d 145, 153 (4th Cir. 2002) (discussing characteristics of joint administration of estates) (citation omitted). Joint administration enables bankruptcy courts to combine multiple debtors' cases for "procedural" efficiency yet leaves untouched the substantive rights of creditors against the individual entities undergoing reorganization. *In re Bonham*, 229 F.3d at 762; *see also* Fed. R. Bankr. P. § 1015 advisory committee's note to 1983 amendment. It is purely procedural, insofar as the assets of one debtor are not subject to the claims of creditors of the other entities, nor are the liabilities of one of the entities considered to be the liabilities of each of the entities of the consolidated cases.

The "per plan" approach does not ignore these important distinctions between substantive consolidation and joint administration. Proponents of the "per debtor" approach have stated that the "per plan" approach violates principles of entity separateness required during joint administration by treating the debtors as if they were substantively consolidated. *See Reider v. Fed. Deposit Ins. Corp. (In re Reider)*, 31 F.3d 1102, 1109 (11th Cir. 1994). It is true that "in the absence of substantive consolidation, entity separateness is essential." *In re Owens Corning*, 419 F.3d at 211. However, applying this principle to find that the "per plan" approach results in substantive consolidation of the debtors is entirely unfounded.

The inquiry as to whether substantive consolidation has in fact occurred is determined on a case-by-case basis. *F.D.I.C. v. Colonial Realty Co*., 966 F.2d 57, 61 (2nd Cir. 1992) (citing *In re Augie/Restivo,* 860 F.2d at 518; *accord In re Auto–Train Corp.,* 810 F.2d 270, 276 (D.C. Cir. 1987)). Specifically, "what must be proven (absent consent) concerning the entities for whom substantive consolidation is sought is that (i) prepetition

they disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity, or (ii) postpetition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors." *See In re Owens Corning*, 419 F.3d at 211. A procedural requirement for plan confirmation, however, is not subject to a case-by-case review of its facts. The statute requires at least one impaired class to confirm a single plan; where this requirement and the fifteen other requirements have been fulfilled, the court *shall* confirm the plan. *See* 11 U.S.C. §§ 1129(a), (b); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26, 35 (1998) (Congress's inclusion of the word "shall" creates an obligation "impervious to judicial discretion."). Therefore, inquiring as to whether substantive consolidation has occurred is an entirely separate inquiry from a procedural requirement such as § 1129(a)(10). Conflating the issues of substantive consolidation and approval under § 1129(a)(10) adds requirements to § 1129(a)(10) that are not ever mentioned in the text.

2. The "per plan" approach is more consistent with joint administration of bankruptcy estates.

Additionally, the "per plan" approach is more consistent with joint administration than the "per debtor" approach. Joint administration is a procedural efficiency measure. *In re Bonham*, 229 F.3d at 762. The approval of a plan under § 1129(a)(10) is a procedural requirement merely meant to ensure "some indicia of support" for a plan. *See In re Combustion Eng'g, Inc.,* 391 F.3d 190 at 243-4 (3d Cir. 2004) (discussing the purposes of § 1129(a)(10)); *see also In re Rhead,* 179 B.R. 169, 177 (Bankr. D. Ariz. 1995) ("Section 1129(a)(10) is a technical requirement for confirmation . . . not a substantive right of objecting creditors."). Consequently, the "per debtor" approach

frustrates the use of joint administration of the estate by adding additional and unnecessary steps to § 1129(a)(10) approval.

The present case illustrates the inefficiencies of the "per debtor" approach. Here, the Plan was jointly administered and expressly stated that the Debtors' estates were not being substantively consolidated. *See* R. at 7. No order by the lower court calling for substantive consolidation occurred, nor did the confirmation of the Plan by less than every impaired class result in de facto consolidation. *See* R. at 30. Section 1129(a)(10), a procedural requirement for plan confirmation, does not consolidate the assets or liabilities of the Operating Debtors and Development. Acceptance of the Plan by "at least one class of claims that is impaired under the plan" merely fulfills the voting requirement found in § 1129(a)(10).

D. Section 1129(a)(10) Is Purely a Technical Requirement for Plan Confirmation That Does Not Provide Substantive Protections to Creditors.

Section 1129(a)(10) does not provide substantive rights to UMT through which they can dispute the confirmation of the Plan. Just as § 1015 is a procedural mechanism for the administration of estates, § 1129(a)(10) is a procedural mechanism for the confirmation of a reorganization plan for such estates. *See In re Rhead,* 179 B.R. at 177 (explaining the procedural nature of § 1129(a)(10)). Because § 1129(a)(10) is a technical requirement, not a part of the Code giving substantive rights, UMT could not raise their issues with the Plan through this provision.

Notwithstanding § 1129(a)(10), UMT had multiple avenues for disputing the plan if they truly believed it unfairly infringed on their rights as creditors. For instance, § 1129(a)(7) includes a provision meant to protect creditors' interests. *See* 11 U.S.C. §

1129(a)(7) (2018). In the absence of unanimous support by each holder of a claim or interest, § 1129(a)(7) requires fulfillment of the best-interests-of-creditors test; every dissenting creditor must receive under the plan not less than it would receive in a hypothetical chapter 7 liquidation—the right to receive at least the liquidation value of the debtor's assets. *See* 11 U.S.C. § 1129(a)(7). Similarly, creditors are further protected from a cramdown during an inequitable reorganization through § 1129(b). If less than every impaired class has accepted the reorganization plan, the court may only confirm such plan "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." *See* 11 U.S.C. § 1129(b).

The provisions in §§ 1129(a)(7) and 1129(b) are meant to protect the substantive rights of creditors. Section 1129(a)(10), however, is merely a procedural check ensuring that the plan has minimal support from creditors. It only ensures that "at least one" impaired class of creditors "under the plan has accepted the plan," with no mention or inquiry as to how this affects the rights of various creditors. *See* 11 U.S.C § 1129(a)(10). To allow substantive protections to creep into a procedural requirement such as § 1129(a)(10) would impermissibly broaden the scope of the statute.

This case presents an example of why the courts' analyses of substantive rights and procedural requirements must be kept separate. Here, there was overwhelming support by all other affected creditors in this case, and UMT could not dispute the Plan under substantive rights provisions because they are unprejudiced under the Plan. *See* R. at 8. In fact, UMT is better off under the Plan than they would be in a chapter 7 liquidation. *See* R. at 6. As a direct result of failing to or being unable to utilize the

substantive protections offered in the Bankruptcy Code, UMT is resorting to a so-called ambiguity in a technical requirement as a last-ditch effort to avoid the assumption of a valid contract. Instead of objecting to "the requirements for confirming the plan," UMT should be required to object to how the Plan violates their substantive rights. *See Transwest III*, 881 F.3d at 733 (concurrence).

Adopting the "per plan" approach will ensure that objections to the plan are voiced in bankruptcy court and not later on through battles over procedural requirements. Conversely, adopting the "per debtor" approach will only further incentivize unreasonable objections to reasonable plans that do not prejudice the objecting creditors. Multiple provisions within § 1129 and throughout the Bankruptcy Code provide substantive rights to UMT, and any of these could have been used to oppose the Plan. Section 1129(a)(10) is not one of these provisions, and the "per debtor" approach should not be adopted to rewrite it as one.

E. The Goals Behind Chapter 11 Reorganization Plans Are Better Advanced by the "Per Plan" Approach.

The purpose of § 1129(a)(10) is to give creditors a bargaining chip in the plan confirmation process by ensuring that that at least some of the impaired creditors under a plan agree to the plan. *See In re Combustion Eng'g, Inc.,* 391 F.3d at 243-44. However, while this purpose is commendable, the "per debtor" approach takes this purpose too far.

There is simply no evidence that Congress intended a single creditor of a single debtor to have the ability to hold a widely accepted plan hostage based on this single creditor's unilateral objection to a plan. *See In re LOOP 76, LLC,* 442 B.R. 713, 722 (Bankr. D. Ariz. 2010). Such an inequitable result could routinely occur under a "per debtor" approach. The present case is a prime example; UMT is the only creditor to

Development, yet wields the power to unilaterally veto a widely accepted plan solely because they are the only creditor for Development. *See* R. at 8. The "per debtor" approach provides UMT disproportionate voting power as compared to other creditors. To allow UMT—and future creditors like them—to dictate the results of a restructuring plan and likely send other debtors into liquidation would be a gross misapplication of § 1129(a)(10).

CONCLUSION

UMT, a single creditor, is unilaterally holding an equitable reorganization plan hostage through its fabrication of potential loopholes in the Bankruptcy Code—loopholes which do not in fact exist. While it is understandable that the Thirteenth Circuit would adopt the "hypothetical test" and "per debtor" approaches to §§ 365(c) and 1129(a)(10), these tests should meet their ends today. Section 365(c) is not meant to bar assumption of an entirely valid contract by a DIP and such a protection is not found anywhere in the Code or elsewhere. Therefore, the "actual test" should be adopted. Similarly, § 1129(a)(10) only mentions a singular "plan" and to apply the per debtor approach entirely contradicts the policies of § 1129 and of chapter 11 bankruptcy. Therefore, the "per plan" approach should be adopted.

Hence, because § 365(c) authorizes a DIP to assume non-exclusive licenses pursuant to the "actual test," and because § 1129(a)(10) only requires that a joint, multi-debtor plan of reorganization must be confirmed by at least one impaired class per plan, we pray that this Court reverse the Thirteenth Circuit.

Team P.8
Counsel of Record

APPENDIX A

11 U.S.C. § 102 (2018)

Rules of Construction

In this title—

(1) [omitted]
(2) [omitted]
(3) [omitted]
(4) [omitted]
(5) [omitted]
(6) [omitted]
(7) the singular includes the plural;
(8) [omitted]
(9) [omitted]

APPENDIX B

11 U.S.C. § 105(a) (2018)

Power of Court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

APPENDIX C

11 U.S.C. § 365 (2018)

Executory Contracts and Unexpired Leases

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.
(b) [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) [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]

APPENDIX D

11 U.S.C. § 323

Role and capacity of trustee

(a) The trustee in a case under this title is the representative of the estate.
(b) [omitted]

APPENDIX E

11 U.S.C. § 1015(b) (2018)

Consolidation or Joint Administration of Cases Pending in Same Court.

(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).

APPENDIX F

11 U.S.C. § 1101

Definitions for this chapter

In this chapter—

(1) “debtor in possession” means debtor except when a person that has qualified under section 322 of this title is serving as trustee in the case;

(2) [omitted]

APPENDIX G

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.

APPENDIX H

11 U.S.C. § 1123(a) (2018)

Contents of Plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—

(1) [omitted]

(2) [omitted]

(3) [omitted]

(4) [omitted]

(5) provide adequate means for the plan's implementation, such as—

(A) [omitted]
(B) [omitted]
(C) merger or consolidation of the debtor with one or more persons;

(6) [omitted]

(7) [omitted]

(8) [omitted]

APPENDIX I

11 U.S.C. § 1124 (2018)

Impairment of Claims or Interests

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

(1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest;

(2) [omitted]

APPENDIX J

11 U.S.C § 1129(a) (2018)

Confirmation of Plan

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

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

(2) [omitted]

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

(4) [omitted]

(5) [omitted]

(6) [omitted]

(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) [omitted]

(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) [omitted]

(12) [omitted]

(13) [omitted]

(14) [omitted]

(15) [omitted]

(16) [omitted]

APPENDIX K

11 U.S.C § 1129(b) (2018)

Confirmation of Plan

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

(b)(2) [omitted]