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Far from the Madding Crowd: Crowdfunding a Small Business Reorganization

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FAR FROM THE MADDING CROWD: CROWDFUNDING A SMALL BUSINESS REORGANIZATION

ABSTRACT

Crowdfunding, the act of raising small sums of money from a large pool of people over the internet, represents a new way for small businesses to raise capital. Thousands of entrepreneurs have used online portals such as Indiegogo.com or Kickstarter.com to fund their business ventures. While the results of those campaigns vary wildly, the market itself has thrived, and currently sees an annual investment of $90 billion. As more businesses turn to crowdfunding, the likelihood that crowdfunding will come into conflict with the Bankruptcy Code increases.

This Comment proposes a framework by which bankruptcy courts can analyze cases involving non-equity crowdfunding and small business debtors. The framework is best described in the context of four questions likely to be raised by the creditors of a crowdfunding debtor. First, creditors may seek to cancel a crowdfunding campaign once the debtor has filed for bankruptcy. Section 365, and the concept of contingent interests, will both allow the debtor to overcome these objections and incentivize debtors to withhold them in the first place. Second, creditors may object to the use of estate property in the campaign itself. Section 363 provides courts with a means to evaluate these objections and debtors with a means to defeat them. Third, creditors may seek to prevent a debtor from taking on new debt by fulfilling its post-petition crowdfunding obligations. Section 364, however, suggests that those obligations should be considered administrative expenses. Finally, creditors may oppose confirmation of a reorganization plan predicated on a successful crowdfunding campaign. If such a plan is carefully designed, however, it can satisfy § 1129(a)(11)'s feasibility standard.

Bankruptcy Courts can and should evaluate these cases with an eye towards promoting trust in the crowdfunding sector. By explaining the proposed framework through the eyes of a fictional small business, this Comment argues that courts can answer creditors' questions in a way that both satisfies the twin aims of bankruptcy and protects the integrity of the crowdfunding system.

PREFACE

Debt, as a general rule, is undesirable. Nevertheless, as the economy continues to grow in unexpected directions, debt remains a constant part of almost any market.[1] Small businesses treading water in that oft-raging sea of equity often discover that, as Ralph Waldo Emerson wrote in 1860, "money often costs too much."[2] Failure to raise capital, then, becomes the breaker upon which so many entrepreneurs ultimately crash.

Crowdfunding represents one means by which individuals and businesses can avoid the pitfalls of debt-based capital formation.[3] Crowdfunding is, in its simplest form, "a financing model that relies on collecting small sums of money from many people over the Internet."[4] The process is straightforward. Instead of giving up equity to a bank or encumbering more of their property with liens, entrepreneurs can tap into their consumer base for needed capital. Using online portals such as Kickstarter.com or Indiegogo.com, the entrepreneur, and thousands like her, simply lists her project online for the masses to evaluate. If an individual likes the project, and wishes to see it thrive, he can contribute funds and become a "backer." In addition to knowing that they have contributed to something they are passionate about, backers are often rewarded with special access, recognition, or items to commemorate their benevolence.

These contributions are flowing in at unexpected rates. According to Forbes, the crowdfunding sector will see investment of $90 billion per year by 2017, and has likely already overcome venture capital in terms of average yearly investment.[5] Small businesses are playing their part in this surge because "[c]rowdfunding addresses a well-known gap in financing for companies and projects with prospects too uncertain to qualify for bank loans as well as business plans too small or esoteric to attract angel investors or venture capital funding."[6]

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[1] At least one commentator has gone further to argue that our "debt-based economy" predates even the original 13 colonies. K-Sue Park, *Money, Mortgages, and the Conquest of America*, 41 LAW & SOC. INQUIRY 1006, 1014 (2016).

[2] *See* Rob Berger, *Top 100 Money Quotes of All Time*, FORBES (Apr. 30, 2014), http://www.forbes.com/sites/robertberger/2014/04/30/top-100-money-quotes-of-all-time/#534e652675e7.

[3] Throughout this Comment, the term "debt-based capital formation" is used as shorthand for traditional methods of capital formation, including loans, mortgages and venture capital. The "pitfalls" referred to here are those that usually come with attaching new obligations to a business: lost equity, interest, and opportunity cost being the most recognizable.

[4] Amy Cortese, *Pennies from Many*, N.Y. TIMES, Sep. 25, 2011.

[5] Chance Barnett, *Trends Show Crowdfunding to Surpass VC in 2016*, FORBES (May 9, 2015), http://onforb.es/1GbtdwP.

[6] *See generally* Dana Brakman Reiser & Steven A. Dean, *Se(c)(3): A Catalyst for Social Enterprise Crowdfunding*, 90 IND. L.J. 1091, 1101 (2015).

On Indiegogo, the "small business" category is filled with well over 250 campaigns[7] crowdfunding for everything from opening a hot yoga studio in Richmond, Virginia ($5,750 raised)[8] to relocating a modular "co-living space" in Los Angeles ($29,307 raised).[9] The allure of tapping into the crowd for capital has also been felt in larger corporate circles. In 2015, Sony, an international company with $148 billion in assets, announced that the third installment of its long dormant video game series *Shenmue* would be funded via Kickstarter.[10] Despite some intense media skepticism and criticism, Sony raised $800,000 in the first half hour of the campaign.[11]

Unfortunately, small businesses often have a rough go in today's economy—in 2016, for example, an average filing-day saw 151 businesses file for bankruptcy.[12] As the amount of businesses using crowdfunding platforms grows, so too will the amount of crowdfunding businesses that fail. More failed businesses funded by crowdfunding campaigns will logically lead to more businesses filing for bankruptcy that still owe promises to backers. These failures will ultimately bring crowdfunding into conflict with chapter 11 of the Code.[13]

INTRODUCTION

Legal scholarship has only recently addressed crowdfunding from a bankruptcy perspective. In a 2013 *American Bankruptcy Institute (ABI) Journal* feature titled *"Crowdfunding" a Chapter 11 Plan,* one commentator wrote that while "[c]rowdfunding has the potential to create new options for small business debtors . . . if and when these new options arise in the context of bankruptcy cases, they will inevitably raise a host of questions."[14] This Comment will address four of those questions, each likely to be brought by creditors of a small business debtor. It will not suggest how a court should rule in any particular

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[7] INDIEGOGO, https://www.indiegogo.com/explore/smallbusiness#/ (last visited Feb. 15, 2018).

[8] *Humble Haven Yoga*, INDIEGOGO, https://www.indiegogo.com/projects/humble-haven-yoga-community-health/x/15370259#/ (last visited Feb. 15, 2018).

[9] *Save Podshare*, INDIEGOGO, https://www.indiegogo.com/projects/save-podshare-end-world-loneliness/x/15370259#/ (last visited Feb. 15, 2018).

[10] *See* Dalton Cooper, *E3 2015: 'Shenmue 3' Announced, To Be Funded on Kickstarter,* GAMERANT https://gamerant.com/shenmue-3-kickstarter-e3-2015/ (last visited Feb. 19, 2017).

[11] *Cf.* The Know*, Shenmue 3 a Scam?! You decide*, YOUTUBE (June 22, 2015), https://www.youtube.com/watch?v=vl4NzY9umlU.

[12] 37,823 businesses filed for bankruptcy in 2016; 6,591 of those filings at least started in Chapter 11. *January 2017 Bankruptcy Statistics- Commercial Filings,* AMERICAN BANKRUPTCY INSTITUTE (Feb. 2, 2017), http://www.abi.org/newsroom/bankruptcy-statistics.

[13] As of the time of writing, no bankruptcy court opinions concerning crowdfunding have been published.

[14] David McGrail, *Crowdfunding A Chapter 11 Plan*, 32 AM. BANKR. INST. J. 30, 30–31 (2013).

case; as will be discussed, such inquiries are rather fact intensive. The Comment will, however, propose a framework for how a court can decide (1) whether the campaign should be cancelled outright upon filing, (2) whether a debtor can use property of the estate to crowdfund, (3) whether promised rewards can be paid without upsetting eventual distribution, and (4) whether a chapter 11 plan can be confirmed if it relies on crowdfunding as a means of capital formation.

This Comment will suggest that, with regards to crowdfunding, the Code need not be reinvented, and the tools to analyze these four questions are already present in the judge's toolbox. The threshold question of the crowdfunding campaign's continuation is addressed by § 365, which concerns executory contracts, and § 541's allowance of contingent interests as property of the estate. As discussed *infra* in parts III (B) and (C), these two sections should allow debtors to continue their campaigns after filing for chapter 11. Part III (D) discusses how § 363 will authorize debtors-in-possession to use property of the estate to crowdfund.[15] Part III (E) proposes that, because rewards promised to backers are post-petition burdens, § 364 can allow debtors to satisfy those obligations. Finally, part III (F) suggests that crowdfunding can satisfy § 1129(a)(11)'s feasibility requirement, and that reliance on such a campaign need not be fatal to a plan's confirmation. That such a framework is already present in the Code means that courts do not need to react impulsively in response to crowdfunding [16]

Broadly speaking, there are two types of crowdfunding: equity crowdfunding and non-equity crowdfunding. While this Comment concerns the former, the latter will be discussed by way of comparison, especially in part II (A), with regards to the 2012 "Jumpstart Our Business Startups" ("JOBS") Act.[17] Equity crowdfunding platforms are akin to virtual stock exchanges. Both individual and institutional investors can log in to an equity crowdfunding portal, such as Microventures.com or Equitynet.com, and purchase shares in

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[15] As discussed in Part III(C), "use" is a term of art in the context of § 363.

[16] Outside of bankruptcy, crowdfunding fits in a niche between securities and contracts. *See* Reza Dibaji, *Crowdfunding Delusions,* 12 HASTINGS BUS. L.J. 15, 16 (2016) (arguing that "existing crowdfunding sites carefully manage around a fundamental ambiguity in the securities laws—a surprisingly fuzzy definition of what a 'security' is").

[17] 15 U.S.C. § 77d(a)(6) (2012). Some commentators argue that "equity crowdfunding" is a misnomer for the marketplace that the JOBS Act helped to create. *Cf.* Ryan Caldbeck, *Equity Crowdfunding is Dead*, TECH CRUNCH (May 16, 2016), https://techcrunch.com/2016/05/16/equity-crowdfunding-is-dead/ ("This isn't "crowdfunding" because there needn't be any "crowd"—the marketplace is a conduit for the right investors and entrepreneurs to come together."). For the purposes of this Comment, the term will suffice.

companies.[18] Backers on these platforms become shareholders, and because they represent a wide swath of the investing community, companies seeking their investment can cater to a wider set of interests than they would in a traditional investment setting.[19] In bankruptcy, these backers would fall behind secured and unsecured creditors in chapter 11 proceedings.[20]

This Comment focuses on non-equity-based crowdfunding, which represents a more attractive proposition to many entrepreneurs because, as the name would suggest, it does not require a business owner to give up equity or shares.[21] As described in Part II (B), a business using a non-equity crowdfund can theoretically raise capital by trading on nothing more than the goodwill of its customers. Further, non-equity campaigns on platforms that do not allow securities offerings, such as Kickstarter.com[22] or GoFundMe.com,[23] are governed by general contract law, which is more accessible to small business owners than securities law.[24] As non-equity crowdfunding contracts are governed by contract law, they are simpler to evaluate in bankruptcy. For example, in a non-equity crowdfunding case, § 1145's securities law exemptions need not be considered.[25]

When a business involved in crowdfunding files for bankruptcy, three unique qualities of crowdfunding schemes may pose challenges for bankruptcy courts.[26] First, many platforms use an "all or nothing" system wherein funds are not released to project organizers until their "goals," as filed with the platform

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[18] If it deals in equity, a crowdfunding intermediary must register with the Securities and Exchange Commission (SEC) as a broker or as a funding portal and become a member of a national securities association (FINRA). *See* FINRA, http://www.finra.org/about/funding-portals-we-regulate (last visited Feb. 15, 2018).

[19] Caldbeck, *supra* note 17.

[20] U.S. SECURITIES AND EXCHANGE COMMISSION, *What Every Investor Should Know*: *Corporate Bankruptcy* (Jan. 19, 2016), https://www.sec.gov/investor/pubs/bankrupt.htm.

[21] For a discussion of the limits of equity crowdfunding, *see* Deborah L. Jacobs, *The Trouble with Crowdfunding*, FORBES (Apr. 17, 2013), http://www.forbes.com/sites/deborahljacobs/2013/04/17/the-trouble-with-crowdfunding/#40f823225f45) ("The risks, burdens and limitations of [equity] crowdfunding render it almost completely useless.").

[22] *See Rules*, KICKSTARTER, https://www.kickstarter.com/rules (last visited Feb. 15, 2018) ("Projects can't offer financial incentives like equity or repayment.").

[23] GoFundMe only allows pure donations. *See Common Questions*, GO FUND ME, https://www.gofundme.com/questions (last visited Feb. 15, 2018).

[24] *See* 2 E-COMMERCE AND INTERNET LAW § 14.01 (2016) ("Similarly, the rules of conduct on social networks, online games, blogs and other websites generally are determined by contract.").

[25] 11 U.S.C. § 1145 (2012).

[26] For simplicity, this Comment will generally use the term "crowdfunding" to refer to non-equity crowdfunding. Similarly, a crowdfunding campaign can be referred to as a "crowdfund," and monies received through said campaign are "crowdfunds."

and advertised to prospective backers, have been met.[27] If the goals are not met, the campaign receives nothing. One could imagine a scenario where a debtor has raised 90% of its goal on the date of filing for chapter 11. Should the court force the campaign's cessation to appease risk averse creditors? Or should the court allow it to continue in the hopes that a successful crowdfunding campaign can provide the debtor with funds for either its day one obligations or plan crucial operating capital? In part III (B) and (C), this Comment will answer these questions by focusing on two concepts. First, § 365 (executory contracts) provides a basis upon which a court can allow a crowdfunding campaign to continue without input or objection from creditors. Second, § 541's inclusion of "contingent interests" in property of the estate creates an incentive for creditors to withhold objections in the first place.

The second challenge derives from how most platforms focus on "rewards based" campaigns, wherein project organizers offer incentives to backers, such as special access to the design process or early access to the backed item.[28] Should a company engaging in such a campaign file for chapter 11, it is conceivable that its creditors will do anything in their power to prevent those rewards from being both issued by the debtor and given to the backers, especially if doing so would shrink the size of the estate. As articulated in parts III (D) and (E), existing law, specifically §§ 363 and 364 of the Code, can provide courts with a framework with which to evaluate the debtor's plans.

The third challenge, as discussed in parts II(C) and III (E), is that predicting the outcome of a crowdfunding campaign is difficult. Part III (E) addresses the final stage of many chapter 11 analyses: confirmation. Part III (E) will suggest that basing a reorganization on a successful crowdfunding campaign can satisfy § 1129(a)(11)'s feasibility standard.

Finally, this Comment will argue that bankruptcy courts can promote the twin aims of bankruptcy—the fresh start and fair and equitable distribution—with an eye towards protecting backer confidence in the crowdfunding system as a whole. By doing so, courts may enable all three types of interested parties to reap some benefit from the chapter 11 proceedings. If all goes well, backers may receive their "rewards," and, ideally, the knowledge that their contribution has gone towards helping their chosen cause. Debtor companies that are allowed

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[27] *See Kickstarter Basics*, KICKSTARTER, https://www.kickstarter.com/help/faq/kickstarter+basics?ref=footer (last visited Feb. 15, 2018) ("Funding on Kickstarter is all-or-nothing. No one will be charged for a pledge towards a project unless it reaches its funding goal. This way, creators always have the budget they scoped out before moving forward.").

[28] *See id*.

to continue crowdfunding during their bankruptcy case will be more likely to make the capital improvements necessary to keep the doors open, keep up with plan payments, and keep employees paid. Accordingly, creditors, though prevented from raiding the crowdfund for short term gains, will be more likely to see long-term returns as the reorganized business uses those new capital improvements to successfully complete its chapter 11 plan. If such a result is realized, both the bankruptcy system and the crowdfunding system, as analyzed in part III (A), will benefit.

Like Thomas Hardy's 1874 Novel *Far from the Madding Crowd,* this Comment draws its name from Thomas Gray's poem *Elegy Written in a Country Churchyard*. Like the poem's narrator, this Comment seeks to avoid "the madding crowd's ignoble strife."[29] If judges can analyze crowdfunding without engaging in such ignoble strife, they can empower crowdfunding debtor businesses to fully utilize the power of the crowd. The "madding crowd" need not be feared—and can, indeed, be tamed.

I. BACKGROUND AND LEGAL DOCTRINES

A. The JOBS Act Suggests that Congress Has Liberalized Capital Formation

Any analytical framework used by bankruptcy courts must fit within the judiciary's role of interpreting the laws as written by the legislature."[30] Those laws, as Karl Llewellyn observed, "must be read in the light of some assumed purpose."[31] This task is simpler when the courts have a statute in which to search for a purpose. Currently, there is no federal statute or regulation pertaining to non-equity crowdfunding.[32] However, in terms of both design and intent, the

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[29] Thomas Gray, *Elegy Written in a Country Courtyard*, THOMAS GRAY ARCHIVE, http://www.thomasgray.org/cgi-bin/display.cgi?text=elcc (last visited Feb. 15, 2018).

[30] As Bankruptcy Judge Hon. Thomas F. Waldron wrote for the ABI, "[i]t is essential to recall that contemporary Supreme Court jurisprudence establishes that the purpose of statutory interpretation is to determine Congressional intent." Thomas F. Waldron, *BAPCPA in the Courts: How Judicial Interpretation of the New Provisions Affects Your Cases*, AMERICAN BANKRUPTCY INSTITUTE 19TH ANNUAL WINTER LEADERSHIP CONFERENCE, 071206 ABI-CLE 15 (noting that this task has been difficult in recent years in the bankruptcy sphere; writing, for example, "the Bankruptcy Abuse Prevention and Consumer Protection Act [] has been repeatedly recognized by the bankruptcy community as, what in common parlance would be called, a mess.")

[31] Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes are to be Construed*, 3 VAND. L. REV. 395, 400 (1949).

[32] As Llewellyn also wrote, "[s]tatutes *in pari materia* must be construed together." Because we only have one statute at issue here (i.e., the JOBS Act, which only concerns equity crowdfunding), this canon is only helpful in the abstract. That is, because we only have one statute, we have nothing to "construe together." *Id.* at 402.

2012 Jumpstart Our Business Startups Act (the JOBS Act), while not specifically relevant to non-equity-based crowdfunding, signals congressional support for a liberalization of how small businesses raise capital. If the goal of the JOBS Act was to create avenues for capital formation, then, it is reasonable to infer that Congress' "assumed purpose" was to create similar avenues for existing small businesses.[33]

The passage of the JOBS and CROWDFUND[34] Acts signaled that, by 2012, Washington, D.C. had seen the great power of crowdfunding as a capital formation tool.[35] In passing these Acts, Congress signaled that, in the midst of the "Great Recession," the federal government was ready to democratize investment on a large scale.[36] As early as 2011, the Obama Administration signaled its support of a bill that would "make it easier for entrepreneurs to raise capital and create jobs."[37] In his 2012 State of the Union Address, President Obama pushed Congress to open up investment opportunities for small businesses, saying that "Most new jobs are created in start-ups and small businesses. So let's pass an agenda that helps them succeed. Tear down regulations that prevent aspiring entrepreneurs from getting the financing to grow."[38] His remarks at the Act's signing four months later are further illustrative:

> And for start-ups and small businesses, this bill is a potential game changer. Right now, you can only turn to a limited group of investors—including banks and wealthy individuals—to get funding. Laws that are nearly eight decades old make it impossible for others to invest. But a lot has changed in 80 years, and it's time our laws did as

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[33] *See JOBS Act Eases Regulatory Burdens on Capital Raising*, THE NATIONAL LAW REVIEW (Apr. 2012), http://www.natlawreview.com/article/jobs-act-eases-regulatory-burdens-capital-raising ("Primarily, the purpose of the JOBS Act is to help ease the regulatory burden of capital raising for startups and smaller companies leading to increased economic growth and job creation.").

[34] The "Capital RaisingOnline While Deterring Fraud and Unethical Non-Disclosure Act of 2011" was a companion bill to the JOBS Act that amended parts of the Securities Act of 1933 to "provide for registration exemptions for certain crowdfunded securities. S. 2190, 112th Congress (2012).

[35] *See also* PandoDaily, *Naval Ravikant: How I Changed the Jobs Act*, YouTube (Nov. 15, 2012), https://www.youtube.com/watch?v=ugDyaVLPj3w. Ravikant, co-founder of AngelList, an angel investing platform, discussed in this interview how involved the crowdfunding industry was in lobbying for Securities reform ("I spent six months of my life just calling in favors left and right.").

[36] *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, "Statement of Administration Policy-H.R. 2930" (Nov. 2, 2011) ("[the President] called for cutting away the red tape that prevents many rapidly growing startup companies from raising needed capital, including through a "crowdfunding" exemption. which would enable greater flexibility in soliciting relatively small equity investments.").

[37] *Id*.

[38] President Barack Obama, *Remarks by the President in State of the Union Address*, THE WHITE HOUSE (Jan. 24, 2012), https://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address.

> well. Because of this bill, start-ups and small business will now have access to a big, new pool of potential investors—namely, the American people. For the first time, ordinary Americans will be able to go online and invest in entrepreneurs that they believe in. [39]

The legislative history behind the Act follows a similar trajectory.[40] Then-Representative Spencer Bachus, for example, stated on the House floor that "[Congress] must cut the red tape that prevents our small businesses and entrepreneurs [from capital formation] . . . . They are creating the most jobs. This legislation will give them the freedom to access capital, to hire workers, and to grow jobs."[41]

The intent to liberalize the means by which small businesses can raise capital was also bipartisan. In the Senate, 23 Democrats joined the entire Republican minority to pass the bill 73-26.[42] In the House, the entire Republican majority and 145 Democrats pushed the bill to President Obama's desk, where it was quickly signed.[43] The expediency by which the bill passed both the House and the Senate, with obvious support from the executive branch, suggests that Washington recognized the reality that "outdated laws [were] cutting off a huge pool of potential capital for small, private businesses that have been all but abandoned by banks and Wall Street."[44]

To be clear, the Act does not strictly apply to non-equity crowdfunding. Among other things, it allows investors earning less than $200,000 a year with a net worth below $1 million to invest in startups through certain online platforms.[45] Those platforms are also subject to restrictions, such as a limit of $1

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[39] *Id*.

[40] The groundwork for President Obama's push was arguably laid by Republican Representatives Carney and Fincher, who introduced H.R. 3606, the Reopening American Capital Markets to Emerging Growth Companies Act, in 2011. H.R. 3606, 112th Cong. (2012). That act was largely incorporated into the JOBS Act.

[41] 158 Cong. Rec. H1234-01 (daily ed. Mar. 7, 2012) (statement of Rep. Bachus). For differing views on the SEC's role in regulating this marketplace, *compare* R. Kevin Saunders II, *Power to the People: How the SEC Can Empower the Crowd*, 16 VAND. J. ENT. & TECH. L. 945, 945 (2014) (proposing that the SEC "initially adopt a light regulatory approach, let the market regulate itself where practicable, and impose harsher regulation only where necessary") *with* Thomas Lee Hazen, *Crowdfunding or Fraudfunding? Social Networks and the Securities Laws-Why the Specially Tailored Exemption Must Be Conditioned on Meaningful Disclosure*, 90 N.C.L. REV. 1735, 1735 (2012) (concluding that "the only appropriate exemption for crowdfunding is one conditioned on meaningful disclosures about the company and the terms of the offering.").

[42] CONGRESS.GOV, https://www.congress.gov/bill/112th-congress/house-bill/3606/actions (last visited Apr. 6, 2018)

[43] *Final Vote Results For Roll Call 132*, OFFICE OF THE CLERK (Mar. 27, 2012), http://clerk.house.gov/evs/2012/roll132.xml.

[44] Cortese, *supra* note 4.

[45] Lucinda Shen, *Now Anybody Can Try Being a Venture Capitalist*, FORTUNE (May 16, 2016), http://fortune.com/2016/05/16/title-iii-jobs-act/.

million on investment during any twelve-month period.[46] For our purposes, then, the JOBS Act should be evaluated considering intent rather than substance. Given that Congress has shown a preference for making equity-based crowdfunding easier, it is likely that Congress will eventually show a similar preference for non-equity-based crowdfunding as well. Non-equity-based crowdfunding carries less risks than its equity-based cousin.[47] More importantly, non-equity crowdfunding is considerably simpler than equity crowdfunding; while the former is essentially a one-time transaction (i.e., money is exchanged for rewards), the latter creates a continuous relationship governed by securities law.[48] If Congress was willing to liberalize equity-based crowdfunding for the masses, then, it is logical that Congress would be equally willing to open up avenues for non-equity-based campaigns for smaller businesses. Bankruptcy courts can, and indeed should, keep this in mind when hearing cases dealing with crowdfunding campaigns.

B. Crowdfunding through the Eyes of a Small Business

Theory can only take one so far before practicality demands some attention. Before explaining the framework that courts can use to evaluate crowdfunding small businesses, it would be helpful to explain *who* those small businesses are likely to be. For reasons described in this section, small, local, and respected businesses, such as family restaurants, are most likely to crowdfund successfully. In the interest of simplicity, this Comment will explain its proposed analytical framework through the eyes of a fictitious small business, owned wholly by Mr. Al Jones, called Al's Pizza.[49] This section serves two purposes: to introduce the reader to the type of business likely to use crowdfunding, and to explain why those businesses can successfully do so.

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[46] *Id*.

[47] Risks that apply to equity crowdfunding and not non-equity crowdfunding include adverse or overinflated valuations, added compliance and corporate governance costs, and a low initial rate of success; during the early stages of equity crowdfunding in the UK, "one in five companies that raised money on equity crowdfunding platforms between 2011 and 2013 had gone bankrupt." Mary Childs, *Fears That Crowdfunding Poses Risks for Small Investors*, FIN. TIMES (June 1, 2016), https://www.ft.com/content/e7756dae-2740-11e6-8ba3-cdd781d02d89.

[48] *See generally* Lisa T. Alexander, *Cyberfinancing for Economic Justice*, 4 WM. & MARY BUS. L. REV. 309, 350 (arguing that the JOBS Act, and equity crowdfunding generally, does not do enough to increase "historically marginalized actors' access to new crowdfunding markets.")

[49] A pizza restaurant was chosen because few things are more ubiquitous than the local pizza joint. Between 2007 and 2010, "[a]bout 1 in 8 Americans consumed pizza on any given day." Donna G. Rhodes et al., *Consumption of Pizza: What We Eat in America, NHANES 2007-2010*, USDA FOOD SURVEYS RESEARCH GROUP DIETARY DATA BRIEF NO. 11 (Feb. 2014), https://www.ars.usda.gov/ARSUserFiles/80400530/pdf/DBrief/11_consumption_of_pizza_0710.pdf. Al's Pizza is fictitious, and no identification with actual restaurants or persons is intended or should be inferred.

In § 101, the Code defines, in relevant part, a "small business debtor" as "a person engaged in commercial or business activities . . . that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than $2,566,050."[50] For this Comment, this definition is rather over-inclusive, and it fails to give an accurate picture of the types of businesses likely to rely on crowdfunding.[51] Likewise, the United States Small Business Administration lists 813 "sub-sections" of small business types.[52] This Comment's proposed framework would apply to any small business so classified. However, manufacturing and service companies that generally do not interact with the public are less likely to utilize crowdfunding.[53] A manufacturer of sporting goods, for example, will not have the same "community" of loyal retail customers as the family-owned store selling those products.[54] Put differently, more traditional "mom and pop" stores, such as restaurants and dry cleaners, are much more likely to have some social capital to tap into with a crowdfunding campaign.[55]

Social capital is the key to crowdfunding, and small businesses are in a unique position to exploit that capital. With regards to small businesses, studies have described the importance of social capital, "including social capital from family and friends and including social capital mediated by social networks."[56] Small businesses can create social capital in several ways: by becoming involved in local events, offering personal contacts with customers, and returning profit back into their communities. These businesses are therefore uniquely poised to

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[50] 11 U.S.C. § 101(51)(D)(A) (2012).

[51] Though, as discussed *supra* with regards to Sony, crowdfunding is certainly not limited to small businesses. *Supra* Part I.

[52] 13 C.F.R. § 121.201 (2012).

[53] *See* Massimo G. Columbo, Chiara Franzoni & Cristina Rossi-Lamastra, *Internal Social Capital and the Attraction of Early Contributions in Crowdfunding*, 39 ENTREPRENEURSHIP: THEORY AND PRAC. 75, 75 (2014) (internal citations omitted).

[54] *See generally* Luigi Guiso, Paola Sapienza & Luigi Zingales, *The Role of Social Capital in Financial Development*, 94 AM. ECON. REV. 526 (2004).

[55] *See* Mark Casson & Marina Della Giusta, *Entrepreneurship and Social Capital: Analysing the Impact of Social Networks on Entrepreneurial Activity from a Rational Action Perspective*, 25 INT'L SMALL BUS. J. 220, 220 (Jun. 2007) ("The concept of social capital is widely agreed to be ambiguous. It has many different connotations, and so the scope for confusion is considerable."). For the purposes of this Comment, social capital can be seen in the broad sense as "the connections and shared values that exist between people and enable cooperation. Chris Cancialosi, *4 Reasons Social Capital Trumps All*, FORBES (Sep. 22, 2014), https://www.forbes.com/sites/chriscancialosi/2014/09/22/4-reasons-social-capital-trumps-all/#22b7f63c6986. An older conception, that social capital "includes[s] information, ideas, leads, business opportunities, financial capital, power, emotional support, goodwill, trust, and cooperation" may also be illustrative. WAYNE BAKER, ACHIEVING SUCCESS THROUGH SOCIAL CAPITAL 25 (2000).

[56] *See supra*, note 53, at 95 (internal citations omitted).

take advantage of their social networks for financial gain. According to Pew Research, "87% of crowdfunding donors feel that [crowdfunding] platforms help contributors feel more connected to the products they support."[57]

Applying the concept to our example business, Al's Pizza can capitalize on this trend by offering backers rewards that "connect" them to its products, such as special access or branded merchandise. Further, projects designed to "help a person in need" are the most popular type of crowdfunding campaigns, making up 68% of the market. Of those contributions, 63% go to "a friend-of-a-friend or acquaintance."[58] If Jones has created a social network to the extent that customers see him as at least an acquaintance, his business has an opportunity to exploit that network. This is good for Jones, as his business is heading towards insolvency. Al's business debts, including a bank lien on his pizza oven,[59] unpaid rent, debt owed to suppliers,[60] withheld salary for two full-time employees, and an adverse judgment in a slip and fall case, equal $500,000.

C. Introduction to Crowdfunding Campaigns

This section describes both the crowdfunding landscape and the type of campaign that Al's Pizza will embark upon. Prior to the passage of the JOBS Act in 2012, small businesses had less capital formation options than did larger corporations.[61] Even after the act passed, the U.S. Small Business Administration wrote in July 2016 that "[s]mall businesses' financing options typically fall into two categories: debt and equity."[62] Debt-based financing is an integral part of the small business landscape; 63% of all small employer businesses have some debt,[63] and, in 2012, "credit cards were one of the top three sources of short term capital used by small businesses."[64] Jones, understanding that any loan terms he could get would be unfavorable,[65] and

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[57] Aaron Smith, *Shared, Collaborative and On Demand: The New Digital Economy*, PEW RESEARCH CENTER (May 19, 2016), http://www.pewinternet.org/2016/05/19/the-new-digital-economy/.

[58] *Id.*

[59] Some time after this Comment was written, a bankruptcy judge in Atlanta suggested to the author that, for various reasons, most trustees would abandon an industrial pizza oven. For the sake of this hypothetical, Al's oven can be liquidated if necessary.

[60] Some of this debt will come post-petition.

[61] Cortese, *supra* note 4.

[62] U.S. SMALL BUS. ADMIN., OFF. OF ADVOC., *Small Business Finance: Frequently Asked Questions* (July 2016), https://www.sba.gov/sites/default/files/Finance-FAQ-2016_WEB.pdf.

[63] *Id*.

[64] *Id.*

[65] This analysis assumes that the costs of crowdfunding, such as time, risk of failure, and payment of rewards, will be less than the costs of taking on a new, traditional loan, which can be substantial. "Microloans," for example, are provided in part by the Small Business Administration for businesses much like Al's. Their

unwilling to add any more liens to his property, has another option in the form of a crowdfunding campaign. Hoping to avoid bankruptcy, and chapter 7 in particular, Jones decides to create such a campaign on the crowdfunding portal Indiegogo.com.[66]

Next assume that confirmation of Jones' reorganization plan hinges on badly needed improvements to the restaurant, and that the crowdfunding campaign is the only reasonable means of paying for those improvements. The plan adds new seating and rearranges the dining room to accommodate ten more seats at the cost of $10,000. He could also buy an additional pizza oven, thus doubling productivity, and reducing wait times during the lunch rush, for $15,000. Jones reasons that these two main additions, coupled with various smaller improvements to the restaurant, would provide him with an additional $100,000 in revenue per year.[67] This increased revenue would allow Jones room to pay off his debts over the course of perhaps six or seven years, or, should he need to file for bankruptcy, give him more of a chance to stay out of chapter 7. With all of this in mind, Jones sets his campaign goal at $25,000.[68]

Like nearly every other campaign creator on Indiegogo, Al's will need to offer incentives to potential backers. These incentives, known in the crowdfunding arena as "perks" or "rewards," can entail tangible gifts, such as clothing, future discounts, public recognition, and special access. Rewards-based crowdfunding does not work if the "rewards" are not significantly inexpensive compared to the prices paid for them. Or, said another way, for a campaign to be successful, a project organizer must make considerably more profit from a crowdfunding transaction than they would from a traditional "sale." Backers know this going in to the transaction, and yet continue that transaction for altruistic reasons. As one commentator wrote in 2011, "beyond a few tokens

interest rates will generally fall between 8 and 13%. Katie Murray, *Financing Your Small Business With a Microloan*, U.S. SMALL BUS. ADMIN. (Jan. 15, 2014), https://www.sba.gov/blogs/financing-your-small-business-microloan. Further, online small business loans from sites such as Kabbage.com can carry an average annual percentage rate of 40%. *See* Darren Dahl, *The Six-Minute Loan: How Kabbage Is Upending Small Business Lending—And Building A Very Big Business*, FORBES (May 25, 2015), http://www.forbes.com/sites/darrendahl/2015/05/06/the-six-minute-loan-how-kabbage-is-upending-small-business-lending-and-building-a-very-big-business/print/.

[66] Indiegogo was chosen for this Comment for two reasons: it lists non-startups (as opposed to Kickstarter), and has options for both standard and "all or nothing" campaigns.

[67] Whether this projection satisfies creditors and the court will likely be a § 1129(a)(11) question. *See infra* part III(F).

[68] This is an ambitious, but not unreasonable, goal. For a discussion of crowdfunding success and failures, *see infra* part III(F).

of appreciation, [backers] get only the satisfaction of seeing an undertaking they support come to life."[69]

A real-life example may be illustrative of the rewards that Al's can offer. "Idiom Brewing Co." offers a backer tier labeled "Carry a Part of Us With You!" on its Indiegogo page.[70] For $50, backers receive stickers and an "Idiom Brewing Co. 64oz Growler."[71] Logical consumers would not pay $50 solely for a growler and stickers; part of their bargained for exchange is also the knowledge that their contribution has helped the company grow or stay in business. In Al's case, what Al's chooses to offer backers is not particularly important so long as it can make a large profit off of each transaction. Reward levels can range from trivial to substantial. Idiom Brewing Co., for example, offers a $1000 reward tier including, among other physical gifts, access to twice yearly "limited edition release parties."[72] Presumably, Idiom spends little more than opportunity cost to bring this reward to fruition. If Al's can follow suit, it will make a considerable profit.

Regardless of what the rewards actually are, some research suggests that receiving them is often the driving factor in a backer's decision to support a campaign.[73] Other backers are not paying for a trinket however, but for a chance to feel good about themselves. As one paper acknowledged, "there is truth in the claim that crowdfunding is based by and large on people's altruism."[74] Some commentators would term their transaction as one of "reciprocal altruism," a behavioral concept where a long-term investment is made without the promise of immediate return.[75] That said, just because the transaction is altruistic in nature does not preclude some immediate benefit to the backer; he may have paid $40 more for a growler then he would have at a store, but knowing that the extra $40 may have helped keep his favorite brewery in business more than makes up for the difference. It is up to project organizers to reward that altruism.

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[69] Cortese, *supra* note 4.

[70] *Idiom Brewing Co.*, INDIEGOGO, https://www.indiegogo.com/projects/idiom-brewing-co#/ (last visited Feb. 16, 2018).

[71] *Id.*

[72] *Id*.

[73] *Cf.* Paolo Crosetto and Tobias Renger, *Crowdfunding: Determinants of success and funding Dynamics*, THE JENA ECON. RES. PAPERS (2014) (noting that "an enhanced presence of pre-selling rewards and of rewards that confer social image to the pledger is positively correlated with project success").

[74] Paolo Crosetto, *It's Never Too Late for (Pre)-Sales: The Dynamics of Crowdfunding*, PAOLO CROSETTO (Jan. 22. 2015), https://paolocrosetto.wordpress.com/2015/01/22/its-never-too-late-the-dynamics-of-crowdfunding/.

[75] For a discussion about how "reciprocal altruism" has played both a legal and an evolutionary role in human development, see Scott Fruehwald, *Reciprocal Altruism as the Basis for Contract*, 47 U. LOUISVILLE L. REV. 489 (2009).

As discussed in the next section, if backers receive nothing for their trouble, the crowdfunding system will struggle to grow.

II. ANALYSIS

A. The Law Should Promote Trust in Crowdfunding

Though backers are happy to pay for altruism, they require protection from fraud and negligence. This section discusses why that is, what the law can do about it, and why courts should care. Generally speaking, absent adequate and visible protections, confidence in any system as a whole will wane. Creating an avenue for backers to at least keep the "benefit" of their bargain—i.e., their physical "reward perks"—can serve as a protection that stays within the limits of the Code.[76] Even if a campaign ultimately fails, providing debtors with another avenue towards reorganization can only further the Code's twin aims of rehabilitation and creditor satisfaction, while at the same time adding a layer of trust to the crowdfunding sector.

Trust is the key to any financial transaction.[77] Rational consumers will only part with their money if they know they are going to get a return on their investment. As discussed *infra* in part II (C), though, the utility gained from that investment need not be solely financial, and "rational behavior does not necessarily always involve receiving the most monetary or material benefit because the satisfaction received could be purely emotional."[78] Further, the emotional appeal of participating in a crowdfunding campaign to save one's

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[76] Crosetto, *supra* note 74. (noting that "project success seem[s] to have to do much more with sales than with altruism").

[77] For the purposes of this article, "trust" can be defined in the lay sense of the word. Legal scholars have, however, sought to qualify the concept further. For example, Timothy L. Fort & Liu Junhai write about three types of "trust"—"hard," "real," and "good"—of which "real trust" is most applicable to crowdfunding ("The idea underlying Real Trust is that customers, in particular, have reason to rely on the businesses that conduct commerce over the Internet.") Timothy L. Fort & Liu Junhai, *Chinese Business and the Internet: The Infrastructure for Trust*, 35 VAND. J. TRANSNAT'L L. 1545, 1552 (2002); *see also* Michele Williams, *In Whom We Trust: Group Membership as an Affective Context for Trust Development*, 26 ACAD. MGMT. REV. 377, 378 (2001) (noting that a more formal way of defining trust is "one's willingness to rely on another's actions in a situation involving the risk of opportunism"); Frank B. Cross, *Law and Trust*, 93 GEO. L.J. 1457, 1461 (2005) ("[T]rust [is] the voluntary ceding of control over something valuable to another person or entity, based upon one's faith in the ability and willingness of that person or entity to care for the valuable thing.").

[78] *See Rational Behavior*, INVESTOPEDIA, http://www.investopedia.com/terms/r/rational-behavior.asp#ixzz4W6s0w8XJ (last viewed Jan. 15, 2018).

favorite family restaurant may also attract consumers that are acting irrationally.[79]

At a micro level, without trust in a business, individual consumers will choose to patronize a competitor, or to withhold their funds entirely. At the macro level, such losses of confidence can have wide reaching consequences. In the crowdfunding realm, if rational consumers *as a whole* lose faith in the process, they will be less likely to participate. Ultimately, if crowdfunding can, in users' estimation, harm them in ways against which they cannot protect themselves, users will be reluctant to embrace such technology—even if it is otherwise beneficial."[80]

More than just intuition supports this proposition. For example, Professors Timothy L. Fort and Liu Junhai examined the issues of trust in another market that was, at the time, not fully understood—E-commerce in China during the early 2000's.[81] The two concluded that:

> Over time, companies will learn that if they are to obtain repeat customers, they will need to replicate the relationship-building required to run a neighborhood shop. That is, they must keep promises [and] provide quality performance. The market itself acts as a disciplining mechanism to reach this kind of trust over a longer haul, but law plays an important role as well.[82]

Further, they write, "In these situations, the rule of law . . . may be the most effective guarantor of the integrity of an E-commerce transaction."[83]

The rule of law can provide utility to the crowdfunding sector because it is particularly susceptible to fraud and negligence.[84] This is due in large part to two factors. First, crowdfunding campaign managers often have little experience beyond their specialized type of business.[85] In Jones' case, for example, decades of experience running a pizzeria may be little help in the world of crowdfunding.

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[79] *See Id*. ("[B]ehavioral finance also analyzes irrational behavior on the part of the investor. This can include making decisions based primarily on emotional components, such as investing in a company the investor has positive feelings for even if financial models suggest the investment is not wise.").

[80] Justin Hurwitz, *Trust and Online Interaction*, 161 U. PA. L. REV. 1579 (2013).

[81] *See generally* Fort, *supra* note 75.

[82] *Id*. at 1556.

[83] *Id.* at 1560–61.

[84] *See generally* Christopher Moores, *Kickstart My Lawsuit: Fraud and Justice in Rewards-Based Crowdfunding*, 49 U.C. DAVIS L. REV. 383 (2015).

[85] *Cf.* Katherine Bindley, *Failed Kickstarter Project Bankrupts Seth Quest, Hanfree iPad Stand Inventor: Report,* HUFFINGTON POST (Jan. 15, 2013), http://www.huffingtonpost.com/2013/01/15/failed-kickstarter-project-seth-quest-hanfree-ipad_n_2479798.html (The project head noted that "Once the manufacturers knew how much money he had to work with from [Kickstarter], they had the upper hand in negotiations.").

Second, the unpredictability of a crowdfunding campaign can cause bizarre and unexpected issues to arise. For example, Flint & Tinder, a men's underwear company, saw production costs balloon after its Kickstarter campaign raised ten times its goal, and the company found itself about 20,000 pairs of underwear short of demand.[86]

Even campaigns that are initially successful are susceptible to massive failure. For example, Hanfree, a hands-free stand for tablets, was fully funded on Kickstarter for $35,000 before the project failed and its creator became insolvent.[87] Similarly, Rebus, a British "claims management firm" entered administration, the UK's equivalent of our bankruptcy system, despite raising over £800,000 on the platform Crowdcube.[88] While these examples of negligence are somewhat well known, the prevalence of fraud has entered the public eye largely due to several catastrophic crowdfunding failures. The high-tech motorcycle helmet manufacturer Skully, for example, squandered $2.5 million in crowdfunds on, among other things, "apartment rent, grocery and restaurant bills, two Dodge Vipers, a rented Lamborghini, $2,000 spent at a strip club, and $2,345 worth of paintings."[89]

Herein lays the problem for crowdfunding projects: until crowdfunding portals break out of the realm of the early adopter, the public at large will view them with skepticism. This is especially true considering that crowdfunding lies in a sort of laissez-faire frontier with regards to regulation.[90] Until it goes further into the mainstream, the crowdfunding sector needs to maintain the trust and support of its "early adopters"—those (relatively) few that have actually used crowdfunding.[91] Law, and bankruptcy law in particular, provides one avenue for the protection of that trust.

Returning to our hypothetical, Al's Pizza has $500,000 in debt and needs of $25,000 for capital upgrades. The confirmation of Al's plan relies on these capital investments; without them, the restaurant is unlikely to meet the revenue projections it needs to satisfy creditors. Al's started a crowdfunding campaign

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[86] Alyson Shontell, *How Raising $291,000 On Kickstarter Nearly Killed Underwear Startup Flint and Tinder,* BUSINESS INSIDER (Dec. 18, 2012), http://www.businessinsider.com/flint-and-tinder-jake-bronstein-kickstarter-2012-12.

[87] Bindley, *supra* note 75.

[88] Adam Palin & Aime Williams, *Rebus becomes largest crowdfunded failure*, FIN. TIMES (Feb. 3, 2016) https://www.ft.com/content/804d41c2-ca6d-11e5-be0b-b7ece4e953a0.

[89] David Z. Morris, *Suit Alleges Rampant Fraud at Collapsed HUD Helmet Maker Skully,* FORTUNE (Aug. 14, 2016), http://fortune.com/2016/08/14/fraud-allegations-hud-skully/.

[90] The JOBS Act was the first large scale attempt at federal oversight.

[91] While one-fifth of Americans have participated in an online fundraising campaign of some sort, 61% of Americans have never heard of the term "crowdfunding." Smith, *supra* note 57.

on Indiegogo.com with a goal of $25,000.[92] As part of this goal, Al's has created several rewards for backers who contribute certain sums of money. Some of these perks will be material, and those material perks will (ideally) be paid for out of the crowdfunding proceeds.[93] Some of those perks will be intangible, such as future discounts, public recognition, or early access to new products. These rewards may not be available until the end of the campaign. For example, trinkets such as T-Shirts will likely be bought in bulk once Al's can accurately tell how many it needs. Further, some gifts, such as access to a grand-reopening, may not be possible to provide until after the capital upgrades are complete.

Assume that Al's begins its campaign successfully and raises $12,000 in the first 15 days. Customer enthusiasm begins to wane, however, and $3,000 trickles in over the next two weeks, leaving Al's with one month to raise the remaining $10,000. If he has chosen Indiegogo's fixed funding plan, Jones must raise that $10,000, or the platform will cancel all the previous contributions.[94] This would, of course, be very stressful for Jones on its own—but what if day 30 of the campaign was also the day he filed for chapter 11?

B. Continuing the Crowdfund as an Executory Contract

Regardless of which funding plan Al's chose, creditors are liable to question whether entering bankruptcy should necessitate the cancelling of the campaign. While many creditors may approve of the campaign, others, especially those with liens subject to depreciation, may fear the added costs, risks, and uncertainty that adding another moving piece to the reorganization may bring. Creditors will also be wary of the possibility that rewards payments will shrink the estate. As a result, creditors may ask whether the ongoing campaign should be cancelled before the question of plan confirmation even arises. This section will argue that a crowdfunding campaign can be an executory contract and, therefore, can be analyzed (and continued) under § 365 of the Code.[95]

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[92] For simplicity, this Comment ignores the approximately 8% in fees (5% to Indiegogo, and between 3-5% to payment processors) that Al's would lose from each pledge. *See Fees & Pricing for Campaigners: How Much Does Indiegogo Cost?*, INDIEGOGO, https://support.indiegogo.com/hc/en-us/articles/204456408 (last visited Feb. 16, 2018). Indiegogo, who may have $2400 at stake here, will pursue these funds as a traditional, unsecured creditor.

[93] For a discussion of the implications of post-petition financing and § 364, see *infra* at Part III (E).

[94] "Fixed funding" refers to a payment plan wherein funds are only released to a campaign organizer if the entire goal is met. On Indiegogo, both "fixed" and "flexible" funding, involve the same fees, and the only significant differences involve what types of payments are accepted. *Fees*, *supra* note 92.

[95] As it is not relevant, this Comment will not discuss assignment of executory contracts, which is described in § 365(b) and (c).

Section 365(a) holds that "the trustee [or debtor-in-possession], subject to the court's approval, may assume or reject any executory contract" of the debtor.[96] The contract itself remains subject to the automatic stay, though; non-debtors are required to perform their end of the contract until the debtor decides to assume or reject it, but the contract's terms are "temporarily unenforceable against the debtor."[97] Should the debtor choose to continue to receive the benefits of the contract, the Supreme Court has held that the non-debtor is entitled to receive reasonable value for those goods or services "depending on the circumstances of a particular contract."[98] Further, if the debtor assumes an executory contract, "it must assume the entire contract *cum onere*—with all of its burdens."[99]

The first step of Al's argument is to show that its crowdfunding campaign is based upon a contract between Al's and its backers. This should not be hard because the transaction contains the traditional elements of a contract: the listing on a crowdfunding portal is an offer, which consumers accept; the two parties show a mutual assent, and have the capacity to do so; and the exchange of goods, services, or cash creates consideration.[100] The foundation of a contract is further supported by legally operative[101] language on IndieGoGo's terms and conditions page that states, "Campaign Owners are legally bound to perform on any promise and/or commitment to Contributors (including delivering any

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[96] 11 U.S.C. § 365(a) (2012).

[97] *In re* Travelot Co., 286 B.R. 462, 466 (Bankr. S.D. Ga. 2002) (citing Pub. Serv. Co. of N.H. v. N.H. Elec. Coop., Inc., (*In re* Pub. Serv. Co. of N.H.), 884 F.2d 11, 14 (1st Cir.1989)).

[98] N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513, 531 (1984) ("If the debtor-in-possession elects to continue to receive benefits from the other party to an executory contract pending a decision to reject or assume the contract, the debtor-in-possession is obligated to pay for the reasonable value of those services.").

[99] Madlyn Gleich Primoff & Erica G. Weinberger, *E-Commerce and Dot-Com Bankruptcies: Assumption, Assignment and Rejection of Executory Contracts Including Intellectual Property Agreements, and Related Issues Under Section 365(c), and 365(e) and 365(n) of the Bankruptcy Code*, 8 AM. BANKR. INST. L. REV. 307, 310 (2000).

[100] 1 WILLISTON ON CONTRACTS § 18 (3d ed. 1957).

[101] The Uniform Commercial Code will generally support, and courts will generally uphold, a contract formed by one's acceptance of a website's terms and conditions, which are known as "clickwraps" or "browsewraps," so long as the terms are not unconscionable. *See* Christopher Moores, *Kickstart My Lawsuit: Fraud and Justice in Rewards-Based Crowdfunding*, 49 U.C. DAVIS L. REV. 383, 396 (2015). Courts have found a contract both where the user was aware that they were entering a contract and where the site put a reasonably prudent user on inquiry notice of the terms of the contract. *Compare* Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 402 (2nd. Cir. 2004) (finding likelihood of success on the merits in a breach of browsewrap claim where the defendant "admitted that it was fully aware of the terms" of the offer) *with* Van Tassell v. United Mktg., 795 F.Supp.2d 770, 792–93 (E.D. Il. 2011) (refusing to enforce arbitration clause in browsewrap agreement that was only noticeable after a "multi-step process" of clicking through non-obvious links); *see generally* Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1176 (9th Cir. 2014) ("Indeed, courts have consistently enforced browsewrap agreements where the user had actual notice of the agreement").

perks)."[102] If a contract exists, then, Al's can use one of two theories, generally speaking, to show that it is executory.

Courts have promulgated two basic ways to determine the "executoriness" of contracts.[103] Executory contracts are not defined in § 365, and, in drafting the Code, Congress itself chose not to define such contracts.[104] Section 365 does, however, allow for a trustee to rely on applicable state laws to assume or reject an executory contract.[105] Professor Vern Countryman provided the earliest understanding of executory contracts in bankruptcy in 1973.[106] Under the Countryman "material breach" test, an executory contract is one "under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other."[107] Thus, "[o]nly a contract that satisfied this test could be assumed by the estate."[108] The Third, Fourth, Ninth and Eleventh Circuits have adopted this view.[109]

On the other hand, as the Fifth Circuit wrote, courts following the Countryman test "have worked needless and perhaps unconstitutional forfeitures of security interests."[110] As a result, many bankruptcy judges have abandoned the Countryman test in favor of more holistic approaches.[111] However, these

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[102] *Terms of Use*, INDIEGOGO, https://www.indiegogo.com/about/terms (last visited Feb. 16, 2018).

[103] The progenitor case of executory contract theory in bankruptcy is Copeland v. Stephens, 106 E.R. 218 (1818). In Copeland, "the King's Bench held that a debtor's obligations remaining under a lease could not be delegated in bankruptcy unless they were affirmatively assumed by the trustee." In 1892, the United States Supreme Court adopted a similar view in *Quincy v. Humphreys*, where Chief Justice Fuller wrote that, with regards to assignees, . . . the law casts upon such assignee the legal title to the unexpired term of the lease, and he thus becomes assignee of the term by operation of law, unless, from prudential considerations, he elects to reject the term as being without benefit to the creditors. Quincy, Mo. & Pac. R. Co. v. Humphreys, 145 U.S. 82, 97 (1892).

[104] S. REP. NO. 95-989, at 58 (noting that "though there is no precise definition of what contracts are executory, it generally includes contracts on which performance remains due to some extent on both sides.").

[105] 11 U.S.C. § 365(C)(1)(a) (2012). This Comment will assume no interference from state laws.

[106] Vern Countryman, *Executory Contracts in Bankruptcy*, 57 MINN. L. REV. 439 (1973).

[107] *Id.* at 460.

[108] Jay Lawrence Westbrook, *A Functional Analysis of Executory Contracts*, 74 MINN. L. REV. 227, 236 (1989).

[109] *Cf. In re* Kiwi Int'l Air Lines, Inc., 344 F.3d 311, 317–18 n.5 (3d Cir. 2003) (quoting Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp., 872 F.2d 36, 39 (3d Cir. 1989)); Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc. (*In re* Richmond Metal Finishers, Inc.), 756 F.2d 1043, 1045 (4th Cir. 1985); *In re* Newcomb, 744 F.2d 621, 624 (8th Cir. 1984); *In re* Select-a-Seat Corp., 625 F.2d 290, 292 (9th Cir. 1980).

[110] *In re* Austin Dev. Co., 19 F.3d 1077, 1081 (5th Cir. 1994).

[111] *See* Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection,"* 59 U. COLO. L. REV. 845, 850 (1988) (arguing that the "principal effect" of Countryman's definition "has been to produce substantial unnecessary confusion."); Olin McGill & Hon. Francis G. Conrad, *Exorcising Executoriness: Functionalist Arguments and Incantations to Avoid Meeting the Devil in the Woods,* NORTON ANN. SURV.

tests have also been met with scholarly criticism. Professor Jay Lawrence Westbrook, for example, derided the consideration of executory contracts as property of the estate in 1989:

> This view treats such contracts just like the two left shoes the trustee finds in the office cloakroom, to be sold if possible or abandoned if without value. This analysis will not do, however, because the trustee cannot merely sell or abandon a contract; the estate must pay for the rights it confers or pay damages for abandoning it, burdens that do not attach to the shoes.[112]

The Sixth and Eleventh Circuits, as well as many District and Bankruptcy courts (including the Southern District of New York) have adopted the functional approach "under which a contract is executory when the estate would benefit from the assumption or rejection of the contract."[113] In *In re Jolly*, for example, the Sixth Circuit wrote that the "strong Congressional policy of rehabilitating a debtor as effectively as possible by letting in the largest possible number of creditors" rendered the Countryman standard too rigid for many cases.[114]

Contracts that courts have deemed executory under the functional approach are varied. A good example is *In re Becknell*, where the Sixth Circuit held that a lease-purchase agreement, which gave the purchaser a fee-simple interest in three million tons of coal, was executory because both creditor and debtor "had obligations to perform in the future."[115] The Sixth Circuit used similar reasoning in *In re Jolly* to disallow a debtor's rejection because the contract was not "an obligation for the debtor to do something in the future."[116]

Whether the Countryman definition would provide favorable results for Al's is unclear. If Al's can persuade the court that failing to go forward with the crowdfund would give rise to a material breach claim by its backers, it may

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BANKR. L. 137, 144 (1994) (stating that functional approach emerged slowly due to frustration over Countryman's test).

112 Westbrook, *supra* note 108, at 245.

113 Michelle Morgan Harner, Carl E. Black & Eric R. Goodman, *Debtors Beware: The Expanding Universe of Non-Assumable/non-Assignable Contracts in Bankruptcy*, 13 AM. BANKR. INST. L. REV. 187, 191 (2005); *see In re* Jolly, 574 F.2d 349, 351 (6th Cir. 1978) ("Generally, they are agreements which include an obligation for the debtor to do something in the future)"; *In re* Drexel Burnham Lambert Group Inc., 138 B.R. 687, 703 (Bankr. S.D.N.Y. 1992) ("The concept of the 'executory contract' in bankruptcy should be defined in light of the purpose for which the trustee is given the option to assume or reject.").

114 *In re* Jolly, 574 F.2d at 351; *see also* Westbrook, *supra* note 108, at 229–30 (arguing that the Countryman definition is too rigid in *all* cases and should be abandoned).

115 *In re* Becknell & Crace Coal Co., Inc., 761 F.2d 319, 322 (6th Cir. 1985).

116 *In re* Jolly, 574 F.2d at 351 ("In this case there is no obligation for the debtor to do anything in the future. His duty was in the past, he has breached that duty, and had judgment entered against him for that breach.").

persuade a court using this standard. However, creditors may have a viable argument that the backers' contributions are so small and diffuse that bringing those claims would be both meaningless and impossible.

It is likely that crowdfunding debtors would prefer the functional approach because it casts a wider net than the Countryman definition.[117] If Al's used a fixed funding campaign, it will argue that, like the debtor in *In re Becknell,* both it and its creditors (the backers) have obligations to perform in the future—Al's must provide the promised perks, and the backers must pay the promised pledges.[118] Finally, because Al's can benefit from a flexible funding campaign even if it were ceased halfway through (i.e., through the already received funds), such campaigns can also fall under the functional approach. This is true even if rewards are still due to backers because, as the Eleventh Circuit wrote, "Even though there may be material obligations outstanding on the part of only one of the parties to the contract, it may nevertheless be deemed executory under the functional approach."[119]

1. Assuming the Contract

It is likely that Al's will want to continue to crowdfund for three main reasons. First, even if the campaign is struggling, it represents the restaurant's best option for gaining new capital. Second, depending on how far along the campaign is, Al's may have invested funds in rewards, and its only way to recoup those expenditures will likely be through completing the campaign. Finally, Al's will want to avoid disappointing its backers, especially if they are its literal last chance at a successful reorganization. Al's will therefore most likely wish to assume the contract.

If the crowdfunding contract is executory, a debtor-in-possession has the power to decide whether to assume it or to reject it, subject to court approval.[120] Especially with regard to assumption, though, approval is not guaranteed, as it "produce[s] a discontinuity with the normal rules for treatment of creditors [because] the estate itself becomes obligated on the contract, and the non-debtor

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[117] Executory contracts are property of the estate under § 541. *See In re* Drexel Burnham Lambert Grp., Inc., 138 B.R. at 702.

[118] In a fixed funding campaign, backers are generally not charged until the campaign's goal has been met.

[119] *See In re* Gen. Dev. Corp., 84 F.3d 1364, 1374 (11th Cir. 1996).

[120] 11 U.S.C. § 365(a) (2012). Professor Andrew argues that "rejection" is a misnomer and should be seen more as "non-assumption," which changes the legal framework surrounding the court approval process significantly. Andrew, *supra* note 111, at 849–50. He writes that "Understanding that rejection does not affect contract liabilities demonstrates, for example, that litigation over whether rejection will be permitted is largely a pointless exercise." *Id.* at 890.

party departs the ranks of ordinary creditors and becomes a priority claimant."[121] Courts will generally analyze the debtor's decision under the "business judgment" standard, which was favored by the Supreme Court in *NLRB v. Bildisco*.[122]

The business judgment standard asks whether the decision to assume "is not materially different from any other investment decision made by a trustee," and the court will ask "[w]hat use or disposition of the assets of the estate is best calculated to maximize the return to creditors."[123] Or, put differently, the test "requires only that the trustee demonstrate that rejection [or acceptance] of the executory contract will benefit the estate."[124] As courts are generally hesitant to overrule the trustee or debtor-in-possession with regards to business matters, then, the choice to assume or reject the contract is usually respected. Al's creditors would therefore have to argue that Al's choice to assume is the incorrect one. If they fail to do so, Al's choice will stand. The creditors' argument may hinge on risk, depreciation, or allegations of bad faith, but, as with the question of feasibility, discussed further in part III (F), Al's would likely succeed.

2. Rejecting the Contract

Depending on the circumstances, Al's may wish to reject the executory contract if it believes it will benefit the estate. As mentioned above, courts generally use the business judgment standard when evaluating the decision to reject an executory contract.[125] If the contract is rejected, Al's will not face liability for breach, meaning that backers, like so many other unsecured creditors, receive nothing.

Rejection can raise a question that challenges the laissez-faire nature of crowdfunding regulation: what happens when a business simply chooses to renege on its plan to raise equity through loyal customers? On its face, it would seem odd to *force* a party to do something it is not contractually obligated to

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121 *Id*.

122 N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513, 526 (1984); *see* Andrew, *supra* note 111, at 895.

123 Andrew, *supra* note 111, at 895–96.

124 *In re* Stable Mews Assocs., Inc., 41 B.R. 594, 596 (Bankr. S.D.N.Y. 1984). It should be noted that the S.D.N.Y. Bankruptcy Court, as well as the D.C. Circuit, overruled parts of *In re* Stable Mews Assocs. with regards to a debtor's decision to reject a contract when that rejection ran afoul of federal rent control guidelines. *see In re* Friarton Estates Corp. 65 B.R. 586, 590 (Bankr. S.D.N.Y 1986); Saravia v. 1736 18th Street, N.W., Ltd. P'ship 844 F.2d 823, 826 (D.C. Cir 1988).

125 *See* N.L.R.B. v. Bildisco & Bildisco, 465 U.S. at 526.

do.[126] The party most obviously opposed to rejection of the contract is the backers. IndieGoGo, the crowdfunding platform, may also object on the basis that fees owed to it will be nullified by rejection. The analysis is also likely to be complicated here by creditors: if Al's leaves funds on the table, creditors will lose out on a chance to see those funds turned into new capital and that capital turned into a higher rate of repayment. Even in a worst-case scenario, those already liquid assets can simply be added into the estate and distributed in chapter 7. The presence of these three interests compels a more careful consideration by the courts.[127] To resolve the dispute, courts can again use the business judgment standard to evaluate crowdfunding obligations.

As described above, bankruptcy courts "routinely defer to the business judgment of [a] chapter 11 debtor-in-possession with respect to decisions involving the management of the debtor's property and the operation of the debtor's business."[128] Courts may decline this deference, though, especially in the bankruptcy context, as "the directors of the chapter 11 debtor, however, are not empowered with *carte blanche* authority to run the company. The business judgment rule simply provides a presumption of propriety that ultimately may be refuted."[129]

Describing all the scenarios that could overcome such a presumption would likely go beyond the scope of this Comment. This is largely because, in the words of one commentator, "thousands of pages of corporate law scholarship and commentary have been devoted to these fundamental questions, yet we remain short of any broad consensus as to the answers."[130]

As this Comment is debtor-friendly, it is tempting to simply defer to both the debtor's wishes and the law's reluctance to force people into contracts.[131]

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[126] *See* Venture Assoc. Corp. v. Zenith Data Sys. Corp., 96 F.3d 275, 281 (7th Cir.1996) (Cudahy, J., concurring) ("Freedom not to contract should be protected as stringently as freedom to contract.").

[127] Adding a layer of scrutiny onto the business judgment rule is not unheard of; the Supreme Court did just that with regards to labor contracts in *Bildisco*. N.L.R.B. v. Bildisco & Bildisco, 465 U.S. at 526.

[128] Ann Marie Bredin & Mark G. Douglas, *Bankruptcy Filing to Prevent Asset Sale Constitutes Bad Faith*, 2 BUS. RESTRUCTURING R. 10, 10 (2003).

[129] *Id*.

[130] Kenneth B. Davis, Jr., *Once More, the Business Judgment Rule*, 2000 WIS. L. REV. 573, 573 (2000); *accord* Douglas M. Branson, *The Rule That Isn't A Rule — The Business Judgment Rule*, 36 VAL. U. L. REV. 631, 631 (2002) ("The much misunderstood business judgment rule is not a "rule" at all."). For a critique of the business judgment rule as favoring authority over accountability, as well as a proposed "new business judgment rule," see D. Gordon Smith, *The Modern Business Judgment Rule,* B.Y.U.L. RESEARCH PAPER SERIES NO. 15-09 (Jun. 19, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2620536.

[131] Todd D. Rakoff, *Is "Freedom from Contract" Necessarily A Libertarian Freedom?* 2004 WIS. L. REV. 477, 477 (2004) ("Freedom *from* contract is a part of the human freedom the law wants to protect as it structures and maintains the institution of contract.") (emphasis added).

That position would unfortunately run counter to a central position of this Comment; namely, that the law should foster trust in the crowdfunding sector. If courts allow crowdfunding debtors to avoid all liability for cancelling their campaigns without seriously evaluating the rejection decision, backers will lose confidence in the system and turn their wallets elsewhere. A court should take a serious look at any decision to reject. Even if the decision is sound, the court should do everything in its power to steer at least some benefit back to the backers, even if that benefit needs to be realized via § 105. As described previously in part III (A), not doing so could have serious repercussions for the crowdfunding sector as a whole.

3. Default before Bankruptcy

Regarding the campaign, if § 365 is invoked, § 365's default provision may be difficult for Al's to overcome because, even under ideal circumstances, Al's prospects for curing, compensating or providing adequate protection are largely speculative. However, as discussed below, courts can allow Al's to satisfy § 365(b) in creative or flexible ways.

A small business may have defaulted in some way on the crowdfunding campaign before filing for chapter 11. It may have overestimated the public's willingness and ability to support it, for example, and therefore not been able to follow through on some part of its reward scheme.[132] Section 365 requires debtors to cure defaults in executory contracts, or to provide adequate assurance of a prompt cure, before assuming them.[133] Congress's intent in imposing these conditions, the Second Circuit found, was "to insure that the contracting parties receive the full benefit of their bargain if they are forced to continue performance."[134]

It makes sense then for a court to simply reject any attempt by the debtor to assume a crowdfunding contract that it has, or will, default upon. This will be easy if those funds have not yet been collected from backers. However, if at least

[132] Considering the often-token nature of crowdfunding rewards, a business in this boat likely has bigger concerns than having its chapter 11 plan confirmed.

[133] 11 U.S.C. § 365(b)(1)(a) (2012).

[134] *In re* Ionosphere Clubs, Inc., 85 F.3d 992, 999 (2d Cir. 1996); *accord In re* Superior Toy & Manufacturing Co., 78 F.3d 1169, 1174 (7th Cir.1996) ("'If the trustee is to assume a contract or lease, the court will have to insure that the trustee's performance under the contract or lease gives the other contracting party the full benefit of his bargain.").

some of the funds made it into the hands of the debtor, creditors are likely to seek their inclusion in the estate as a means of solidifying their own claims.[135]

Courts should not consider the question of a defaulted upon executory contract inflexibly. As the Bankruptcy Court for the Southern District of New York described in *In re Evelyn Brynes, Inc.*, "the legislative history of the Code shows that [the terms 'adequate assurance'] were intended to be given a practical, pragmatic construction."[136] Although *In re Evelyn Brynes* concerned § 365's treatment of the assignment of leases, its flexible interpretation can apply just as well to executory contracts:

> Congress did not mandate that the courts require the assignee to literally comply with each and every term of the lease. It has entrusted to the courts the determination, on a case-by-case basis, of the meaning of the term "adequate assurance," taking into account whether the [debtor's] opposition to the assignment is "based upon reason and [is] not arbitrary or capricious."[137]

In re Evelyn Brynes suggests that a small business can provide adequate assurance in any number of ways. Courts should evaluate adequate assurance based on the particular circumstances of each case. If Al's defaulted on its crowdfunding obligations because the crowdfund was unsuccessful, there may be no way in which adequate assurance can be guaranteed. Conversely, supposing that Al's was unable to purchase and distribute rewards because funds from the campaign went straight to other creditors, a court may reckon that, with the automatic stay in place, Al's can use post-petition crowdfunds to promptly cure any defaults.

One could also suppose that Al's might attempt to cure the default in the crowdfund by promising the rewards to be given after its grand re-opening—an undetermined date well after the confirmation of his chapter 11 plan. In this scenario, courts are going to need to choose between the two sets of claimants—the backers and the creditors. This choice may boil down to a simple fact determination considering the surrounding circumstances of the campaign, and a sympathetic court may accept Al's plans. That said, it may be more prudent to simply include these funds in the estate, and hope that backers will gain some

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[135] In this instance, and as described further in part II (C) creditors would argue that any monies collected from the (pre-petition) crowdfund are property of the estate under 11 U.S.C. 541(a)(1) (2012). If these funds are property of the estate, and the executory contract is in default, it is in the creditor's best interest to ensure that the crowdfunds remain property of the estate.

[136] *In re* Evelyn Byrnes, Inc., 32 B.R. 825, 828–29 (Bankr. S.D.N.Y. 1983).

[137] *Id*. at 829 (citations omitted).

altruistic benefit from knowing that their contribution at least gave their (now liquidated) favorite business some breathing room in chapter 7.

C. Crowdfunds as a Contingent Interest

The concept of contingent interests provides Al's with another avenue to keep its campaign running if § 365 fails. In the case of all or nothing, rewards-based campaigns, a project organizer may have a contingent interest in the funds he would raise should the campaign continue.[138] If those funds are contingent, they become property of the estate. As described above with regards to § 365, the concept of contingent interests creates a double-edged sword for Al's: if the funds are a part of the estate, creditors will be able to eventually reach them. However, if creditors know that they will receive at least some benefit from the crowdfund should Al's enter chapter 7, they will have less incentive to object to the campaign's continuation. This breathing room can give Al's both time and space to complete the crowdfund and, ideally, to use the received funds to successfully reorganize. It is therefore in the interests of both Al's and its creditors for the proceeds of the crowdfund to be classified as contingent.

Although no courts have addressed whether withheld crowdfunds qualify as a contingent interest, § 541(a) is broad enough to include them. Most courts interpret § 541(a) broadly, and property of the estate has been stretched to include "speculative" interests. As the Second Circuit ruled, "[E]very conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of § 541."[139] Among other prospective causes, courts have held that potential claims asserted against insurance companies[140] and the right to receive per capita distribution of earnings from a tribe's gaming activity by a member of that tribe in the event that it chose to distribute those funds[141] are contingent interests.[142] Also illustrative are the cases wherein courts have held that such contingent interests are property of the estate even if some post-petition action must be taken in order

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[138] *See Contingent*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Possible; uncertain; unpredictable; Dependent on something that might or might not happen in the future; conditional.").

[139] Chartschlaa v. Nationwide Mut. Ins. Co., 538 F.3d 116, 122 (2d Cir. 2008).

[140] *Id*. at 123.

[141] *In re* Kedrowski, 284 B.R. 439, 449 (Bankr. W.D. Wis. 2002) (finding the prospective distribution a "property right").

[142] *See also In re* Goins, 181 B.R. 45, 47 (Bankr. S.D. Ohio 1994) (future wages); *In re* Carlton, 309 B.R. 67, 75 (Bankr. S. D. Fla. 2004) (stock options); *In re* Moyer, 421 B.R. 587, 590–91 (Bankr. S.D. Ga. 2007) (increase in value of stock of wholly-owned corporation); *In re* Anders, 151 B.R. 543, 547 (Bankr. D. Nev. 1993) (post-petition spousal payments).

for the interests to be realized.[143] Further, the Supreme Court added an element of temporality to the analysis in *Segal v. Rochelle* by holding that a payment was contingent because it was "sufficiently rooted in the debtor's pre-bankruptcy past."[144] As a dissent in a Tenth Circuit case decades later noted, however, finding a line between "contingencies" and "mere expectancies" is still crucial for courts.[145]

If the court accepts that Al's campaign, which was conceived, begun, and operating before it filed for bankruptcy, is sufficiently rooted in the pre-petition period, then, it must determine whether the realization of those funds is indeed contingent. It can do so by looking at both the crowdfunding market in general and the facts specific to Al's case. The court's determination of the contingent issue will be complicated somewhat by one of the peculiarities of crowdfunding. IndieGoGo claims that campaigns raise, on average, 42% of their total during the first three and last three days of their duration.[146] This fact can play into a debtor's favor; even if Al's is behind its projected earnings, it can honestly suggest that contributions are more likely to increase as the campaign nears its deadline.

A more comprehensive look at the crowdfunding landscape is provided by Wharton School of Business Professor Ethan Mollick. Mollick, at the request of Kickstarter, developed an independent study of "nearly 500,000" backers with which the platform had interacted.[147] Mollick found that, among other things, "[p]roject backers should expect a failure rate of around 1-in-10 projects, and to receive a refund 13% of the time . . . . Ultimately, there does not seem to be a systematic problem associated with failure (or fraud) on Kickstarter, and the vast majority of projects do seem to deliver."[148] However, because Kickstarter is a vastly different platform from IndieGoGo, as it deals almost exclusively in "products" and not in services (unlike IndieGoGo, which supports both),

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[143] *See In re* Mid-Island Hosp., Inc., 276 F.3d 123, 128 (2d Cir. 2002) (hospital's "speculative" and "intangible" interest in funds withheld contingent on the satisfaction of its obligations to the State was property of the estate).

[144] Segal v. Rochelle, 382 U.S. 375, 380 (1966); *see also In re* Dittmar, 618 F.3d 1199, 1208 (10th Cir. 2010) ("Like stock options, the fact that the [interests] are contingent on post-petition events does not mean that Debtors' interest in them is not rooted in the pre-bankruptcy past.").

[145] *In re* Dittmar, 618 F.3d at 1213 (Holloway, J., dissenting); *see also In re* Klein-Swanson, 488 B.R. 628, 633 (B.A.P. 8th Cir. 2013) (finding that bonus payments due after filing are not property of the estate because the employer had "absolute discretion" whether to award them).

[146] Amy Yeh, *New Research Study: 7 Stats from 100,000 Crowdfunding Campaigns*, INDIEGOGO (Oct. 6, 2015), https://go.indiegogo.com/blog/2015/10/crowdfunding-statistics-trends-infographic.html.

[147] *The Kickstarter Fulfillment Report*, KICKSTARTER, https://www.kickstarter.com/fulfillment (last visited Feb. 3, 2018).

[148] *Id.*

Mollick's findings do not apply perfectly to Al's situation. Indeed, a report by London-based market research firm The Crowdfunding Centre found that, in 2015, only 13% of IndieGoGo campaigns ended fully funded.[149]

It should be noted that these numbers are likely skewed by projects that are doomed from the start. For example, on November 5, 2016, the author found a campaign titled "Help Jump Start My Business! Chance to Win $2,000!" The campaign was organized by a would-be stock guru attempting to raise $10,000 to start his career as a trader. The project organizer's sole reward category was an entry to win $2,000. On March 5, 2017, the campaign had raised $0.[150] For comparison, in a campaign called "Modern Milk: A unique mom & baby wellness center," a small business raised 103% of its $25,000 goal.[151] Keeping this in mind, a sympathetic judge may be justified in doubting The Crowdfunding Centre's 13% figure, at least as applied to the case in front of her.

In Al's case, a simpler solution would be to ask the court to make a judgment call as to whether it believes *Al's* campaign will reach its goal and receive its funds. Courts can consider several factors for this test. As suggested previously in part II (C), Al's could argue that its loyal and widespread swath of customers is more likely than not to help it fully fund the campaign. Of course, the discouraging crowdfunding statistics described above will have less effect on the judge if the campaign is on track to hit or exceed its goal. Proving this by sticking to the particular facts of its case should allow Al's to convince a court that, like so many other varied interests, its potential crowdfunding earnings are contingent.

D. Operating the Crowdfund Using Estate Property via § 363

If the crowdfund can proceed and the crowdfunds do enter into the estate, some creditors may look to object to specific parts of its mechanics. Most prominent of those mechanics is the fact that estate property will be used, in some ways, to both operate the crowdfund and to bring rewards to fruition. Arguably, § 363 permits the court to allow such use of estate property.

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[149] Catherine Clifford, *Less than a Third of Crowdfunding Campaigns Reach Their Goals,* ENTREPRENEUR (Jan. 18, 2016), https://www.entrepreneur.com/article/269663.

[150] *See* Daniel McGuire, *Help Jump Start My Business! Chance to Win $2,000!*, INDIEGOGO, https://www.indiegogo.com/projects/help-jump-start-my-business-chance-to-win-2-000-entrepreneur#/ (last visited Feb. 3, 2018).

[151] *See* Stephanie Nguyen, *Modern Milk: A Unique Mom & Baby Wellness Center*, INDIEGOGO, https://www.indiegogo.com/projects/modern-milk-a-unique-mom-baby-wellness-center-lifestyle-health/x/15370259#/ (last visited Feb. 3, 2018).

The Code acknowledges that business owners are usually the ones most likely to successfully manage their reorganizations.[152] Specifically, §§ 1107 and 1108 allow the debtor-in-possession to act as trustee and continue to run the business. Thus, the Code allows business owners the latitude to run their reorganizing businesses as they see fit, with few limitations. Two of those notable limitations are found in §§ 363 and 364.

Section 363 concerns the use, sale, or lease of property of the estate by the trustee or debtor-in-possession.[153] In the crowdfunding arena, § 363 is likely to arise in the context of "use" of the property by the debtor to fulfill its reward obligations.[154] For example, creditors will object (rationally or otherwise) to Al's spending money on providing T-shirts and tasting parties to backers when it owes them money, especially if property securing that money (e.g., the pizza oven) is depreciating in value.[155] Creditors may also use § 363 to object to the "use" of cash collateral. For example, Al's suppliers will likely seek to stop any cash collateral that they have an interest in from being used in the crowdfunding campaign.[156] Conversely, though, Al's may see these "uses" as his best way of escaping his debt predicament, despite what his creditors may think.

Section 363 tries to strike a balance between debtor autonomy and creditor oversight by relying on the "ordinary course of business" standard to evaluate debtor decisions regarding use of property of the estate. Section 363(c) states that a trustee "may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing."[157] This means that Al's is free to use its property to crowdfund without court approval, so long as the crowdfund is within the ordinary course of business. If its creditors wish to stop the crowdfund, then, they must (a) show that it is not within the ordinary course of business, therefore triggering a

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[152] *In re* Johns-Manville Corp., 60 B.R. 612, 615–16 (Bankr. S.D.N.Y. 1986) ("Indeed, the Code favors the continued operation of a business by a debtor and a presumption of reasonableness attaches to a debtor's management decisions"). Allowing a debtor-in-possession to continue to manage his business also protects the objectivity of the involved judge. The House Judiciary Committee admitted as much, writing that "it is an easy matter for a bankruptcy judge to feel personally responsible for the success or failure of a case. Bankruptcy judges frequently view a case as 'my case'. The institutional bias thus generated magnifies the likelihood of unfair decisions in the bankruptcy court. H.R. REP. 95-595 at 91, as reprinted in 1978 U.S.C.C.A.N. 5963, 6052.

[153] 11 U.S.C. § 363 (2012).

[154] "Use" is interpreted broadly. *See In re* Cont'l Air Lines, Inc., 780 F.2d 1223, 1227 (5th Cir. 1986) ("application of funds derived from airline operations" to satisfy lease obligations constituted use).

[155] This analysis assumes that secured creditors will not raise adequate protection claims under § 363(e).

[156] 11 U.S.C. § 363(c)(2) (2012).

[157] *Id.* § 363(c)(1).

hearing, and (b) convince the court to refuse authorization of the campaign under § 363(c)(1).

1. Ordinary Course of Business

Al's campaign will be evaluated for § 363 purposes under the ordinary course of business standard. The ordinary course of business standard is intended to protect ordinary trade transactions between a debtor and a creditor.[158] To fall within the ordinary course of business, an action taken by the debtor-in-possession must satisfy a two-pronged test. The "vertical" prong requires that the debtor's action be reasonably anticipated by all parties in interest given the range and scope of the business. The "horizontal" prong asks whether similarly situated businesses would have engaged in such conduct. As the Eighth Circuit wrote in *Lovett v. St. Johnsbury Trucking*, "[T]here is no precise legal test which can be applied" to determine what transactions occur in the ordinary course of business, "rather, th[e] court must engage in a 'peculiarly factual' analysis."[159] Like the business judgment rule, this standard is flexible. As the Southern District of New York ruled in *In re Johns-Manville Corp.*, the ordinary course of business standard is "purposely not defined so narrowly as to deprive a debtor of the flexibility it needs to run its business and respond quickly to changes in the business climate."[160] As a result, "[t]he § 363 mandate necessarily includes the concomitant discretion to exercise reasonable judgment in ordinary business matters."[161]

Satisfying the vertical prong of the test will be the more difficult burden for Al's to overcome. As the Southern District of New York held in *In re James Phillips, Inc.*, "The touchstone of 'ordinariness' is thus the interested parties' reasonable expectations of what transactions the debtor in possession is likely to enter in the course of its business."[162] In other words, the test asks "whether the transaction subjects a creditor to economic risks of a nature different from those

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158 John Kane, *Litigating the Ordinary Course of Business Defense Summary Judgment and the Stanziale v. Industrial Specialists Decision*, INSOLVENCY INSIGHTS (Sep. 30, 2015), https://insolvencyinsights.com/2015/09/30/litigating-the-ordinary-course-of-business-defense-summary-judgment-and-the-stanziale-v-industrial-specialists-decision/.

159 Lovett v. St. Johnsbury Trucking, 931 F.2d 494, 497 (8th Cir. 1991). Note that the ordinary course of business standard used in §§ 363 and 364 is the same as, and is arguably derived from, that used in § 547. *See In re* Poff Const., Inc., 141 B.R. 104, 105 (W.D. Va. 1991) ("Not finding a definition of that phrase within the Bankruptcy Code, the lower court turned to cases from other jurisdictions interpreting 'ordinary course of business' in the context of § 547 dealing with preferences.").

160 *In re* Johns-Manville Corp., 60 B.R. 612, 617 (Bankr. S.D.N.Y. 1986).

161 *Id.* at 616.

162 *In re* James A. Phillips, Inc., 29 B.R. 391, 394 (S.D.N.Y. 1983); *see also In re* Johns-Manville Corp., 60 B.R. at 616.

he accepted when he decided to extend credit."[163] Considering the fact intensive nature of the risks that the campaign will impose on creditors, a court's view on whether the vertical relationship in Al's case is hard to predict. For example, in *In re Roth American, Inc.* the Third Circuit found that the specific facts of a collective bargaining agreement were "extraordinary" enough to push said agreement outside the normal course of business, despite the fact that such agreements "routinely" satisfied the horizontal prong.[164]

Similarly, Al's creditors may argue that it never expected a pizza shop to get involved with online fundraising, and that even if it did, the type of fundraising Al's is engaged in is on a scale significantly beyond what they had expected. While there are no guarantees, Al's will likely be able to reply that continuing the crowdfund adds no significant risk besides depreciation and opportunity cost, especially if the campaign is well designed. Al's could ease creditor's minds, for example, by ensuring that rewards are paid for exclusively by income from the campaign. Further, if the campaign is only scheduled for a few months, these risks will be minimal.

A crowdfunding business should pass the horizontal test relatively simply. To satisfy this test, Al's must show that the crowdfund "conformed to standard practices in the [pizzeria] industry as a whole."[165] At best, Al's would be able to show that crowdfunding is a new normal in the small business sphere, as discussed *supra* in part II (B). At worst, Al's should be able to compare crowdfunding favorably with other types of promotional campaigns in which pizzerias normally partake.[166] A close comparison might be a fundraising night, where Al's agrees to donate a token percentage of its receipts for one evening to a local school or organization. Like the crowdfund, the fundraiser sacrifices liquid capital in exchange for long term gains, although in the case of the latter, these gains take the form of both community goodwill and the potential for

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[163] *In re* Johns-Manville Corp., 60 B.R. at 616.

[164] *In re* Roth American, Inc., 975 F.2d 949, 953 (3d Cir. Pa. 1992) (noting that the "agreement is fundamentally different from the previous collective bargaining agreements entered into between Roth American and the Teamsters insofar as it contains the provision purporting to bind Roth American to maintain its operations").

[165] Courts have wide discretion to decide this inquiry. *See In re* Blitz U.S.A. Inc., 475 B.R. 209, 214 (Bankr. D. Del. 2012) (continuation of an incentive-based bonus plan was a common industry practice, and satisfied the horizontal prong); *In re* Glosser Bros., Inc., 124 B.R. 664, 668 (Bankr. W.D. Pa. 1991) (holding that it was common industry practice for department store like debtor to license others to operate certain departments, and for store to terminate license when it was dissatisfied with performance of licensee.")

[166] Promotional actions can satisfy the horizontal prong. *Cf. In re* Atlanta Retail, Inc. 287 B.R. 849, 857 (Bankr. N.D. Ga. 2002) ("For a calculated financial exposure, [debtor] gained immeasurable promotional exposure. Examined in this context, it is hard for this Court to imagine a similarly situated financially distressed debtor, attempting to restructure, that would not enter into such a promotion.").

increased business. Again, because the risks to creditors are relatively low in this situation, and given the wide authority debtors-in-possession are allowed by §§ 1107 and 1108, courts should at least consider the feasibility of the crowdfund before rejecting it outright at this stage.[167]

2. Cash Collateral

In a similar fashion, creditors can attack the use of cash collateral through § 363(c)(2), which holds that trustees cannot use, sell, or lease cash collateral without consent of entities with an interest (i.e., creditors) or court authorization after a hearing. Because of the adequate protection requirement of § 363(e), the cash collateral concept is likely a creditor's best option for reigning in Al's crowdfund.

Al's already-received crowdfunds may be cash collateral. Section 363(a) defines cash collateral as "cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest . . . ."[168] Section 363 also holds that the "proceeds, products, offspring, rents, or profits of property" subject to a lien are cash collateral.[169] Section 552(b)(1) continues the creditor's security interest in the proceeds of the inventory collateral.[170] If funds raised as part of the campaign can be traced as "proceeds, products, or offspring" to property encumbered by a future acquired property clause, they will be considered cash collateral.[171]

The cash collateral issue is most likely to be raised by Al's suppliers. If the supplier succeeds in showing that Al's is using cash collateral in which it has an interest, absent consent, Al's must get court authorization to do so "in accordance with the provisions" of § 363(c)(2)(B).[172] Courts generally see this edict as a reference to § 363(e), which requires a debtor to provide adequate protection in exchange for the use of cash collateral.[173] In a contested hearing,

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167 Feasibility is discussed in detail *infra* at Part III (F).

168 11 U.S.C. § 363(a) (2012).

169 *Id.*

170 William L. Norton Jr., *§ 94:6. Cash collateral (Code § 363)*, NORTON BANKRUPTCY L. PRACTICE (Jan. 2018).

171 *Id.* ("[I]f the debtor has granted a prepetition security interest in particular assets to a lender or other creditor, the proceeds of that prepetition collateral that fall within the definition of cash collateral will also be cash collateral.")

172 11 U.S.C. § 363(c)(2)(B) (2012).

173 *In re* George Ruggiere Chrysler-Plymouth, Inc., 727 F.2d 1017, 1019, (11th Cir. 1984) ("[t]he principal restraint on use of cash proceeds is found in § 363(e), which specifies that the court shall condition the use of the secured property 'as is necessary to provide adequate protection of such interest'").

the pre-petition lender has the burden to prove the "validity, priority or extent" of its interest in cash collateral.[174]

The objected "use" of cash collateral in this situation can take several forms. Suppose that Al's purchases $1000 of cheese from a supplier on credit. Al's then uses the cheese to earn $1500 in sales. § 552(b)(1) allows the supplier to claim an interest in that income as "proceeds, products, or offspring" of the original credit.[175] If Al's spends that money on shirts or fees for a crowdfunding campaign, the supplier will naturally be worried about its investment. Unless Al's suppliers consent to the use of the cash collateral in which they have an interest, Al's will need to provide the supplier with adequate protection in one of the ways prescribed by § 361. For a small business, such as Al's, consent is a possibility, especially if it is dealing with another small business. For example, if Al's receives its dairy products from a local farm, the farm's owners may reason that spoiling its relationship with a local customer is a sub-optimal solution. For larger suppliers, such as condiment wholesalers, retaining a full interest will likely outweigh any loyalty to one of many customers. With that in mind, Al's would do well to make sure that it can adequately protect that interest before it considers fighting for its campaign proceeds. If adequate protection creates a severe burden on Al's, it may endanger the campaign.

E. Paying for Rewards through § 364

This section suggests that § 364, which concerns the steps debtors-in-possession must take to obtain credit, is the avenue by which crowdfunding debtors can fulfill their obligations to backers. Debtors may argue that, because the "debt" accrued through the campaign (i.e., the obligations to backers) is going to be paid for, essentially, by those consumers, § 364 is a dead end. Put more simply, the rewards a backer expects are being paid for by her contribution.

Creditors are of course not likely to accept this argument. Instead, they will contend that the crowdfunding campaign falls under § 364(a) or (b) because it is, in effect, an attempt to obtain credit.[176] In other words, the crowdfund creates new debt for the estate in the form of both the rewards promised to backers, and any monies spent procuring and providing those rewards should become estate

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[174] *In re* Kleibrink, 346 B.R. 734, 761 (Bankr. N.D. Tex. 2006) (holding that while a debt did exist, the creditor's failure to supply evidence of its existence prevented the Court from lifting the automatic stay).

[175] 11 U.S.C. § 552(b)(1) (2012).

[176] § 364(c) and (d) will not apply because Al's will have no difficulty "obtaining" credit. Where, for example, a bank may require § 364(c) or (d) protection as a condition of the loan, the crowdfund has no such obligation.

property regardless of their source. Courts have indeed recognized that "[d]ebt need not be trade debt in order to qualify as [a] postpetition obligation incurred 'in ordinary course of business.'"[177]

If the pledged rewards are a post-petition obligation, courts can allow debtors to uphold their commitments by classifying them as administrative expenses, which receive second priority under § 507.[178] While backers would of course prefer this priority status, unsecured creditors will rationally see it as a shrinking of the pie, especially if the reorganization eventually fails and the company is liquidated. Debtors will prefer to operate in § 364(a), which allows taking unsecured credit as an administrative expense without court approval. The court's determination of whether the crowdfund falls within the ordinary course of business would largely mirror the one analyzed with regards to § 363 in part III (C), *supra*. Further, some courts have focused only on the vertical creditor expectation test with regards to § 364 (this analysis would also mirror the one discussed *supra)*.[179]

If the campaign is not within the ordinary course of business, the court will hold a § 364(b) hearing.[180] Creditors will use that hearing to persuade the judge to either give priority to their own claims over the crowdfunding debts or to disallow the campaign outright. However, the latter discussion may not be necessary. If backers are pushed too far down the priority ladder, their rewards will never be realized, and the campaign will likely be rendered unnecessary.

F. Plans Relying on Crowdfunding can be Feasible

A reorganization plan can pass the feasibility requirement of § 1129(a)(11). The risk lurking behind any discussions of debtor crowdfunding is liquidation. If a debtor encumbers itself with crowdfunding obligations and still ends up in chapter 7, creditors will have lost time and opportunity cost while waiting for the campaign to play out. Further, if things go poorly, paying for the crowdfunding obligations may shrink the size of the estate. While courts should be happy to provide debtors with more options to save themselves, there must be limits to how much deference debtors-in-possession receive.

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177 *In re* Poff Const., Inc., 141 B.R. 104, 106 (W.D. Va. 1991).

178 11 U.S.C. § 364(a) (2012).

179 *See* 1 COLLIER ON BANKRUPTCY ¶ 15.04 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.); *cf. In re* Garofalo's Finer Foods, 186 B.R. 414, 428 (N.D. Ill. 1995) ("Section 364(a) does not require the court to analyze industry wide practices to determine whether a particular transaction was within the debtor's ordinary course of business.").

180 11 U.S.C. § 364(b) (2012).

Once again, though, bankruptcy courts already have a tool at their disposal to protect creditors in this position: § 1129(a)(11). This section conditions confirmation of the plan on it being not likely to be "followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan."[181] In practice, this stipulation is known as the feasibility assessment,[182] although some courts have merged the doctrine into § 1129(a)(3), which requires that a plan be proposed in good faith.[183]

"The purpose of section 1129(a)(11)," says *Colliers*, "is to prevent confirmation of visionary schemes which promise[] creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation."[184] As a result, a guarantee of successful reorganization is not necessary, and the threshold of proving a feasible plan is low.[185]

Under that most basic guideline, one would expect a crowdfund that is low risk and trending towards completion to be confirmable. However, more specific considerations will draw the court's attention. These will include, for example, whether the crowdfunding can provide adequate cash flow to meet continuing obligations, or whether the crowdfunding will be able to supply a capital infusion adequate to meet continuing obligations and allow continued operation. The analysis will necessarily be fact heavy; for example, in *In re Wetdog, LLC*, the Bankruptcy Court for the Southern District of Georgia found that "as long as the condition and appearance" of a Savannah Inn "[was] maintained to the satisfaction of the rating agencies and advertising is adequate," revenue would be "automatic," and the plan was therefore feasible.[186] That same court came to a different conclusion in *In re HSD Partners, LLC*, where it held that despite a

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[181] *Id*. § 1129(a)(11).

[182] *See* Richard I. Aaron, *The Chapter 11 Plan of Reorganization*, BANKRUPTCY LAW FUNDAMENTALS § 12:14.

[183] *In re* Pikes Peak Water Co., 779 F.2d 1456, 1460 (10th Cir. 1985) ("Not confirming the plan for lack of good faith is appropriate particularly when there is no realistic possibility of an effective reorganization and it is evident that the debtor seeks merely to delay or frustrate the legitimate efforts of secured creditors to enforce their rights.").

[184] *See* 7 COLLIER ON BANKRUPTCY ¶ 1129.02 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). The classic case illustrating this point is (or at least should be) *In re Trans Max Technologies*, where then-Judge Markell declined to confirm a plan that relied on the debtor company developing a flying car in three years without incurring any debt. *In re* Trans Max Techs., Inc., 349 B.R. 80, 95 (Bankr. D. Nev. 2006).

[185] *See In re* Brotby, 303 B.R. 177, 192–93 (B.A.P. 9th Cir. 2003) (Bankruptcy Court's finding as to feasibility of a plan relying on a 60-year-old computer programmer increasing his income 10% per year over 8 years was not clearly erroneous); *In re* Proud Mary Marina Corp., 338 B.R. 114, 132 (Bankr. M.D. Fla. 2006) (plan proponent not required to guarantee success, just reasonable assurance).

[186] *In re* Wetdog, LLC, 518 B.R. 126, 137–38 (Bankr. S.D. Ga. 2014).

debtor's "draconian cost cutting attempts," its revenue could not meet continued operating needs and its plan was therefore unfeasible.[187] Al's revenue projections based on the capital infusion therefore need to be realistic.

Other facts that a court may consider in the feasibility analysis may include: (1) the adequacy of the debtor's capital structure; (2) the earning power of the business; (3) related economic conditions; (4) the ability of management; (5) the probability of the continuation of the same management; and (6) any other related matter which determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan.[188]

In Al's case, the debtors can show: (1) the crowdfund will add a minimal amount of burden into the estate while adding significant, and needed, capital; (2) the added capital will increase earning power by increasing efficiency and seating capacity; (3) the state of both the local restaurant market and the crowdfunding market as a whole are conducive to growth and capital formation, respectively; (4) that Jones can successfully run his business under the plan; and (5) that Jones will continue to do so. More than just bankruptcy policy supports a finding of feasibility. If the court decides to confirm Al's plan, the risks to creditors are likely minimal. If the court holds that the plan is unfeasible, the chilling effect upon both potential backers and potential crowdfunders, as described *supra* in part III (A), may cause negative externalities for the crowdfunding industry.

CONCLUSION

Small businesses can, and often do, fail for any number of reasons, be they unpredictable, seemingly inconsequential, or downright bizarre. During the writing of this Comment, in fact, two businesses outside of Emory University's front door closed for starkly different reasons. Casual restaurant Slice and Pint shuttered after a competitor broke its local monopoly on both pizza and alcohol. Two doors down, Daankbar Taco closed after its owner was charged with first degree homicide by vehicle.[189] Mentioning these misfortunes illustrates a point: the small business world is fraught with danger.

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[187] *In re* HSD Partners, LLC, No. 10-40295, 2011 WL 7268051 3 (Bankr. S.D. Ga. 2011).

[188] *See In re* Sagewood Manor Assocs. Ltd. P'ship, 223 B.R. 756, 763 (Bankr. D. Nev. 1998); *In re* Greate Bay Hotel & Casino Inc., 251 B.R. 213, 226–27 (Bankr. D.N.J. 2000).

[189] Chris Fuhrmeister, *Bad Dog Taqueria Owner Tracy Mitchell Charged in Fatal Hit-and-Run*, EATER ATLANTA (Nov.12, 2015), http://atlanta.eater.com/2015/11/12/9723962/tracy-mitchell-hit-and-run-bad-dog-taqueria-owner.

The hope for this Comment's proposed framework is for it to empower small businesses, and the lawyers advising them, to have the confidence in the power of the crowd. The crowd represents an immeasurable opportunity for anyone to turn social capital into fiscal capital. Small businesses are uniquely situated to take advantage of that opportunity, and courts should not interfere with such a burgeoning market. Dialectics aside, capitalism works best when options are plentiful for both consumers and producers.[190] Just as Al's customers benefit from having multiple pizzerias in town, so does Al's itself benefit from having multiple ways in which to raise capital. Crowdfunding can serve as an avenue for such a venture.

As both the Supreme Court[191] and Congress[192] have acknowledged, the law can and should play a role in fostering competition. The same attitude should prevail in the capital raising market.[193] The passage of the JOBS Act signaled that Congress has actively encouraged competition in the capital foundation market. Further, the relatively low risks of non-equity crowdfunding make it a prime candidate for a hands-off approach, both from regulators (as recognized by the JOBS Act) and from the courts. Because law can foster trust, courts can and indeed should try to protect the integrity of the crowdfunding system.

Bankruptcy courts can play their part in this crowdfunding push by ensuring that backers are given every opportunity to receive the benefit of their bargain. By using the options already presented to them within the Code, courts can do so efficiently. More importantly, courts can give backers the chance to reap the benefit of their bargain while remaining faithful to the Code's twin aims of rehabilitation and equitable distribution.

Bankruptcy courts already possess the means by which crowdfunding will be assessed. Debtor businesses should be able to continue their crowdfunding campaigns, if necessary, using the executory contract doctrine of § 365 or the contingent interest concept found in § 541. Section 363 should provide an avenue by which the debtor-in-possession can continue to crowdfund without debtor interference, and § 364 can allow the debtor to uphold his end of the bargain with regards to backer's rewards. Perhaps most importantly,

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190 Maurice E. Stucke, *Is Competition Always Good?*, 1 J. ANTITRUST ENFORCEMENT 162, 162 (2013) ("Promoting competition is broadly accepted as the best available tool for promoting consumer well-being.").

191 Standard Oil Co v. FTC, 340 U.S. 231, 248 (1951) ("The heart of our national economic policy long has been faith in the value of competition").

192 41 U.S.C. § 1705 (2012). (Government agencies must employ an officer responsible for "challenging barriers to, and promoting full and open competition in, the procurement of property and services by the executive agency.").

193 *See generally* Stucke, *supra* note 190, at 62–63.

reorganization plans predicated on a successful crowdfunding campaign can satisfy the low expectations of § 1129(a)(11)'s feasibility requirement.

The fictional Al's Pizza has served as means of simplifying this argument, but its inclusion serves also to keep this Comment grounded. The goal of the debtor, its creditors, backers, and the court should be to keep Al's in business. By affording Al's the chance to complete the crowdfunding campaign, bankruptcy courts can provide a low risk avenue to successfully reorganize. For creditors, a successful campaign represents a significant step away from liquidation. If there is a successful reorganization, Al's can pay his creditors more than they would have received in chapter 7, return to profitability, and continue to provide the community with jobs. Just as well, if backers are allowed to receive the rewards they paid for, confidence in the crowdfunding system will increase. As the marketplace matures, other businesses will be able to use the foundation laid by Al's to tap into the crowd for their own needs. A successful crowdfunding campaign is therefore an efficient solution to an otherwise costly problem.

The problem of how to reorganize a crowdfunding business is new and uncomfortable. The goal of this Comment was to provide courts and practitioners with a means of understanding this problem. Ultimately, with regards to crowdfunding and the Code, the wheel need not, and indeed should not, be reinvented. Just as courts can find ways to analyze crowdfunding within the limits of the Code, so too can they protect and foster the competitive nature so inherent to crowdfunding. Debtor rehabilitation can be sought at the same time as the integrity of the crowdfunding system is protected. Or, to bring things nearly full circle, the madding crowd does not need a madding response.

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* Managing Editor, *Emory Bankruptcy Developments Journal;* J.D., with honors, Emory University School of Law (2018); B.A., with departmental honors in History, Colgate University (2014). My sincerest gratitude is owed to Professor Deborah Dinner for her invaluable patience in advising this Comment, and to Professor Martha Grace Duncan for her guidance throughout law school. My apologies and thanks to *EBDJ* executives Johnathan Green and Jake Loken for their painstaking work making this Comment presentable (any mistakes remaining are my own). Thank you as well to the *EBDJ* staff for dedicating time surely better spent on their own endeavors to my work. Most crucially, all the love, appreciation, and recognition in the universe is due to my fiancée, Kathryn E. Modugno (Emory Law '17) for her persistence and patience. Thank you, Kathryn, for pushing me to be both the best writer and the best person that I can be. I have only ever backed one crowdfunding campaign, and I received my reward 885 days after the campaign was launched.