No. 19-1004

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

In Re Tumbling Dice, Inc. *et al*., Debtors,

Tumbling Dice, Inc. *et al*., Petitioner,

v.

Under My Thumb, Inc., Respondent.

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

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BRIEF FOR RESPONDENT

Team R9

Counsel for Respondent

QUESTIONS PRESENTED

I. Under the United States Bankruptcy Code, does 11 U.S.C. § 365(c)(1) permit a debtor in possession to assume an executory contract, where the non-debtor party objects, when federal intellectual property law excuses the non-debtor party from accepting performance from or rendering performance to an entity other than the debtor in possession?

II. Under the United States Bankruptcy Code, does 11 U.S.C. § 1129(a)(10) require 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, in a case where a class of claims is proposed to be impaired under a joint, multi-debtor plan?

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The United States Bankruptcy Court ruled in favor of Debtors on both issues in front of the court, confirming Debtors' joint plan support agreement. R. 3, 9. First, the court found that assumption by the debtor in possession of a non-exclusive software license agreement was not barred by 11 U.S.C. § 365(c)(1) because the developer and licensor, Under My Thumb, Inc., was merely honoring existing contractual obligations with the original licensee, Tumbling Dice Development, LLC. R. 9. Second, the court found that because at least one impaired class of claims of any individual Debtor accepted the joint, multi-debtor plan, 11 U.S.C. § 1129(a)(10) was satisfied. *Id.* Therefore, Under My Thumb, the only creditor of Debtor Tumbling Dice Development, LLC, was not able to defeat confirmation of the joint plan by down-voting it. *Id.*

The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court's findings and Under My Thumb appealed to the Thirteenth Circuit. *Id.* The Circuit Court reversed the decision of the bankruptcy court. R. 21. The court found that under 11 U.S.C. § 365(c)(1), assumption of the software licensing agreement by the debtor in possession was barred where Under My Thumb did not consent. R. 15. Moreover, the court found that one impaired class of claims for each Debtor in a joint, multi-debtor plan must approve of the plan to satisfy 11 U.S.C. § 1129(a)(10). Because Under My Thumb was the only creditor of Tumbling Dice Development, LLC and did not agree to the plan, the plan was not confirmable. R. 21.

The Supreme Court of the United States granted Debtors' petition for a writ of certiorari. R. 1.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS INVOLVED

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

A. 11 U.S.C. § 102(7)

B. 11 U.S.C. § 365(a), (c)(1), (f)(1), (f)(2)(A)

C. 11 U.S.C. § 1107

D. 11 U.S.C. § 1122(a)

E. 11 U.S.C. § 1123(a)(2), (a)(3), (a)(5)(C), (b)(2)

F. 11 U.S.C. § 1124

G. 11 U.S.C. § 1126(a), (c), (f)

H. 11 U.S.C. § 1129(a)(1)-(10), (b)

I. Bankruptcy Rule 1015(b)

STATEMENT OF FACTS

Debtors consist of a holding company, Tumbling Dice, Inc. ("TDI"), and nine of its wholly owned subsidiaries. R. 4. Eight subsidiaries operate a separate casino and resort (each an "Operating Debtor") and the ninth subsidiary, Tumbling Dice Development, LLC ("Development"), acts solely as a licensee under a non-exclusive software license agreement with Under My Thumb, Inc., a leading software developer. *Id.* In 2016, Debtors each filed voluntarily under chapter 11 of the Bankruptcy Code and their cases were jointly administered under Bankruptcy Rule 1015(b). R. 3. Debtors rank as one of the largest casino gaming operations in the United States. R. 4.

I. Development contracts with Under My Thumb to develop resort and casino loyalty program software and obtains a non-exclusive license for that software.

In 2008, Under My Thumb spent about $10 million to develop a customer loyalty program for Debtors, pursuant to an agreement with Development. *Id.* In exchange, Development signed a $7 million unsecured promissory note to reimburse Under My Thumb for some of its costs. *Id.* Development entered into a non-exclusive licensing agreement with Under My Thumb whereby Development and its affiliated entities were authorized to use the newly developed software in exchange for a sliding monthly fee, calculated based on the amount of spending by Debtors' loyalty program members. R. 5. Development was prohibited from assigning or sublicensing the software to any other party without the express written consent of Under My Thumb. *Id.*

Utilizing the software, Debtors tracked loyalty member preferences and catered to those preferences, thereby increasing revenue. *Id.* The software is indispensable to Debtors' continued operations. *Id.* Under My Thumb received greater than expected monthly fees from Debtors' use of the software because of the loyalty program's popularity and licensed like software to similar companies, as permitted by the licensing agreement. *Id.* Therefore, Under My Thumb benefitted significantly from its relationship with Debtors and the favorable licensing agreement. *Id.*

II. TDI is acquired by a hedge fund, Start Me Up, Inc., through a leveraged buyout, which eventually leads to Debtors filing chapter 11 bankruptcy.

In 2011, Start Me Up, Inc. ("SME"), acquired TDI stock through a leveraged buy-out. [1] R. 6. In accordance with the buyout, a group of lenders loaned Debtors $3 million in exchange for first-priority liens on Debtors' assets. *Id.* The liens were granted by TDI and the Operating Debtors. *Id.* Development was not a party to the transaction, partly because of the non-exclusivity of the software license agreement with Under My Thumb.[2] *Id.*

Heavily burdened by the buyout debt, Debtors stopped paying Under My Thumb under the $7 million unsecured promissory note, leaving a remaining balance of approximately $6 million. *Id.* Eventually, Debtors filed under chapter 11 of the Code. *Id.* Despite owing approximately $2.8 million to its lenders and another $120 million to unsecured creditors, to include Under My Thumb, Debtors remained current on their payments to Under My Thumb under the software licensing agreement. *Id.*

III. Debtors and stakeholders create joint plan of reorganization and restructure Debtors' debt.

Debtors reached a plan support agreement (the "Plan") with SME, its lenders, the unsecured creditors' committee, and other stakeholders. *Id.* Under My Thumb did not participate in reaching that agreement. *Id.* Restructuring Debtors' debt with Debtors' lenders was the paramount goal of the Plan. *Id.* SME agreed to fund a $66 million distribution to Debtors' unsecured creditors in exchange for SME retaining its equity interest in Debtors. R. 7. The Plan also cancelled existing shares and membership interests in Debtors and issued new shares and memberships in the reorganized Debtors. *Id.*

[1] It is undisputed that no fraudulent transfer action was brought before the applicable fraudulent transfer lookback period in this case. Therefore, this leveraged buyout was not challenged as fraudulent under state or federal law.
[2] Development was not a party also because of its limited purpose as a licensee and other restrictive covenants in the loan agreement.

Under the Plan, the licensing agreement with Under My Thumb would be assumed and Under My Thumb would continue to receive monthly payments from Debtors' software usage. *Id.* Moreover, Under My Thumb would receive $6 million, plus obligation, from the 55% distribution from SME to settle the outstanding unsecured promissory note. *Id.*

Debtors filed the Plan and disclosure statement in August 2016, with Under My Thumb in favor of the Plan. *Id.* However, after Under My Thumb reviewed the disclosure statement, it realized a private equity group, Sympathy for the Devil ("SFD"), would fund $35 million of SME's distribution. R. 7–8. Under My Thumb was concerned because SFD would receive 51% of the shares of the reorganized Debtors and SFD's portfolio included a company that was a top competitor of Under My Thumb. R. 8. Under My Thumb worried its competitor would gain access to its software and attempt, as it had in the past, to replicate it. *Id.*

IV. Under My Thumb, the sole creditor of Development, objects to the Plan because of its competitor's involvement with SFD.

TDI and the eight Operating Debtors each had one impaired class of creditors who voted to accept the Plan. *Id.* Under My Thumb, the only creditor of Development, rejected the Plan. *Id.* Therefore, Development was the only debtor without an accepting class of creditors. *Id.* However, the Plan received overwhelming support from nearly all other creditor groups. *Id.*

Under My Thumb objected to the Plan and refused to consent to Debtors' assumption of the non-exclusive software licensing agreement. *Id.* First, Under My Thumb argued that because it was excused from rendering performance to an entity other than Debtors under federal intellectual property law, the contract was unassignable, and thus, under the "hypothetical test," § 365(c)(1) barred assumption of the agreement without Under My Thumb's consent. *Id.* Second, Under My Thumb objected to the Plan because it argued that where it was the only creditor of Development and had not voted in favor of the Plan, the Plan could not be confirmed under

§ 1129(a)(10). *Id.* The bankruptcy court confirmed the Plan over Under My Thumb's objections. *Id.*

SUMMARY OF ARGUMENT

Resolving the first issue requires adherence to the plain meaning of § 365(c)(1), which prohibits a debtor in possession from assuming *or* assigning a nonexclusive software license without the licensor's assent. Courts must assume that a statute means what the plain language says. Here, § 365(c)(1) is written in the disjunctive and prohibits a debtor in possession from assuming *or* assigning an executory contract without the consent of the non-debtor party. The plain language rule requires this Court to adopt the hypothetical test which interprets § 365(c)(1) as allowing a debtor in possession to assume an executory contract *only if* it would hypothetically be allowed to assign the contract to a third-party. This Court should read the disjunctive language of the statute ("assume" *or* "assign") as it is written and refrain from reading in the conjunctive ("assume" *and* "assign"). To hold otherwise—that is, to adopt the actual test—would infringe on Congress's sole power to write (and rewrite) legislation.

A literal reading of § 365(c)(1) does not render § 365(f)(1) inoperative or superfluous. Both statutes utilize the term "applicable law" in different ways; these subsections are neither contradictory nor render the other inoperative. Subsection 365(f)(1) serves as the general rule, under which the "applicable law" prohibits or restricts assignment of an executory contract by a debtor in possession. Conversely, § 365(c)(1) operates as an exception to § 365(f)(1). As used in § 365(c)(1), "applicable law" excuses the non-debtor party to an executory contract from rendering or accepting performance from a third-party. Put simply, the "applicable law" in § 365(f)(1) limits the ability of a non-debtor to control assignment of an executory contract by a debtor in possession while the same term as used in § 365(c)(1) excuses the non-debtor from accepting such an

assignment. Federal intellectual property law excuses Under My Thumb from accepting performance from or rendering performance to a third-party and therefore, the contract is not assignable where Under My Thumb does not consent. Because the contract cannot hypothetically be assigned, even if Debtors have no actual intention to assign the contract, the contract cannot be assumed without Under My Thumb's consent.

Regarding the second issue, in a joint bankruptcy administration where the debtors have not reorganized under the substantive consolidation doctrine, § 1129(a)(10) requires that "at least one class of claims that is impaired under the plan has accepted the plan." Congress provided a safeguard against confirmation of a reorganization plan without the approval of a requisite level of support from impaired creditors. The plain meaning rule and the rule of contextual statutory interpretation require that this Court apply the *per debtor* approach to interpret § 1129(a)(10). While the *per plan* approach may be attractive under policy considerations, the Court should not substitute the plain language of the statute enacted by Congress with its own policy agenda.

Moreover, Debtors sought reorganization under a joint plan, not a substantive consolidation. Under the substantive consolidation doctrine, debtors under the plan are pooled and treated as though they are one entity—this is not the case with joint administration. As such, debtors seeking court confirmation under a joint, multi-debtor plan should not be allowed to avoid their individual obligation to comply with the requirements of § 1129(a). Therefore, acceptance should be required from at least one impaired class of claims of each Debtor, this includes Development. Development's only creditor, Under My Thumb, is impaired under the Plan and does not approve of it. Therefore, Development has not met the § 1129(a)(10) requirement, so the Plan is not confirmable.

ARGUMENT

I. A Non-Exclusive License of Intellectual Property Cannot be Assumed Over the Objection of the Licensor Because Under § 365(c)(1), if a Debtor Cannot Assign a Contract to a Third-Party, it Cannot Assume that Contract.

A debtor in possession has the same rights, powers, and responsibilities charged to a trustee under the Bankruptcy Code, "[s]ubject to any limitations on a trustee serving in a case under this chapter." 11 U.S.C. § 1107 (2018). When a trustee is not appointed, the Code "gives a debtor in possession the powers and duties of a trustee." *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery (In re Cybergenics Corp.)*, 226 F.3d 237, 243 (3d Cir. 2000). Thus, the two terms—trustee and debtor in possession—are "essentially interchangeable" within the Code. *Id*.

Under § 365(a), a debtor in possession may assume an executory contract held by the debtor prior to bankruptcy proceedings. 11 U.S.C. § 365(a) (2018).[3] Subsection 365(c)(1) is an explicit limitation on § 365(a), providing that:

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

11 U.S.C. § 365(c)(1) (2018). Federal law dictates that intellectual property licenses are "personal to the licensee" and thus, unassignable without express consent in the license agreement or from the licensor. *Unarco Indus., Inc. v. Kelley Co.*, 465 F.2d 1303, 1306 (7th Cir. 1972). Therefore, Development cannot assume or assign the software contract because applicable law—longstanding federal intellectual property law—excuses Under My Thumb "from accepting performance from

[3] "Generally speaking, a license agreement is an executory contract as such is contemplated in the Bankruptcy Code." *In re Kmart Corp.*, 290 B.R. 614, 618 (Bankr. N.D. Ill. 2003) (internal citations and quotation marks omitted).

. . . an entity other than the debtor or the debtor in possession" and Under My Thumb "does not consent to such assumption or assignment." *Cf.* 11 U.S.C. § 365(c)(1).

A. The phrase "assuming *or* assigning" in § 365(c)(1) dictates that Development cannot assume the software agreement because under federal intellectual property law, it is prohibited from assigning the agreement to a third-party absent Under My Thumb's consent.

Development is prohibited from assuming the software agreement because assumption of the agreement is contingent upon Development attaining permission to assign the contract, and Under My Thumb refuses to consent. *See* 11 U.S.C. § 365(c)(1); *see also* R. 8. The Circuits are split as to whether a debtor in possession can assume an executory contract if the debtor in possession has no actual intent to assign the contract. *Compare RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257 (4th Cir. 2004), *with Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489 (1st Cir. 1997). The "hypothetical test," which permits a debtor in possession to assume an executory contract only if it would hypothetically be allowed to assign said contract to a third-party, has been adopted by a majority of circuit courts. *See, e.g.*, *In re Sunterra Corp.*, 361 F.3d 257; *Perlman v. Catapult Entm't, Inc. (In re Catapult Entm't, Inc.)*, 165 F.3d 747 (9th Cir. 1999); *City of Jamestown v. James Cable Partners, L.P. (In re James Cable Partners, L.P.)*, 27 F.3d 534 (11th Cir. 1994); *Matter of W. Elecs. Inc.*, 852 F.2d 79 (3d Cir. 1988). A minority of circuit courts have adopted the "actual test," barring a debtor in possession from assuming an executory contract only if it has actual intent to assign the contract to a third-party. *See, e.g.*, *Institut Pasteur*, 104 F.3d 489; *see also In re Footstar, Inc.*, 323 B.R. 566, 570 (Bankr. S.D.N.Y. 2005) (following the circuit courts that adopted the actual test).

A fundamental canon of statutory construction, the plain language rule, requires adoption of the hypothetical test in interpreting § 365(c)(1). *See In re Sunterra Corp.*, 361 F.3d at 269. This Court repeatedly says, "courts must presume that a legislature says in a statute what it means and

means in a statute what it says there." *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253–54 (1992). Accordingly, the plain language of § 365(c)(1) says that a debtor in possession may not "assume *or* assign" an executory contract if the non-debtor party does not consent. Assumption and assignment of an executory contract are "two conceptually distinct events," and "each of these events is contingent on the [licensor's] separate consent," under § 365(c)(1). *In re Catapult Entm't, Inc.*, 165 F.3d at 752. Therefore, even if the contract could be assigned under applicable law, Development would need Under My Thumb's consent to assume the contract. *See* 11 U.S.C. § 365(c)(1)(A) (2018). Development does not have that consent. R. 8.

Adoption of the actual test instead of the hypothetical test ignores the disjunctive language Congress codified and reads in conjunctive language instead (*i.e.*, "assume *and* assign"). *See In re Sunterra Corp.*, 361 F.3d at 268–69. This result is not tenable. When the statute is clear, as is § 365(c)(1), a court must end its analysis with the statute's plain meaning. *Hillman v. I.R.S.*, 263 F.3d 338, 342 (4th Cir. 2001) (citing *Caminetti v. United States*, 242 U.S. 470 (1917); *see also United States v. Morison*, 844 F.2d 1057, 1064 (4th Cir.1988) ("[W]hen the terms of a statute are clear, its language is conclusive and courts are not free to replace that clear language with an unenacted legislative intent." (internal quotation marks, alteration marks, and citations omitted)). Thus, this Court must adopt the hypothetical test and hold that Development may not assume the software agreement because Under My Thumb has withheld its consent.

B. Construing § 365(c)(1) literally does not produce an absurd result because it does not render § 365(f)(1) inoperative or superfluous where § 365(f)(1) is a general rule to which § 365(c)(1) is an exception.

A court is prohibited from looking beyond the language of an unambiguous statute, unless one of two narrow exceptions to the plain meaning rule applies. *In re Sunterra Corp.*, 361 F.3d at 265. First, "when literal application of the statutory language at issue results in an outcome that can truly be characterized as absurd, i.e., that is so gross as to shock the general moral or common

sense." *Hillman*, 263 F.3d at 342 (internal quotation marks and citation omitted). Second, "when literal application of the statutory language at issue produces an outcome that is demonstrably at odds with congressional intent to the contrary." *Id*. Neither exception applies here.

Despite Debtors' argument that reading § 365(c)(1) literally would render § 365(f)(1) inoperative and superfluous, the supposed inconsistent term "applicable law" encompasses a different scope within each subsection. *In re Catapult Entm't, Inc.*, 165 F.3d at 752. Debtors maintain that use of "applicable law" in §§ 365(c)(1) and 365(f)(1) is inconsistent if § 365(c)(1) is read in the disjunctive ("assume *or* assign") because § 365(f)(1) generally permits assignment, in spite of applicable law, and § 365(c)(1) prohibits assumption where applicable law bars assignment. *See* 11 U.S.C. § 365(f)(2)(A) (2018) (providing that a debtor in possession "may assign an executory contract . . . of the debtor only if [the debtor in possession] assumes such contract . . . in accordance with the provisions of this section."). Therefore, Debtors conclude, § 365(f)(1) becomes inoperative because § 365(c)(1) allows "applicable law" to bar assumption even though § 365(f)(1) expressly allows it. *See* R. 13. However, no such conflict exists because the scope of "applicable law" varies between the subsections. *In re Catapult Entm't, Inc.*, 165 F.3d at 752.

The "applicable law" recognized in each of the subsections are of "markedly different scope[s]." *Id.* In the statutory scheme of § 365, subsection 365(f)(1) is the broad rule. *In re Sunterra Corp.*, 361 F.3d at 266–67. The "applicable law" in § 365(f)(1) is "the law prohibiting or restricting assignments" of an executory contract. *Id.* Therefore, § 365(f)(1) overrides law that itself prohibits or restricts assignment of a contract and requires assumption of the contract before assignment. 11 U.S.C. §§ 365(f)(1), (f)(2)(A). Notably, § 365(f)(1) begins by carving out an exception for subsection (c). *See* 11 U.S.C. § 365(f)(1) ("[e]xcept as provided in subsections (b) and (c) of this section . . . ."). Subsection 365(c)(1) is an exception to § 365(f)(1). *See id.* The

"applicable law" in § 365(c)(1) does not refer to law that "prohibits or restricts" assignment, but rather allows legal excuses for refusing to render or accept performance, regardless of the contract's status as assignable. *In re Sunterra Corp.*, 361 F.3d at 266–67 (internal citations omitted). Therefore, under § 365(f)(1), contracts are generally assignable, notwithstanding applicable law, but where applicable law provides a legal excuse for refusing to render or accept performance, § 365(c)(1) prohibits assignment.

Moreover, § 365(f)(1) generally allows assignment, except where prohibited when a contracting party's identity matters under § 365(c)(1). Subsection 365(c)(1) prohibits assignment where the contracting party's identity is material to the agreement and that party does not consent. The applicable law here is federal intellectual property law, under which identity matters because that law protects the licensor from unconsented assignment by the licensee as such licenses are "personal to the licensee." *Unarco Indus., Inc.*, 465 F.2d at 1306. Because identity matters here, § 365(c)(1) comes into play and excuses Under My Thumb from rendering performance, making the contract unassignable and not assumable, absent Under My Thumb's consent, even though § 365(f)(1) makes the contract generally assignable and therefore, assumable. *See id.* Thus, the "applicable law" provisions in §§ 365(c)(1) and 365(f)(1) are distinct and not contradictory. It cannot be determined based on the supposed inconsistency posited by Debtors, therefore, that reading § 365(c)(1) literally—in the disjunctive, as written—would render § 365(f)(1) inoperative because the "applicable law" referred to in each subsection is different. *In re Catapult Entm't, Inc.*, 165 F.3d at 752. Therefore, the hypothetical test should be adopted.

C. The conjunctive "and" should not be read into § 365(c)(1) where the legislature has not included it.

This Court should read § 365(c)(1) in the disjunctive because the legislature solely is authorized to rewrite § 365(c) to prohibit assumption *and* assignment. *See In re Sunterra Corp.*, 361

F.3d at 269. This is not the job of courts. *Id*. This Court has established 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." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). Courts are charged with enforcing laws as Congress enacts them without making unnecessary alterations or deletions. *See id.* This responsibility cannot be shirked when the courts are enticed by attractive policy arguments. *Id.* at 13–14 ("Achieving a better policy outcome . . . is a task for Congress, not the courts.").

Debtors argue that reading § 365(c)(1) literally would be absurd because it would produce a result inconsistent with general bankruptcy policy objectives: promoting successful reorganization and maximizing a debtor's estate. R. 14. However, a literal reading of § 365(c)(1) does not produce an absurd result merely because the statute is written to disfavor the debtor. *See In re Sunterra Corp.*, 361 F.3d at 268 ("[C]ourts should not assume that sections of the Bankruptcy Code unfavorable to the debtor were enacted in error.") (internal quotation marks omitted). It is Congress's prerogative to enact statutes, based on its own policy calculations, establishing rights for the non-debtor to protect it against certain actions of the debtor. *See id.*

The Code contains several similar "non-debtor provisions" that are effectively safeguards protecting the interests of non-debtors over those of the debtor. *See In re Sunterra Corp.*, 361 F.3d at 268 (identifying 11 U.S.C. §§ 362(b), 555–557, and 559–60 as chapter 11 provisions that explicitly carve out protections for the non-debtor within statutes that otherwise favor the debtor). Taking Debtors' argument, that § 365(c)(1) should be read in the conjunctive ("assume *and* assign") because it is otherwise more favorable to the non-debtor than the debtor, to its natural conclusion would mean that at least six other similar statutes must also be voided—a flawed

proposition. *See id.* Courts must reject absurdity exceptions to the plain meaning rule when application of the plain meaning is consistent with Congress's intent. *Id.* (citing *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 308 (4th Cir. 2000), aff'd sub nom. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, (2002)). All of the "non-debtor provisions"—including § 365(c)(1)—are evidence of Congress's intent to provide non-debtors protections under the Bankruptcy Code; thus, "application of the Plain Meaning Rule does not produce a result so grossly inconsistent with bankruptcy policy as to be absurd." *Id*.

Furthermore, there is no exception to applying the plain meaning rule in interpreting § 365(c)(1) based on policy objectives alone. *In re Sunterra, Corp.*, 361 F.3d at 265 (explaining that there are only "two narrow exceptions to application of a statute's plain language[:]" absurdity and legislative intent). Even if, as Debtors argue, the actual test supports the general policy goals of chapter 11 more than the hypothetical test, courts are not permitted to manipulate the language of an unambiguous statute on that basis alone. *Id.* This is especially true when the statute in question, read literally, promotes a legislative intent consistent with Congress's policy objectives—*i.e.*, protecting the interests of a non-debtor party. *See id.* at 268. The Constitution reserves the right to modify statutes "to achieve a preferable policy outcome" to Congress. *Id*. at 269 (citing *Hartford*, 530 U.S. at 13).

The rewrite Debtors request requires application of the actual test instead of relying on the plain language of § 365(c)(1) and applying the hypothetical test. *See id*. The actual test ignores the disjunctive construction of § 365(c)(1), as written, and reads the statute in the conjunctive, replacing "or" with "and" extralegislatively. *See In re Footstar, Inc.*, 323 B.R. at 570. That replacement changes the statute's application by allowing a debtor to assume an executory contract when it does not have the actual or present intent to subsequently assign the contract. *Bonneville Power*

Admin. v. Mirant Corp. (In re Mirant Corp.), 440 F.3d 238, 248 (5th Cir. 2006). That application eviscerates Congress's intent to prohibit a debtor in possession from either assuming *or* assigning an executory contract without the non-debtor's consent, as indicated by the plain language of § 365(c). *See In re Sunterra Corp.*, 361 F.3d at 265. Debtors' preferred construction under the actual test reads "assume" out of the statute entirely, prohibiting only the assigning of executory contracts absent the non-debtor's consent, not the assumption. *See In re Sunterra Corp.*, 361 F.3d at 269.

As this Court previously said, "[w]hen the words of a statute are unambiguous, then the first canon is also the last: judicial inquiry is complete." *Conn. Nat'l Bank*, 503 U.S. at 253–54 (internal quotation marks omitted). Thus, where § 365(c)(1) is unambiguous in its use of "or" to mean that the non-debtor must consent to assumption *or* assignment individually, this Court's inquiry should end with the hypothetical test. To employ the actual test despite the plain language of the statute would produce an erroneous result and infringe upon Congress's sole authority to write (and rewrite) statutes. Therefore, this Court should read the statute in the disjunctive, as written, and interpret § 365(c)(1) using the hypothetical test. *See Hartford*, 530 U.S. at 6.

II. A Court Cannot Confirm a Joint, Multi-Debtor Plan Without Acceptance by at Least One Impaired Class of Claims of Each Debtor Because § 1129(a)(10) Requires Acceptance *Per Debtor*.

Congress designed chapter 11 bankruptcy proceedings to encourage confirmation of a debtor's reorganization plan. *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204 (1983). Congress also included protections for the substantive rights of impaired class members and codified a minimum requisite level of support from affected creditors for a proposed reorganization plan in order to attain court confirmation. *See* 11 U.S.C. § 1129(a)(10) (2018). To achieve this objective, chapter 11 plans organize creditor claims into classes of substantially similar claims. 11 U.S.C. § 1122(a) (2018). Treatment for impaired classes must be identified under the plan. 11 U.S.C.

§ 1123(a)(3) (2018). Section 1124(1) provides that a "class of claims . . . 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 . . . entitles the holder of such claim . . . ." 11 U.S.C. § 1124(1) (2018). Congress decidedly emphasized the importance of impaired classes in the reorganization process by giving such classes the right to vote on the plan, and expressly not giving such a right to unimpaired classes. 11 U.S.C. §§ 1126(a), (f) (2018). Consequently, the voting right bestowed on impaired classes is a substantive right and protective tool—established by Congress—that ensures some basic level of agreement between debtors and impaired classes of creditors for a debtor's reorganization plan. *Compare* 11 U.S.C. § 1126(a) (2018), *with* § 1126(f) (2018).

A. A plan cannot be confirmed under § 1129(a) without the consent of at least one impaired class of claims of *each* debtor because, based on the plain language and statutory scheme, § 1129(a)(10) creates a *per debtor* requirement.

In § 1129(a), Congress codified a list of requisite thresholds that must be met for a court to confirm a plan for reorganization. *See* 11 U.S.C. §§ 1129(a)(1)–(16); *see also JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props. Inc. (Matter of Transwest Resort Props., Inc.)*, 881 F.3d 724, 729 (9th Cir. 2018) ("[s]ection 1129 lists the requirements for approval of a cramdown plan, and contains a number of safeguards for secured creditors who could be negatively impacted by a debtor's reorganization plan." (internal quotation marks omitted) (citing *U.S. Bank N.A. v. The Vill. at Lakeridge, LLC (In re The Vill. at Lakeridge), LLC*, 814 F.3d 993, 1000 (9th Cir. 2016)). Congress provided that a court could not confirm a plan without the following requirement being 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.

(emphasis added). 11 U.S.C. § 1129(a)(10). This subsection limits the ability of a plan to go forward in the confirmation process without the consent of a debtor's impaired creditors. *See id*.

The courts below are split on how to interpret the encumbrance of impaired class approval that Congress has placed on the confirmation process through § 1129(a)(10). *Compare In re Tribune Co.*, 464 B.R. 126 (Bankr. D. Del. 2011), *with Matter of Transwest Resort Props., Inc.*, 881 F.3d 724. The Delaware Bankruptcy Court applies the *per debtor* approach, under which § 1129(a)(10) is read to require acceptance by at least one impaired class of creditors for *each debtor* in a joint, multi-debtor plan.[4] *See, e.g.*, *In re Tribune Co.*, 464 B.R. at 183 (holding that "absent substantive consolidation or consent, [§ 1129(a)(10)] must be satisfied by each debtor in a joint plan."); *see also In re Woodbridge Grp. Cos., LLC*, 592 B.R. 761 (Bankr. D. Del. 2018); *In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293 (Bankr. D. Del. 2011). The *per plan* approach, adopted by other courts, may be less restrictive for debtors, but it compromises an impaired class of creditors' power to reject a reorganization plan. *See generally In re Tribune Co.*, 464 B.R. 126; *Matter of Transwest Resort Props., Inc.*, 881 F.3d 724. Accordingly, the *per plan* approach interprets § 1129(a)(10) as requiring only a single impaired class of creditors of any one debtor in a multi-debtor plan to vote in favor of that plan. *See, e.g.*, *Matter of Transwest Resort Props., Inc.*, 881 F.3d at 729–30 (holding that § 1129(a)(10) requires acceptance by only one impaired class); *see also 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) ("[I]t is appropriate to test compliance with section 1129(a)(10) on a per-plan basis, not . . . on a per-debtor basis.").

[4] Although only the Delaware Bankruptcy Court has adopted the *per debtor* approach, it is important to note that, as the dissent below acknowledges, the "District of Delaware [is] one of the country's most influential business bankruptcy courts." R. 17.

The plain language of the statute makes clear that Congress intended for § 1129(a)(10) to be a safeguard against the confirmation of a reorganization plan without buy-in from impaired creditors. *See* 11 U.S.C. § 1129(a)(10). However, the *per plan* approach undermines this very safeguard because it diminishes and further minimizes the requisite approval Congress requires for the acceptance of a plan when impaired creditors are affected. *See In re Combustion Eng'g, Inc.*, 391 F.3d 190, 243–44 (3d Cir. 2004), as amended (Feb. 23, 2005). Congress's intent is plainly laid out in § 1129(a)(10).

Courts should begin with the plain language when interpreting a statute. *Universal Church v. Geltzer*, 463 F.3d 218, 223 (2d Cir. 2006). Section 1129(a) requires that debtors in a multi-debtor plan meet the various requirements set forth in the statute to receive court confirmation for the overall plan. *See* 11 U.S.C. § 1129(a). As a guide for interpreting the Code, § 102(7) provides that, throughout the Code, "the singular includes the plural." In this case, § 102(7) should be applied to the current reading of § 1129(a)(10) because there are multiple debtors and thereby, multiple plans. *See* R. 7. As discussed *infra*, because Debtors neither advocated for nor were granted substantive consolidation, § 1129(a)(10) should be read as:

> (a) The court shall confirm [the] *plans* only if all of the following requirements are met:
>
> . . .
>
> (10) 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* . . . ."

11 U.S.C. § 1129(a)(10) (substitutions in italics). This plain reading of the text requires each Debtor in this case to receive approval of the proposed reorganization plan from at least one of *its* impaired classes of creditors. *See In re Tribune Co.*, 464 B.R. at 182. Here, Under My Thumb is Development's sole creditor and Under My Thumb is impaired. R. 8. Therefore, Under My Thumb must approve the Plan for Debtors to obtain plan confirmation from the court because otherwise

approval by "at least one of" the Debtors' impaired class of creditors is not present. *See In re Tribune Co.*, 464 B.R. at 183. Thus, the requirements of § 1129(a) are not met.

Moreover, "the plan," as used in § 1129(a)(10), does not mean that there is a single plan, in which case only one of the Debtors would need to receive approval from one impaired class of creditors. *See id*. To the contrary, there are ten different, individual plans, one for each Debtor, under the joint reorganization plan and, consequently, each Debtor must comply with the confirmation requirements set forth in § 1129(a). *See id.; see also* R. 18. No exception to § 1129(a) has been carved out in the statute for the requirement imposed by § 1129(a)(10).

One plan was filed on behalf of each Debtor. R. 7.[5] The court in *In re Tribune* decided that without substantive consolidation, there were in fact different plans filed for each debtor, in the joint, multi-debtor proceeding. 464 B.R. at 182. Here, similarly, the record states that the Plan consisted of ten distinct plans, one for each Debtor. R. 19. Thus, there is no basis for circumventing the requirements laid out in § 1129(a) for a debtor to obtain court confirmation for its own plan. *See In re Tribune Co.*, 464 B.R. at 183. Failing to hold each debtor to its own congressionally imposed obligation is to strip impaired creditors of the rights ascribed to them in § 1129(a)(10) and to disregard the plain language of §§ 1129(a) and 102(7).

This Court held in *King v. St. Vincent's Hospital* that a "cardinal rule" of statutory construction is that "a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." 502 U.S. 215, 221 (1991) (citations omitted). Section 1129(a)(1) requires that the Plan comply "with the applicable provisions of this title." 11 U.S.C. § 1129(a)(1). Thus, under § 1129(a)(1), each debtor in a jointly administered bankruptcy case has an independent obligation to comply with the Bankruptcy Code. Moreover, § 1129(a)(8) requires "[w]ith

[5] The facts of the case are not disputed. R. 3.

respect to each class of claims or interests, [that] such class has accepted the plan; or [that] such class is not impaired under the plan." 11 U.S.C. § 1129(a)(8). These provisions, in conjunction with § 1129(a)(10), establish the underlying principle that each and every debtor must satisfy the confirmation requirements Congress set forth in § 1129(a). Section 1129(a)(10) requires that "at least one class of claims that is impaired under the plan has accepted the plan." 11 U.S.C. § 1129(a)(10). Thus, Development must meet each of these requirements before the Plan can be confirmed because under joint administration, each of the ten individual Debtors must satisfy each requirement under § 1129(a). Moreover, Development should not be permitted to use any of the other Debtors' approving impaired classes of creditors to satisfy its own § 1129(a)(10) requirement. Development should only be permitted to satisfy this requirement by receiving approval of the Plan from its only impaired creditor: Under My Thumb.

Development did not meet the § 1129(a) requirements ascribed by Congress because Under My Thumb has rejected the Plan. *See* R. 8. As such, the bankruptcy court below had no authority to confirm. *See* 11 U.S.C. § 1129(a) ("The court shall confirm a plan only is all of the following requirements are met . . . ."). Furthermore, the plain meaning rule as well as the contextual statutory interpretation rule, emphasized by this Court in *King*, support the *per debtor* approach as the appropriate interpretation of § 1129(a)(10). *See* 502 U.S. at 221. The *per plan* approach disregards these canons of construction, and thereby the approval requirement and thus should be rejected in favor of the *per debtor* approach. *See id.*

B. The proposed plan should not be confirmed under the *per plan* approach because Debtors sought the reorganization plan under joint reorganization, not substantive consolidation.

Debtors should not be relieved of their individual obligation to comply with the requirements set forth in § 1129(a) simply because Debtors sought confirmation under a joint reorganization plan. *See In re Tribune Co.*, 464 B.R. at 183. Only under substantive consolidation are

separate entities undergoing chapter 11 bankruptcy proceedings allowed to be pooled together by the courts and treated effectively as one entity. *See Clark's Crystal Springs Ranch, LLC v. Gugino (In re Clark)*, 548 B.R. 246, 254 (B.A.P. 9th Cir. 2016), aff'd, 692 F. App'x 946 (9th Cir. 2017) ("Substantive consolidation is an uncodified, equitable doctrine allowing the bankruptcy court, for purposes of the bankruptcy, to combine the assets and liabilities of separate and distinct—but related—legal entities into a single pool and treat them as though they belong to a single entity." (internal quotation marks omitted) (quoting *In re Bonham*, 229 F.3d 750, 764 (9th Cir. 2000))). The purpose of the substantive consolidation doctrine is to ensure fairness to all creditors, but courts in general hold that this equitable doctrine should be used sparingly. *Id.*

Here, the Plan expressly states that Debtors are not being substantively consolidated. R. 7. In *In re Enron Corporation*, the court applied the *per plan* approach and confirmed the debtors' plan. No. 01-16034, 2004 Bankr. LEXIS 2549 (Bankr. S.D.N.Y. July 15, 2004). Adoption of the *per plan* approach in that case is distinguishable, however, because the debtors pursued reorganization under the substantive consolidation doctrine. *Id.* at *55. Therefore, the court held, *inter alia*, that the § 1129(a)(10) requirement had been satisfied because the substantive consolidation doctrine permitted the court to treat the debtors in that case as a single entity. *Id.* at *235. If Debtors in the present case sought reorganization under the substantive consolidation doctrine, the *per plan*/*per debtor* debate would be for naught because the sole purpose of the substantive consolidation doctrine is to provide debtors with the option to consolidate their assets and liabilities and to reorganize their collective debt as one single entity. *See, e.g.*, *In re Owens Corning*, 419 F.3d 195, 211 (3d Cir. 2005); *see also* 11 U.S.C. § 1123(a)(5)(C) (2018) (providing that a plan may provide for the "merger or consolidation of the debtor with one or more persons"). But that is not the case here. Debtors did not seek confirmation under the substantive consolidation doctrine; to

the contrary, Debtors sought the convenience of receiving confirmation of their reorganization plan under joint administration. R. 7. In fact, the Plan specifically expressed that "no debtor is liable for the obligations of another." *Id.*

Debtors pursued chapter 11 reorganization under a joint, multi-debtor plan. *Id*. Notwithstanding the joint nature of the reorganization, each Debtor nevertheless retains the obligation to reorganize its individual bankruptcy estate separately and in accordance with the Bankruptcy Code. *See In re Tribune Co.*, 464 B.R. at 181. That is, each Debtor-entity is independently required to meet the confirmation requirements under § 1129(a). *Id*. In this case, that means that Development is obligated to receive approval of the Plan from Under My Thumb, its only impaired creditor. *Cf. id.* Without application of the substantive consolidation doctrine, the bankruptcy court erroneously confirmed the Plan without Development's satisfaction of the § 1129(a)(10) requirement. Therefore, this Court should uphold the procedural separation of the substantive consolidation doctrine from joint administration and adopt the *per debtor* approach.

C. Adoption of the *per plan* approach is an unauthorized judicial override of the statutory scheme and policy considerations established by Congress.

General policy considerations favored by the courts neither justify nor give them the authority to override statutory requirements established by Congress in § 1129(a). *See SCA Hygiene Prod. Aktiebolag v. First Quality Baby Prod., LLC*, 137 S.Ct. 954, 967 (2017). The courts cannot render statutory provisions null and void to attain a more judicially favored result when Congress has not established such a remedy. *See id.* at 967 (2017) ("[W]e cannot overrule Congress's judgment based on our own policy views."). Adopting the *per plan* approach does just that: it replaces the policy objectives of Congress with favored policy objectives of the courts. In this case, an impaired class of each Debtor accepted the Plan, except that of Development because Under My Thumb did not approve the Plan. R. 8. Under the *per debtor* approach, Under My Thumb retains

the statutorily granted ability to block confirmation of Development's reorganization plan, notwithstanding the other Debtors receiving near unanimous support and approval of their respective plans. *See* 11 U.S.C. § 1129(a)(10).

Under the *per plan* approach, however, the outcome is different entirely. Because at least one class of claims of *any* Debtor that is impaired under the Plan has approved, the court could approve the reorganization plan despite Under My Thumb's objections. *See Matter of Transwest Resort Props., Inc.*, 881 F.3d 724, 729 (9th Cir. 2018). This would mean that so long as *one* of the ten present Debtors had approval of the Plan from an impaired class of creditors, the Plan would be confirmed even if every impaired class of creditors of every other Debtor objected. Without the protection of § 1129(a)(10), Under My Thumb—as well as any future creditor of a debtor participating in a joint, multi-debtor bankruptcy proceeding—would face an inevitable cramdown simply because a bankruptcy court allowed joint administration of a reorganization plan. Here, Under My Thumb is trying to protect its self-created software from a direct competitor. *See* R. 8. If the *per debtor* approach is rejected by this Court, debtors will be unfettered in their attempts to reorganize by their impaired creditors, shirking this congressional mandate of minimum support from those creditors for confirmation of any reorganization plan. *See* 11 U.S.C. § 1129(a)(10).

This Court should not impede the § 1129(a)(10) requirement enacted by Congress and imposed on each individual debtor in a chapter 11 bankruptcy proceeding based solely on the Court's own policy objectives. The statute requires that "at least one class of claims that is impaired under the plan [accept] the plan." 11 U.S.C. § 1129(a)(10). To give full effect to this statute, the necessary extension of the approval requirement to each debtor and each individual plan under joint administration must be upheld. Adopting the *per plan* approach impedes Congress's goal of protecting

the interests of both debtor and non-debtor parties in a bankruptcy proceeding. Therefore, this Court should adopt the *per debtor* approach to interpret § 1129(a)(10).

CONCLUSION

A debtor in possession cannot assume *or* assign a nonexclusive software license without the licensor's consent. This is consistent with the plain meaning of § 365(c)(1), which provides that a debtor in possession "may not assume or assign any executory contract . . . of the debtor . . . if [the licensor] does not consent to such assumption or assignment." This statute is written in the disjunctive and should not be effectively rewritten by this Court in the conjunctive. The plain meaning rule requires that this Court adopt the hypothetical test to correctly interpret § 365(c)(1). The actual test reads Congress's prohibition on assumption of executory contracts without the consent of the non-debtor party out of the statute. This interpretation aids Development in circumventing the requirement that it seek and obtain Under My Thumb's approval prior to either assuming *or* assigning the software agreement.

Under a joint reorganization plan where the debtors have not been substantively consolidated, § 1129(a)(10) requires that "at least one class of claims that is impaired under the plan has accepted the plan." The plain meaning of this statute and the cardinal rule of contextual statutory interpretation, reaffirmed by this Court in *King*, require enforcement of § 1129(a)(10) to its full extent. The *per debtor* approach does this. It requires independent debtors under a joint reorganization plan to retain their independent obligation to comply with the requirements of § 1129(a) to receive court confirmation for the joint, multi-debtor plan. The *per plan* approach, on the other hand, relieves debtors in a multi-debtor plan of legislatively imposed requirements. As such, this Court should adopt the *per debtor* approach and require each individual Debtor under this plan to receive approval from at least one of its impaired class of claims. Because Development has not

satisfied this requirement—due to Under My Thumb's rejection of the Plan—the Plan is not confirmable under § 1129.

Thus, the Court should affirm the Thirteenth Circuit on both issues.

Team R. 9
Counsel of Record

APPENDIX A

11 U.S.C. § 102(7) – Rules of Construction

In this title—

(1) [omitted]

(2) [omitted]

(3) [omitted]

(4) [omitted]

(5) [omitted]

(6) [omitted]

(7) the singular includes the plural;

(8) [omitted]

(9) [omitted]

APPENDIX B

11 U.S.C. § 365(a) – Executory Contracts and Unexpired Leases

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

11 U.S.C. § 365(c)(1)

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

11 U.S.C. § 365(f)(1)

(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.

11 U.S.C. § 365(f)(2)(A)

(f)(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;

APPENDIX C

11 U.S.C. § 1107 – Rights, Powers, and Duties of Debtors in Possession

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

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

APPENDIX D

11 U.S.C. § 1122(a) – Classification of Claims or Interests

(a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

APPENDIX E

11 U.S.C. § 1123 – Contents of Plan

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

(1) [omitted]

(2) specify any class of claims or interests that is not impaired under the plan;

(3) specify the treatment of any class of claims or interests that is impaired under the plan;

(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;

(D) [omitted]

(E) [omitted]

(F) [omitted]

(G) [omitted]

(H) [omitted]

(I) [omitted]

(J) [omitted]

(6) [omitted]

(7) [omitted]

(8) [omitted]

(b) Subject to subsection (a) of this section, a plan may—

(1) [omitted]

(2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

APPENDIX F

11 U.S.C. § 1124 – 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; or

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

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

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

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

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

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

APPENDIX G

11 U.S.C. § 1126 – Acceptance of Plan

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

(b) [omitted]

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

(d) [omitted]

(e) [omitted]

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

(g) [omitted]

APPENDIX H

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

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

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

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

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

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

(i) has accepted the plan; or

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

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

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

(A) such class has accepted the plan; or

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

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

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

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

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

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

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

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

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

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

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

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

(11) [omitted]

(12) [omitted]

(13) [omitted]

(14) [omitted]

(15) [omitted]

(16) [omitted]

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

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

(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

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

(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) [omitted]

(d) [omitted]

(e) [omitted]

APPENDIX I

Bankruptcy Rule 1015 - Consolidation or Joint Administration of Cases Pending in Same Court

(a) [omitted]

(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]