No. 19-1004

IN THE

Supreme Court of the United States

OCTOBER TERM, 2019

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

TUMBLING DICE, INC. ET. AL., PETITIONER

V.

UNDER MY THUMB, INC., RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

BRIEF FOR RESPONDENT

Team Number R. 11
Counsel for Respondent

QUESTIONS PRESENTED

I. Whether, under 11 U.S.C. § 365(c)(1), a debtor in possession may assume a non-exclusive license of intellectual property over the licensor's objection where applicable non-bankruptcy law excuses the licensor from rendering performance to an entity other than the debtor in possession.

II. Whether, under 11 U.S.C. § 1129(a)(10), a joint, multi-debtor plan may be approved where an impaired class of creditors has not given acceptance.

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OPINIONS BELOW

At the Bankruptcy Court, Respondent, Under My Thumb, Inc. objected to the proposed chapter 11 reorganization plan on two grounds. First, the proposed assumption of the agreement by the Debtors, Tumbling Dice, Inc. is impermissible under 11 U.S.C. § 365(c)(1). Second, the plan was not confirmable under 11 U.S.C. § 1129(a)(10) because no impaired class of creditors had voted to accept it. The Bankruptcy Court ruled in favor of Petitioner, Tumbling Dice, Inc., holding that the debtor may assume the agreement at issue. The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court on both issues. The United States Court of Appeals for the Thirteenth Circuit correctly reversed the rulings of both lower courts. The Supreme Court of the United States has granted *certiorari*.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

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

11 U.S.C. § 102(7)

11 U.S.C. § 302(b)

11 U.S.C. § 330(a)(1)

11 U.S.C. § 363(c)(2)

11 U.S.C. § 365

11 U.S.C. § 546(a)

11 U.S.C. § 547

11 U.S.C. § 1107(a)

11 U.S.C. § 1121(a)

11 U.S.C. §1124

11 U.S.C. § 1129

38 U.S.C. § 8127

STATEMENT OF THE CASE

Tumbling Dice, Inc. ("TDI") is a holding company created to own the membership interests of its nine subsidiary companies (collectively, the "Debtors"). R. at 4. One subsidiary, Tumbling Dice Development, Inc. ("Development"), acts as a licensee under a critical, non-exclusive software licensing agreement. *Id.* The remaining subsidiaries ("Operating Debtors") are casinos. *Id*. Together, TDI and its affiliated debtors comprise one of the largest gaming operations in the country. *Id*.

Respondent, Under My Thumb, Inc. ("Under My Thumb"), is a leading software designer in the hospitality field, specializing in customer loyalty programs. *Id.* In a 2008 Research and Development Agreement, Under My Thumb agreed to engineer a comprehensive, integrated software system to modernize Development's thirty-year-old rewards program, Club Satisfaction. *Id.* Under My Thumb's revitalization of Club Satisfaction lasted nearly a year. *Id.* In that year, they spent approximately $10 million on the project. *Id.* As partial compensation for its work, Under My Thumb received an unsecured $7 million promissory note ("R&D Note") from Development. *Id*. The new Club Satisfaction software provided the Debtors access to nuanced information about customers' purchasing habits and gaming preferences. R. at 5. With this information, the Debtors enticed customers to play longer, spend more money, and return more frequently. *Id.* After updating Club Satisfaction, Under My Thumb entered into another contract with Development ("Agreement"). *Id.* The Agreement granted Development a non-exclusive license to use its copyrighted and patented software. *Id*. In exchange for the license, Development paid Under My Thumb a monthly fee. *Id.*

The relationship between Debtors and Under My Thumb initially flourished as casino membership tripled and revenue increased. *Id.* The Debtors even boasted that Under My

Thumb's software was an essential part of the Debtors' ongoing business model. *Id.* Under My Thumb also appeared to hit the jackpot, as it received higher-than-expected payments and retained the right to license similar versions of the software to third parties. *Id.* The relationship thrived until June 2015 when Debtors suddenly ceased payments on the R&D Note. R at 6.

In January 2016, Start Me Up, Inc., a hedge fund, acquired Tumbling Dice through a leveraged buyout. *Id.* In exchange for a $3 billion loan, Tumbling Dice, Inc. and the Operating Debtors granted first priority liens on their assets to a syndicated group of lenders ("Lenders"). *Id.* Development was not listed as a borrower in this transaction. *Id.*

In 2016, this large and unserviceable debt load led the Debtors to commence these jointly administered chapter 11 petitions at issue. *Id.* At the time of filing, the Debtors owed approximately $120 million to their unsecured creditors, including $6 million to Under My Thumb. *Id.* In addition to the unsecured debt, the Debtors owed roughly $2.8 billion to the secured Lenders. *Id.* After court-ordered mediation, which Under My Thumb did not attend, the Debtors announced a deal had been made. R. at 6-7. The deal contemplated a joint plan for all parties involved. R. at 7. The deal had two major components. First, it restructured the remaining $2.8 billion owed to Lenders in a twenty-year plan featuring lower interest rates. *Id*. Second, it reconciled the debt with the unsecured creditors, including Under My Thumb. *Id.* After an injection of new capital, the unsecured creditors would receive a 55% distribution on their claims on a pro rata basis. *Id.* Thus, the plan impaired all unsecured creditors. *Id.* It also explicitly stated that "the Debtor's estates are not being substantively consolidated and no Debtor is to become liable for the obligations of another." *Id.*

Though it was initially satisfied with the prospect of the plan, Under My Thumb's careful review of the disclosure statements uncovered an apparent ambush. A private equity group,

known as Sympathy for the Devil, LP ("SFD"), would inject thirty-five of the $66 million going to repay unsecured creditors. R. at 7-8. SFD owns one of Under My Thumb's direct competitors, which has actively tried to replicate Under My Thumb's intellectual property. *Id.* In exchange for its injection of capital, SFD would obtain 51% of the voting share in Tumbling Dice. R. at 8.

Unsurprisingly, Under My Thumb feared that its competitor would finally replicate the software. *Id.* To protect its intellectual property, Under My Thumb refused to consent to the plan. *Id.* Under My Thumb objected to the plan on two grounds. First, Under My Thumb argued that, without its consent, Development's assumption of the agreement was impermissible under 11 U.S.C. § 365(c)(1). R. at 8. Second, Under My Thumb asserted that, absent its consent, the plan was not confirmable under 11 U.S.C. § 1129(a)(10). *Id.*

The bankruptcy court overlooked the concerns of Development's sole impaired creditor and overruled both of its objections. *Id.* Applying the "actual test," the bankruptcy court held that § 365(c)(1) mandates a case-by-case inquiry into whether the non-debtor party was in fact being forced to accept performance under its executory contract from an entity other than the original party to the contract. R. at 8-9.

Further, the bankruptcy court held that §1129(a)(10) requires acceptance from only one class of impaired creditors under the "per plan" interpretation. R. at 9. The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed on both issues. *Id.* Finally, reviewing both issues *de novo*, the United States Court of Appeals for the Thirteenth Circuit correctly reversed the previous holdings. R. at 3. Using the "hypothetical test," the Thirteenth Circuit found that Under My Thumb had a right to objection to the assumption of the agreement. R. at 21. The Thirteenth Circuit also used the "per debtor" interpretation, finding that the Debtors' did not meet the requirements of § 1129(a)(10). *Id.*

SUMMARY OF THE ARGUMENT

Development, as a debtor in possession, cannot assume the Agreement over the objection of its counterparty, Under My Thumb, because § 365(c)(1) plainly requires the "hypothetical test." First, 11 U.S.C. § 1107(a) forces the textual restrictions on assumption found in § 365(c) onto debtors in possession. Because § 365(c)'s language restricts the powers of trustees, § 1107(a) subjects debtors in possession to the same limiting language. When no trustee has been appointed in a chapter 11 case, the Code grants "all the rights . . . and powers of a trustee" to the debtor in possession, subject to "any limitations on a trustee." Further, § 365(c)'s limiting language applies equally to debtors in possession and trustees because there is no textual reason to treat them differently. No debtor in possession can have powers not belonging to a trustee unless the Code carefully carves out an exception. The only authority arguing that debtors in possession should not be subject to the textual limitation in § 365(c) has inappropriately inserted concepts into § 365(c) that are not found in the text. Because there is no exception, the limit in § 365(c) must apply to debtors in possession.

Second, the plain text of § 365(c) shows debtors in possession are subject to the "hypothetical test." If § 365(c) is unambiguous, then the Court's inquiry should cease. Moreover, § 365(c) restricts "assumption or assignment" disjunctively, rather than conjunctively. Courts widely recognize "or" to be disjunctive. Furthermore, Congress demonstrated it knew how to indicate the conjunctive elsewhere in § 365(c), and did so with a different conjunction—the word "and." Section 365(c)(1)'s use of "applicable law" unambiguously refers to non-bankruptcy law. Assuming that such law must be "triggered" in order for § 365(c)'s restriction on assumption to apply requires another inappropriate insertion of concepts not found in the statute's text.

Moreover, the "hypothetical test" is not made ambiguous when read together with § 365(f)(1). Rather than rendering § 365(f)(1) meaningless, § 365(c)(1) creates an exception to § 365(f)(1)'s general rule. The "hypothetical test" also is not made ambiguous by any supposedly "absurd" results. "Absurdity" only occurs where a statute's application would shock the conscience. Rational policy considerations fall short of that standard. The "hypothetical test" is not made ambiguous because of a violation of the rule of surplusage. The requirement of creditor consent demonstrates that the phrase "or assign" is not surplusage.

Finally, the "hypothetical test" applies to debtors in possession because legislative history clearly does not indicate congressional intent to implement the "actual test." The legislative history does not support show unequivocal Congressional intent.

The debtors' plan does not meet the confirmation requirements of § 1129(a)(10) because Development does not have at least one impaired class of creditors' consent. On its face, the codified rules of construction in the Bankruptcy Code support the "per debtor" interpretation. The rules of construction guide courts in ascertaining the plain meaning of provisions within the Code. Under § 102(7), the Code specifies that the "singular includes the plural." In conjunction with § 102(7), § 1129(a)(10) provides for multiple requirements when multiple debtors exist. Thus, the "per debtor" interpretation is proper because it places individual requirements on each debtor.

The "per plan" interpretation of § 1129(a)(10) contradicts surrounding provisions in § 1129 because those provisions contain individual requirements for each debtor. The doctrine of *in pari materia* requires a contextual analysis. Since §§ 1129(a)(1), (a)(3), and (a)(7) are not met unless each debtor under a plan satisfies them, the court must require each debtor to fulfill §1129(a)(10).

Finally, a "per debtor" interpretation protects the substantive rights of already-impaired creditors under § 1129(a)(10). In the alternative, the "per plan" interpretation ignores the substantive rights and safeguards of creditors awarded by Congress. Not only does the main authority for the "per plan" interpretation not even consider the rights of creditors, but it functionally assumes substantive consolidation even though the debtors' plan explicitly contradicts this. Subsequently, the scenario created means the more interests that are at risk, a proportionally lesser number of requirements exist.

ARGUMENT

The facts of this case are undisputed. R. at 9. This appeal presents only questions of law, which are reviewed de novo. *In re Soileau*, 488 F.3d 302, 305 (5th Cir. 2007).

I. Development, as a Debtor in Possession, Cannot Assume the Agreement Over the Objection of its Counterparty, Under My Thumb, Because § 365(c)(1) Plainly Requires the "Hypothetical Test."

"You can't always get what you want." The Rolling Stones, *You Can't Always Get What You Want* (Decca Records 1969). No matter how badly the Petitioner wants the word "or" in § 365(c) to read "and," it simply does not. Such a warped reading of the statute is necessary to reach the result Petitioner seeks. However, of course, the role of the Court is to enforce the statutes Congress writes. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13 (2000). When Congress chooses its words clearly, that job should be straightforward. But no matter Congress's choice in words, Petitioner urges that the Court can squint until those words no longer hold their obvious meaning. Petitioner proclaims that its preferred interpretation is supported by policy concerns and a sliver of legislative history. But bankruptcy policy is for Congress to decide. No matter how badly Petitioner might want "or" to mean "and," and no matter what sort of policy a court might think preferable, Mick Jagger's advice echoes true.

The issue is this: does a creditor have a right to prevent a debtor in possession from assuming an intellectual property license held pre-petition? Development thinks not, siding with the minority of circuits, which have ignored § 365(c)(1)'s text in support of their own preconceived notion of sound bankruptcy policy. *See*, *e.g.*, *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 747 (1st Cir. 1997). Meanwhile, if Development can take over this contract without mind of Under My Thumb's objection, the controlling share of its stock would change hands, and its new holding company would expose Under My Thumb's software to a direct competitor. To protect itself from this unjust result, Under My Thumb needs only to rely on the plain text of § 365(c)(1), which a majority of Circuit Courts agree allows a creditor to object to the assumption of an executory contract when the contract is not assignable outside of bankruptcy. *See*, *e.g.*, *RCI Tech. Corp. v. Sunterra Corp (In re Sunterra Corp.)*, 361 F.3d 257 (4th Cir. 2004). Because Under My Thumb has objected to Development's assumption of the Agreement, which the parties concur is executory, a finding by the Court that § 365(c)(1) requires the "hypothetical test" will prevent Development from assuming the agreement.

A. 11 U.S.C. § 1107(a) Forces the Textual Restrictions on Assumption Found in § 365(c) onto Debtors in Possession.

i. Because § 365(c)'s Language Restricts the Powers of Trustees, § 1107(a) Subjects Debtors in Possession to § 365(c)'s Limiting Language.

In chapter 11 cases in which no trustee has been appointed, the Code grants "all the rights . . . and powers of a trustee" to the debtor in possession. 11 U.S.C. § 1107(a). However, in order to place the debtor in possession "in the shoes of a trustee in every way," S. Rep. No. 95-989, at 116 (1978), those rights and powers are subject to "any limitations on a trustee serving in a case under [chapter 11]." 11 U.S.C. § 1107(a); *see also Cybergenics Corp. v. Chinery (In re Cybergenics Corp.)*, 226 F.3d 237, 243 (3rd Cir. 2007). "The terms 'trustee' and 'debtor in

possession,' as used in the Bankruptcy Code, are thus essentially interchangeable." *Cybergenics,* 226 F.3d at 243 (citing *L.R.S.C. Co. v. Rickel Home Ctrs., Inc. (In re Rickel Home Ctrs., Inc.)*, 209 F.3d 291, 297, n. 7 (2000)). Thus, absent a statutory exception, § 1107(a) subjects every debtor in possession to the same Code sections that place limits on trustees' powers.

To illustrate the way in which § 1107(a) interacts with other statutes to place limits onto debtors in possession, Courts routinely substitute the word "debtor in possession" for "trustee" in the original statute. *See In re United Airlines, Inc.*, 368 F.3d 720, 725 (7th Cir. 2004) (applying the limitation on trustee power in § 365(c)(2) to a debtor in possession)[1]; *Blackwood Associates, L.P. v. Federal Home Loan Mortgage Corp. (In re Blackwood Assocs., L.P.)*, 153 F.3d 61, 67 (2d Cir. 1998) (applying the limitation on trustee power in § 363(c)(2) to a debtor in possession)[2]. Using this technique, § 365(c) restricts debtors in possession as follows:

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

11. U.S.C. § 365(c).

ii. Section 365(c)'s Limiting Language Applies Equally to Debtors in Possession and Trustees Because There is No Textual Reason to Treat them Differently.

Because § 1107(a) grants all powers of trustees to debtors in possession, subject to "any limitations on a trustee," no debtor in possession can have powers not belonging to a trustee unless the Code carves out an exception. *Century Brass Products, Inc. v. Caplan (In re Century*

[1] "Section 365(b)(1) provides: 'If there has been a default in an executory contract or unexpired lease of the debtor, *the trustee [or debtor in possession]* may not assume such contract or lease unless . . . .'" (emphasis added).
[2] "Under § 363(c)(2) of the Code, '*The trustee [or debtor in possession]* may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless . . . .'" (emphasis added).

Brass Prod., Inc.), 22 F.3d 37, 39 (2d Cir. 1994) ("We see no basis in the Code for carving out of this blanket provision an exception for § 546(a)'s statute of limitations."); *see also Coastal Group, Inc. v. Mfrs. Hanover Tr. Co. (In re Coastal Grp. Inc.)*, 13 F.3d 81, 83 (3d Cir. 1994); *In re Black & Geddes, Inc.*, 35 B.R. 827, 828 (Bankr. S.D.N.Y. 1983). In other words, "particular statutory provisions" should *only* "apply differently" to debtors in possession if language in the Code requires. *See Id.* Nevertheless, one Court has argued the limit on "assumption" in § 365(c) should not apply to debtors in possession because "a trustee is not the same as a debtor in possession in point of fact and law*." See In re Footstar, Inc.*, 323 B.R. 566, 577 (Bankr. S.D.N.Y. 2004). These entities are of course legally and factually different, but these Courts have been unable to show that the Code supplies grounds for treating them differently. Indeed, the Code does *not* say that § 365(c)'s limitation on "assumption" should apply differently to debtors in possession.

In both *Century Brass* and *Coastal Group*, the Second and Third circuits respectively examined the question of whether language in the Code allowed limits on trustees to apply differently to debtors in possession. *See Century Brass*, 22 F.3d at 39; *Coastal Group*, 13 F.3d at 83. At issue in both cases, specifically, was whether the limitation period on motions to avoid preferential transfers in § 546(a), triggered by the appointment of a trustee, was also triggered in cases involving debtors in possession. *Id.* In each case, debtors in possession waited more than two years from the dates of their bankruptcy petitions to move to avoid preferential transfers under § 547. *Id.* No trustees were appointed at any time in either debtor's case. § 546(a) provided:

> (a) An action or proceeding under section . . . 547 . . . of this title may not be commenced after the earlier of—
>
> (1) two years after the appointment of a trustee under section 702, 1104, 1163, 1302, or 1202 of this title; or

(2) the time the case is closed or dismissed.

11. U.S.C. § 546(a). The debtors in possession argued they were not subject to the limitation period in § 546(a)(1) because debtors in possession, unlike trustees, are not "appointed" *per se*—but rather, "come[] into existence with the filing of the petition." *Coastal Group*, 13 F. 3d at 84. Both Courts held § 546(a)(1) applied to the debtors in possession, reasoning that "[t]hat term[, 'appointed,'] has been construed as general enough to include *elected* trustees." *Century Brass Prod., Inc.*, 22 F.3d at 40 (citing *In re Black & Geddes, Inc.*, 35 B.R. 827, 828-29 (Bankr. S.D.N.Y. 1983)). Crucially, the Courts did not merely *ignore* the word "appointed." *See id.* Rather, they understood "appointed," as used in § 546(a), was a general enough term to include the manner in which debtors in possession "come into existence." *See id.* The Courts were still bound to apply the text of § 546(a) to debtors in possession.

In *Footstar*, the Southern District of New York departed from the text of the Code in an attempt to avoid applying the § 365(c) limitation on assumption of executory contracts to debtors in possession. *See Footstar*, 323 B.R. at 577. The Court accepted that *trustees* were barred from either assuming or assigning executory contracts when applicable law made the contract assignable outside of bankruptcy and the counterparty did not consent. *See id.* However, the Court also concluded that, under the same circumstances, *debtors in possession* were barred only from assigning executory contracts. *See id.* The Southern District rested its argument on two premises. First, that the limitation only applied "'if' a counter party to a contract is excused by applicable law from accepting performance from or rendering performance to 'an entity *other than* the debtor or the debtor in possession." *Id.* at 576 (emphasis in original). Second, that, "without assignment there is no 'entity other than the debtor in possession' *involved with the contract*." *Footstar*, 323 B.R. at 577 (emphasis added).

But even though it professed to reconcile its position with *Century Brass*, the *Footstar* Court relied on sleight-of-hand—smuggling an additional condition into § 365(c) that had no "basis in the Code." Indeed, § 365(c) includes no language stating that its restriction on assumption only applies where the assumption would *result* in a party other than the debtor in possession becoming "involved with the contract." Rather, the restriction comes into play "if" applicable law would excuse the counterparty from "accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession." 11 U.S.C. § 365(c). Adding the words "involved in the contract" violates a canon of statutory interpretation: doing so would "result not [in] a construction of [the] statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope." *Lamie v. U.S. Tr.*, 540 U.S. 526, 538 (2004) (quoting *Iselin v. United States*, 270 U.S. 245, 251 (1926)).

The *Footstar* Court erroneously stated its conclusion was consistent with *Century Brass*. According to *Footstar*, *Century Brass* "focused on the *substantive* limitation set forth in [§ 546(a)] *as applied to the debtor in possession* and recognized that the result may vary from the literal language of the statute." *Footstar*, 323 B.R. at 577 (emphasis in original). But *Century Brass* did not ignore text to invent a substantive limitation. Rather, after analyzing precedent relating to the interpretation of the word "appointed," the *Century Brass* Court found that § 546(a)(1) applied a substantive limitation to debtors in possession. *See Century Brass*, 22 F.3d at 40. Moreover, while *Century Brass* does criticize an overly "literal" reading of the word "appointment," its criticism does not grant license to invent substance not found in the Code's plain language. *See Century Brass*, 22 F.3d at 40. *Century Brass*'s problem with "literalism" is a problem with the argument that § 546(a)'s use of the word "appointment" was so *narrow* that it

could not refer to the manner in which debtors in possession "come into existence." *Id. Century Brass* is thus an opinion rooted in the text of the Code. *Footstar*, on the other hand, without explanation, merely inserts a new necessary condition into § 365(c) that must be met before the restriction on assumption kicks in: that the party "other than the debtor or debtor in possession" be "involved in the contract." *Footstar*, 323 B.R. at 577. Because this condition is nowhere to be found in § 365(c)'s plain language, there is no "basis in the Code" for applying § 365(c)'s limitation on assumption differently between trustees and debtors in possession.

B. The Plain Text of § 365(c) Shows Debtors in Possession are Subject to the "Hypothetical Test."

i. Section 365(c)(1)'s Use of "Or" is Unambiguously Disjunctive.

The Code supplies no reason for applying the textual limitation on trustees in § 365(c) differently to debtors in possession. Thus, a straightforward interpretation of § 365(c) demonstrates the nature of the limit on a debtor in possession's power to assume executory contracts. The statutory language itself must be the point of departure for statutory interpretation. *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 388 (2013). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then this first canon is also the last: judicial inquiry is complete." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (internal citations and quotations omitted); *see also Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991); *Price v. Del. State Police Fed. Credit Union*, 370 F.3d 362, 368 (3d Cir. 2004) ("We are to begin with the text of a provision and, if its meaning is clear, end there.").

Simply put, the plain language of § 365(c) places restrictions on "assumption or assignment." 11 U.S.C. § 365(c). Section 365(c) makes no mention of "assumption and assignment." Thus, the preconditions in § 365(c)(1)(A) and (B) apply respectively and separately

to assumption and to assignment. As applied to this case, § 365(c) puts two separate prohibitions on Development—one against assuming the Agreement and another against assigning it. If (1) Development wishes to assume the Agreement and (2) the preconditions spelled out in § 365(c)(1)(A) are satisfied, then (3) Under My Thumb would need to consent. Subsequent to assuming the Agreement, though, if Development wished to assign it to another party, Under My Thumb would need to consent again. But Development states that it is possible for "the disjunctive term 'or,' . . . [to] be construed in the conjunctive as 'and.'" *Sunterra*, 361 F.3d at 260. Consent, then, would only be required if the debtor in possession wanted to *both* assume and assign.

However, as the Fourth Circuit recognized in *Sunterra*, the word "or" is unambiguously disjunctive. *Sunterra*, 361 F.3d at 265. Moreover, Congress uses the word "or" disjunctively and the word "and" conjunctively in other parts of the statute. Congress separated § 365(c)(1)(A) from § 365(c)(1)(B) with a plainly conjunctive "and." Moreover, no court has entertained the argument that § 365(c)(1)(A) is only triggered if the counterparty is excused from *both* "accepting performance from" *and* "rendering performance to . . . an entity other than . . . the debtor in possession." If Congress meant "accepting performance from or rendering performance to" disjunctively, why would it mean "assume or assign" conjunctively? The easy answer is that it did not—especially because it also unambiguously denoted the conjunctive with the word "and" between § 365(c)(1)(A) and (B). Thus, Congress demonstrated it knew how to distinguish between the disjunctive (by writing "or") and the conjunctive (by writing "and"). When Congress demonstrates it knows how to make a material distinction in a statute, Courts must respect Congress's choice in words. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) (finding 38 U.S.C. § 8127(d)'s use of "shall" indicated a command where §

8127(b) and (c) used "may," reasoning Congress knew how to distinguish between a command and permission); *see also Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, (2015); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("when Congress includes particular language in one section of a statute but omits in another section of the same Act, it is generally presumed Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *Rea v. Federated Inv'rs*, 627 F.3d 937, 940 (3d Cir. 2010).

ii. Section 365(c)(1)'s Use of "Applicable Law" Unambiguously Refers to Non-Bankruptcy Law.

The dissent to the Thirteenth Circuit's opinion in this matter makes one other argument in an attempt to cloud the plain meaning of § 365(c). Citing *Summit Inv. & Dev. Corp. v. Leroux*, 69 F.3d 608, 613 (1st Cir. 1995) in support, the dissent states, "the dispositive terms in section 365(c)(1) are 'applicable law' and 'an entity other than the debtor or debtor in possession.' Where the debtor in possession seeks to assume, but not assign, an executory contract, the applicable law referenced in section 365(c)(1) is not triggered." R. at 23.

First, the Dissent's cited authority does not support its argument. The extent of the analysis *Leroux* devotes to the text of 365(c) is an uncited assertion that "it is . . . plausible to construe [§ 365(c)] as requiring an *actual* showing . . . that the nondebtor party . . . would not be forced to accept performance . . . from someone other than the debtor . . . ." *Leroux*, 69 F.3d at 612. *Leroux* supplies no substantive reasoning in support of the "plausibility" of its preferred reading—let alone any discussion of the phrase "applicable law." The Thirteenth Circuit's use of *Leroux*, therefore, does not support its specific argument regarding the phrase "applicable law."

Further, the Dissent's argument falls victim to the same mistake made by the *Footstar* court—inserting language into the statute to support its preferred reading. Section 365(c) itself does not require any so-called "triggering" of applicable law. 11 U.S.C. § 365(c). Adding the

word "triggering" into § 365(c) is therefore just as impermissible as *Footstar*'s addition of "involvement in the contract." *See Lamie*, 540 U.S. at 538. Moreover, Courts have unequivocally held that § 365(c)'s use of "'applicable law' means any law applicable to a contract, other than bankruptcy law." *In re XMH Corp.*, 647 F.3d 690, 695 (7th Cir. 2011) (citing *Sunterra,* 361 F.3d at 261, n. 5; *In re Pioneer Ford Sales, Inc.,* 729 F.2d 27, 28 (1st Cir. 1984); *In re Wellington Vision, Inc.,* 364 B.R. 129, 135 (S.D.Fla. 2007)). Because its uses of "or" and "applicable law" are unambiguous, § 365(c)'s plain meaning requires implementing the hypothetical test.

iii. The "Hypothetical Test" is Unambiguous Because it Does Not Render § 365(f)(1) Meaningless.

Petitioner may also attempt to create confusion by arguing that § 365(f)(1) is rendered meaningless by the "hypothetical test." However, there is no conflict between § 365(c)(1) and § 365(f)(1). The latter statute provides:

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

11 U.S.C. § 365(f)(1). This section, thus, puts forth a broad rule: non-bankruptcy law "that, as a general matter, 'prohibits, restricts, or conditions the assignment' of executory contracts is trumped by the provisions of subsection (f)(1)." *Sunterra*, 361 F.3d at 266 (4th Cir. 2004) (quoting *Perlman v. Catapult Entm't, Inc. (In re Catapult Entm't, Inc.,* 165 F.3d 747, 752 (9th Cir. 1999); *see also City of Jamestown v. James Cable Partners, L.P. (In re James Cable Partners)*, 27 F.3d 534, 538 (11th Cir. 1994); *In re Magness,* 972 F.2d 689, 695 (6th Cir. 1992).

Section 365(c)(1), though, carves out an exception to the broad rule. Only a subset of the "applicable laws" trumped by § 365(f)(1) are revived in § 365(c)(1). § 365(c)(1)'s restriction on assumption only kicks in where the excuse that would be granted by applicable non-bankruptcy

law would be given in order to let the creditor refuse either (1) to accept "performance from" or (2) to render "performance to" "an entity other than the . . . the debtor in possession." 11 U.S.C. § 365(c)(1)(A). In other words, § 365(c)(1) gives creditors the ability to object to assumption or assignment where "applicable law" would allow them to refuse "'accepting performance from or rendering performance to an entity' *different from the one with which the party originally contracted*.'" *Sunterra*, 361 F.3d 257, 266 (4th Cir. 2004) (quoting *Catapult,* 165 F.3d at 752) (emphasis added). Consequently, the exception in § 365(c)(1), only kicks in where applicable law would allow the creditor to refuse performance because of a material change in their counterparty's identity. Some laws that prohibit assignment inevitably fall outside that category. Ordinary contract laws, for example, which merely enforce anti-assignment provisions in debtor-creditor contracts, would not fall under the § 365(c)(1) exception, but would still be trumped by § 365(f)(1). *See Pioneer Ford Sales,* 729 F.2d at 28. As a result, the hypothetical test does not render § 365(f)(1) meaningless.[3]

iv. The "Hypothetical Test" is not Ambiguous Because it Does not Produce Absurd Results.

Petitioner contends that reading § 365(c)(1) to impose the "hypothetical test" produces an absurd result. However, the "hypothetical test" reading produces a result falling well short of the high bar required for a finding of "absurdity." "[T]he issue is not whether the result would be 'unreasonable,' or even 'quite unreasonable,' but whether the result would be *absurd*." *Sunterra*, 361 F.3d at 268 (4th Cir. 2004) (citing *Maryland State Dep't of Educ. v. U.S. Dep't of Veterans*

[3] Federal patent law excuses the performance of parties granting non-exclusive patent licenses because the identity of the counterparty is material to the contract. *See Catapult*, 165 F.3d at 752 (9th Cir. 1999) ("We note that, in the instant case, the federal law principle against the assignability of nonexclusive patent licenses is rooted in the personal nature of a nonexclusive license—the identity of a licensee may matter a great deal to a licensor") ; *see also Unarco Indus., Inc. v. Kelley Co.*, 465 F.2d 1303, 1306 (7th Cir. 1972) ("The long standing federal rule of law with respect to the assignability of patent license agreements provides that these agreements are personal to the licensee and not assignable unless expressly made so in the agreement.").

Affairs, 98 F.3d 165, 169 (4th Cir.1996); *see also Crooks v. Harrelson*, 282 U.S. 55, 60, (1930) (finding a taxation statute not to be absurd, regardless of any policy considerations); *United States v. Kirby*, 74 U.S. 482, 485–86 (1868) (finding a statute that criminalized obstruction of the mail would be absurd if it were held to criminalize the arrest of a postal worker for murder).

In the case at hand, the Petitioner may contend that the "hypothetical test" is absurd merely because, in its eyes at least, the balance of policy-related arguments weigh against it. *See* R. at 26. First, the issue is not whether a Court believes the benefits of one interpretation outweigh another. "Congress is the policymaker—not the courts. *Hartford Underwriters,* 530 U.S. at 13 (2000) (citing *Kawaauhau v. Geiger,* 523 U.S. 57, 64 (1998); *United States v. Noland,* 517 U.S. 535, 541–42, n. 3 (1996); *Union Bank v. Wolas,* 502 U.S. 151, 162 (1991)). The modification of a statutory provision to achieve a preferable policy outcome is a task reserved to Congress. *Sunterra*, 361 F.3d at 269.

Therefore, courts cannot simply find an unwise policy "absurd." Rather, a statute is only "absurd" if it "shock[s] the general moral or common sense." *Crooks*, 282 U.S. at 60. Criminalizing the arrest of a postal worker who has committed murder because the arrest "obstructs" the passage of mail, as the Supreme Court found in *Kirby*, shocks common sense. *See Kirby*, 74 U.S. at 486. An ordinary person can easily recognize the irrationality of a law that would charge police officers with crimes whenever they arrest postal workers for murder. On the other hand, the ordinary person has no sense of the rationality or irrationality of giving creditors the right to stop debtors in possession from assuming executory contracts. In *Crooks*, the Court determined that laws appearing to represent tax-policy decisions (even bad policy decisions) were within the purview of Congress. *See Crooks*, 282 U.S. at 60. In the case at hand, § 365(c)(1) appears to represent a bankruptcy-policy decision from Congress: creditors have the

right to prevent the assumption of executory contracts by debtors in possession. This policy decision also must be within Congress's purview.

> Laws enacted with good intention, when put to the test, frequently, and to the surprise of the lawmaker himself, turn out to be . . . objectionable. . . . But . . . Congress may select the subjects of taxation and qualify them differently as it sees fit; and if it does so in plain terms, as it has done here, it is not within the province of the court to modify the law by construction.

Crooks, 282 U.S. at 60. Thus, because application of the "hypothetical test" does not approach a "shock" to the "general moral or common sense," it does not produce an absurd result.

v. The "Hypothetical Test" is Not Ambiguous Because it Does not Violate the Rule of Surplusage.

The Thirteenth Circuit's Dissent argues that reading § 365(c)(1) to impose a "hypothetical test" would render the words "or assign" in § 365(c)(1) surplusage. R. at 24. First, the Dissent reasons, § 365(f)(2)(A) requires the assumption of a contract before it can be assigned. *Id.* Thus, "If Congress had wanted to preclude assumption and assignment, all it needed to say in section 365(c)(1) was that the trustee 'may not *assume*' . . . an executory contract." *Id.* However, as this brief demonstrated in section C, the disjunctive nature of the word "or" subjects *both* assumption *and* assignment, respectively and independently, to the statutory requirements in §§ 365(c)(1)(A) and (c)(1)(B). The latter subsection requires the consent of the creditor. 11 U.S.C. § 365(c)(1). Thus, Congress included the words "or assign" because it recognized that a creditor might consent to the assumption of a contract, but not to assignment. Thus, the words "or assign" have a clear purpose, and are more than mere surplusage.

C. The "Hypothetical Test" Applies to Debtors in Possession Because Legislative History Clearly Does Not Indicate Congressional Intent to Implement the "Actual Test."

The Thirteenth Circuit's Dissent has one last argument against the "hypothetical test." It contends that a House committee report made about an unenacted 1980 amendment to § 365(c)

is a clear indicator of the legislature's intent to create an "actual test." *See* H.R. Rep. No. 96-1195, at 57 (1980). Given the unambiguous language in § 365(c), legislative history must be "unequivocal" in order to establish Congressional intent to create a contrary statute. *See Miller v. Comm'r*, 836 F.2d 1274, 1283 (10th Cir. 1988) ("Legislative history is a step removed from the language of the statute and, hence, is not entitled to the same weight. When there is a conflict between portions of legislative history and the words of a statute, the words of the statute represent the constitutionally approved method of communication") (citing *Piper v. Chris-Craft Industries,* 430 U.S. 1, 26 (1977)).

Legislative history is not "unequivocal" if it attaches significance to "mute intermediate legislative maneuvers." *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989) (finding unequivocal the Senate's unexplained failure to include language appearing in the House version of a bill). Moreover, legislative history demonstrating only "unenacted approvals, beliefs, and desires" falls far short of being "unequivocal." *See Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988). Finally, legislative history showing the intent of one iteration of Congress does not "unequivocally" speak for the intent of a different term's Congress. *See United States ex rel. Landis v. Tailwind Sports Corp.*, 167 F. Supp. 3d 80, 83 (D.D.C. 2016) (finding *post hoc* legislative history "inherently entitled to little weight," reasoning later versions of Congress are comprised of different members with different perspectives); *see also Cobell v. Norton*, 428 F.3d 1070, 1075 (D.C.Cir. 2005).

In the case at hand, reliance on the 96th Congress's 1980 Senate report cannot "unequivocally" determine the 98th Congress's intent with respect to the 1984 amendment of § 365(c). Even if the language of the statute the 96th Congress proposed was the same as that which was ultimately passed by the 98th Congress, an indefinite number of "mute intermediate

legislative maneuvers" necessarily passed between 1980 and 1984. *See Mead Corp.*, 490 U.S. at 723. The Petitioner asks the Court to assume the 98th Congress (1) knew what the 1980 Senate report said about the proposed amendment, (2) knew the language of both amendments was identical, and (3) did not believe the 96th Congress's choice of words required *exactly the opposite result*. Given the fact that the unambiguous language in § 365(c)(1) establishes a "hypothetical test," those assumptions appear unlikely. Unless Petitioner can prove them, Congress's motivations are still muddy, and the Court is left only with proof of intent of one Committee from a different iteration of Congress. Thus, the Court should reach the same conclusion as the *Sunterra* court, which dismissed the legislative history, and found that the plain language of § 365(c) controlled.[4]

II. The Debtors' Plan Does Not Meet the Confirmation Requirements of § 1129(a)(10) Because Development Does Not Have At Least One Impaired Class of Creditors' Consent.

When a debtor enters into financial distress and files for bankruptcy, the future for unsecured creditor claims is likely bleak. The debtor typically creates and proposes the plan. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 642 (2012). The plan divides the different creditors into classes and determines each class's treatment. *Id.* Generally, a court can only confirm a plan if each class of impaired creditors consents to the proposed plan. 11 U.S.C. § 1129(a)(8). A creditor is impaired if the plan alters its "legal, equitable and contractual rights." 11 U.S.C. § 1124(1).

[4] "For at least three reasons, the 1980 Report is not conclusive on congressional intent concerning the 1984 Act. First, the 1980 Report relates to a 1980 proposal, which was never enacted, rather than to the 1984 Act; and we have held that courts are not free to replace a statute's plain meaning with "unenacted legislative intent." . . . Second, the 1980 Report was prepared several years prior to enactment of the Statute. . . . Finally, it reflects the views of only a single House committee." *Sunterra*, 361 F.3d at 265.

However, § 1129(b) carves out an exception to the requirement that each class of impaired creditors gives consent. 11 U.S.C. § 1129(b). A nonconsensual plan is often referred to as a "cramdown" plan. *RadLAX Gateway Hotel*, 566 U.S. at 641-42. 11 U.S.C. § 1129 outlines multiple requirements for the confirmation of a cramdown plan. *See generally* 11 U.S.C. § 1129. The purpose of these requirements is to safeguard those interests that will be "negatively impacted by a debtor's reorganization plan," such as the unsecured creditors'. *U.S. Bank N.A. v. Vill. at Lakeridge, LLC*, 814 F.3d 993, 1000 (9th Cir. 2016). "If a class of claims is impaired under the plan," § 1129(a)(10) only permits confirmation when "at least one class of *claims that is impaired under the plan has accepted the plan* . . . ." 11 U.S.C. § 1129(a)(10) (emphasis added). This provision is a critical safeguard for unsecured, impaired creditors during a nonconsensual plan. *See U.S. Bank N.A.,* 814 F.3d at 1000.

A new question arises in multi-debtor bankruptcies. *See* 7 Collier on Bankruptcy P 1129.02 (16th 2019). Specifically, courts disagree on the number of impaired creditors that must consent to the cramdown plan's confirmation. *Id*. Resolving this split will have a drastic impact on a creditor's ability to utilize the § 1129(a)(10) safeguard. *See* 11 U.S.C. § 1129(a)(10); *see also In re Tribune Co.*, 464 B.R. 126, 184 (Bankr. D. Del. 2011).

In addition to the Thirteenth Circuit, multiple cases from the Bankruptcy Court in the District of Delaware, the leading business bankruptcy court, affirm the "per debtor" interpretation. R. at 21; *In re Woodbridge Grp. of Cos., LLC*, 592 B.R. 761 (Bankr. D. Del. 2018); *In re Jer/Jameson Mezz Borrower II, LLC*, 461 B.R. 293 (Bankr. D. Del. 2011); *In re Tribune Co.*, 464 B.R. at 183-84. These courts adopt the view that multi-debtor bankruptcies require one impaired creditor's consent "per debtor." *In re Jer/Jameson Mezz Borrower II, LLC*, 461 B.R. at 293.

The only appellate court to use the alternative "per plan" interpretation is the Ninth Circuit. *See generally JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props,* 881 F.3d 724 (9th Cir. 2018). The "per plan" interpretation of § 1129(a)(10) states that only one consenting impaired creditor from the entire multi-debtor bankruptcy is required to confirm the nonconsensual plan, binding all impaired creditors. *See JPMCC 2007-C1 Grasslawn Lodging,* 881 F.3d at 726.

This Court should affirm the Thirteenth Circuit's ruling that the Petitioners' plan does not meet the requirement in § 1129(a)(10) for two reasons. R. at 21. First, the Code's rules of construction in § 102, as well as a *in pari materia* analysis, show that the "per debtor" interpretation is within the plain meaning of the statute. *In re Tribune Co.*, 464 B.R. at 183-84. Second, the alternative "per plan" interpretation strips the substantive safeguards that protect already-impaired creditors. *Id.*

A. On its Face, the Codified Rules of Construction in the Bankruptcy Code Support the "Per Debtor" Interpretation.

The plain meaning of legislation should be conclusive unless the "literal application of a statute will produce a result demonstrably at odds with the intention of the drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). However, under a statutory analysis, not all components within a statute are decisive. *See United States v. Ron Pair Enters*., 489 U.S. 235, 251 (1989); *see also Barrett v. Van Pelt,* 268 U.S. 85, 91 (1925) (for example, punctuation is minor and non-controlling). Courts, when considering the meaning of a bankruptcy provision, use the Code's rules of statutory interpretation—termed the "rules of construction." 11 U.S.C. § 102. Courts must read the plain meaning of any bankruptcy provision in "conjunction with any applicable rules of construction." *In re Phillips,* 483 B.R. 53, 57 (Bankr. E.D.N.Y. 2012) (the

plain meaning of the statute in conjunction with the Bankruptcy Code's rules of construction was unambiguous).

Looking at 11 U.S.C. § 1129 without applying the rules of construction, the Code would explicitly state the requirements for a single debtor to confirm a plan, but not a multi-debtor bankruptcy's requirement. 11 U.S.C. § 1129(a)(10). The single debtor would simply need to gain the consent of one impaired creditor. *Id.* However, the phrase "at least one class of claims that is impaired under the plan has accepted the plan" would not specify how multiple debtors should act in the cramdown situation. *Id.* Moreover, these multiple debtors may have completely different creditors. However, before a bankruptcy provision is declared ambiguous, the court's analysis proceeds to the rules of construction set forth in § 102 of the Code. 11 U.S.C. § 102.

The Thirteenth Circuit and the Bankruptcy Court of the District of Delaware recognize § 102(7) states that "the singular includes the plural." 11 U.S.C. § 102(7); R. at 21; *In re Tribune Co.*, 464 B.R. at 183-84. An early example of this rule's application is in *In re Werth* when the Colorado Bankruptcy Court used the § 102(7) rule of construction to determine whether 11 U.S.C. § 1121(a) prohibits a debtor from filing more than one plan at a time. *See In re Werth*, 29 B.R. 220, 222 (Bankr. D. Colo. 1983); 11 U.S.C. § 102(7). In *In re Werth* the debtor filed two proposed plans with its disclosure statement. *Id.* The phrase at issue in the provision was that "the debtor may file a plan." *In re Werth*, 29 B.R. at 222. The Court ruled that the debtor could submit more than one plan because the provision must be read in light of the § 102(7) rule of construction. *Id.* Thus, the phrase "a plan" was interpreted in the plural form. *Id.* The Court further reasoned that Congress could have easily chosen to state that only a single plan may be under consideration at a time, but it did not do so. *Id.* The *Werth* application of § 102(7) was reaffirmed as recently as 2011 by the Nebraska Bankruptcy Court stating that the "singular

includes the plural remains the same today as it was at the time of the *Werth* case." *In re Crossroads Ford, Inc.,* 453 B.R. 764, 770 (Bankr. D. Neb. 2011).

As applied specifically to § 1129(a)(10), multiple courts use § 102(7) to provide guidance when interpreting the provision. 11 U.S.C. § 102(7); *see In re Tribune Co.*, 464 B.R. at 183-84. Problematically, the Petitioner assumes that § 1129(a)(10)'s use of the singular word "plan" necessarily implies that the subsequent requirement applies to multi-debtor situations. *In re Tribune Co.*, 464 B.R. at 183-84. However, as the court reasoned in *Tribune*, because the "singular includes the plural," the provision reads that all debtors must have at least one class of impaired creditors consent to the plan based on the plain meaning in the Code. *Id.* Thus, the Court found "nothing ambiguous" in § 1129(a)(10) and stated that the requirements of one debtor should apply to all debtors in a multi-debtor case. *Id.*

The *Tribune* application of § 102(7) is very similar to the § 102(7)'s application elsewhere, such as in *Werth. In re Tribune Co.*, 464 B.R. at 183-84; *In re Werth*, 29 B.R. at 222. Although the Code provision is different, both courts use § 102(7)'s rule of construction to ascertain a provision's plain meaning where a pluralistic situation exists under a provision with singular requirements. As the *Werth* Court determined that the phrase "plan" expands to include multiple plans, the *Tribune* court determined that a single requirement for a single debtor results in multiple requirements in the case of multiple debtors. *In re Tribune Co.*, 464 B.R. at 183-84; *In re Werth*, 29 B.R. at 222. Thus, the plain meaning of the statute within the Bankruptcy Code supports the "per debtor" application.

B. The "Per Plan" Interpretation of § 1129(a)(10) Contradicts Surrounding Provisions in § 1129 Because Those Provisions Contain Individual Requirements For Each Debtor.

An *in pari materia* analysis is a cannon of statutory interpretation. *United States v. Stewart*, 311 U.S. 60, 64 (1940); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 411 (1968); *In Pari Materia*, Bouvier Law Dictionary (2012). The doctrine is a contextual analysis: "all acts *in pari materia* are to be taken together, as if they were one law." *Id.* This means that, in "doubtful cases" of statutory interpretation, the plain meaning of a statute must consider the surrounding statutes. *United States v. Freeman*, 44 U.S. (3 How.) 556, 564-65 (1845). The rationale for this tool of interpretation is that, whenever Congress passes a statute, it is "aware of all previous statutes on the same subject." *Erlenbaugh v. United States*, 409 U.S. 239, 239 (1972); *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) ("statutory language, plain or not, depends on context."). For example, the Supreme Court determined an *in pari materia* analysis required considering The Revenue Act of 1916 when interpreting The Farm Loan Act. *Stewart*, 311 U.S. at 64. The Court reasoned that both Acts were the "same subject matter" of tax exemptions for farm loan bonds. *Id.*

Courts use an *in pari materia* analysis to interpret specific provisions of the Bankruptcy Code. *Things Remembered v. Petrarca*, 516 U.S. 124, 127 (1995). Three provisions give guidance for interpreting § 1129(a)(10). First, § 1129(a)(1) requires that the "plan complies with the applicable provisions of this title." 11 U.S.C. § 1129. This provision is not satisfied if all debtors in a jointly administered proceeding do not meet the requirements of the provision. *Tribune Co.,* 464 B.R. at 183. Second, under § 1129(a)(3), all debtors must meet the requirement that the plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. §1129(a)(3). Without fulfillment from each debtor, the plan cannot move forward. *Id.*

Further, the best interest of creditors test gives guidance in § 1129(a)(7):

> **(7)**With respect to each impaired class of claims or interests—
>
> **(A)** each holder of a claim or interest of such class—
>
> **(i)** has accepted the plan; or
>
> **(ii)** will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 . . . .

11 U.S.C. § 1129(a)(7). Essentially, it requires that for each class of impaired claims, each holder of an allowed claim will consent to the plan or at least retain property worth the same amount as the creditor would have received if the debtor had liquidated under chapter 7. *Id.* This attests to the individual focus of the Bankruptcy Code—one of the two requirements in § 1129(a)(7) must be met for each creditor, regardless of what the other creditors do. *See* Suzanne T. Brindise, *Choosing The "Per-Debtor" Approach To Plan Confirmation in Multi-Debtor Chapter 11 Proceedings*, 108 NW. U. L. R. 1355, 1375 (2014).

11 U.S.C. §§1129(a)(1), (a)(3), and (a)(7) require individual debtor fulfillment, even during joint administration. Thus, the "per debtor" interpretation of § 1129(a)(10) is the appropriate approach because it mirrors the individualized requirements in the surrounding provisions. *See Freeman*, 44 U.S. (3 How.) at 564-65. Violating the doctrine of *in pari materia*, the "per plan" approach does not extend individualized requirements to each debtor. While the Court in *Stewart* went as far as comparing entirely separate acts, this Court need only consider the bankruptcy provisions a few lines above § 1129(a)(10).

C. A "Per Debtor" Interpretation Protects the Substantive Rights of Already-Impaired Creditors Under § 1129(a)(10).

The general rule is that absent circumstances requiring otherwise, a parent company is treated as separate from its subsidiary. *Skidmore, Owings & Merrill v. Canada Life Assurance*

Co., 907 F.2d 1026, 1027 (10th Cir. 1990). However, the Bankruptcy Code allows the court to "determine the extent . . . to which the debtors' estates shall be consolidated." 11 U.S.C. § 302(b). A majority of circuits allow for the substantive consolidation of separate entities into a single case as an equitable remedy. *Kapila v. S & G Fin. Servs., LLC*, 451 B.R. 573, 579 (Bankr. S.D. Fla. 2011).

Substantive consolidation eliminates "intercorporate liabilities." *Id.* Courts use substantive consolidation sparingly and with "caution." *Id.*; *Official Comm. of Unsecured Creditors of Verestar, Inc. v. Am. Tower Corp.*, 343 B.R. 444, 462 (Bankr. S.D.N.Y. 2006) (describing how substantive consolidation pools the assets and liabilities of entities together, paying creditors' claims from a common fund). The purpose of substantive consolidation is to ensure equitable treatment for all creditors—unsecured or otherwise. *In re Stone & Webster*, 286 B.R. 532, 539 (Bankr. D. Del. 2002).

However, entities do not only have the extreme option of substantive consolidation, but can also opt for joint administration. Bankr. R. 1015. Parties choose this option for convenience in administration. *In re Tribune Co.*, 464 B.R. at 183. Joint administration is a "non-substantive" consolidation. *Id.* at 182. As opposed to combining entities' assets and liabilities into a common pool, joint administration results in a joint plan that "actually consists of a separate plan for each Debtor." *Id.* Without a substantive consolidation, "entity separateness is fundamental." *Id.*; *In re Owens Corning*, 419 F.3d 195, 211 (3rd Cir. 2007). Thus, there is a distinct difference between substantive consolidation and joint administration. *See Id.* This difference is important because of its effect on the substantive protections and safeguards for impaired creditors during the confirmation of a plan. *In re Stone & Webster*, 286 B.R. at 539.

In a cram down situation, where there is an exception to the requirement of impaired creditors' full consent, the safeguard in § 1129(a)(10) is a last line of protection for already impaired creditors under a joint plan. *Id.* Under the "per debtor" interpretation, this protection is preserved for impaired creditors in situations where parties have chosen not to pool assets and liabilities together. *See id.; In re Tribune Co.*, 464 B.R. at 183 ("convenience alone is not sufficient reason to disturb the rights of impaired . . . creditors of a debtor not meeting confirmation standards.")

Under My Thumb's substantive rights are stripped under the "per plan" interpretation and preserved through the "per debtor" interpretation. *See id.* In the matter at hand, the debtor's plan expressly states that the "estates are not being substantively consolidated and no Debtor is to become liable for the obligations of another." R. at 7. Thus, even the Petitioners admit that substantive consolidation is not at play. The "per plan" method conflates substantive consolidation with joint administration even in situations where parties explicitly state otherwise. *See* Suzanne T. Brindise, *Choosing The "Per-Debtor" Approach To Plan Confirmation in Multi-Debtor Chapter 11 Proceedings*, 108 NW. U. L. R. 1355, 1375 (2014). Using the "per plan" interpretation, courts ignore the distinction between the interests of Under My Thumb and the variety of other creditors under the jointly administered plan. *See In re Woodbridge Grp. of Cos.*, 592 B.R. at 778. The "per plan" interpretation conflates joint administration and substantive consolidation to the detriment of the vulnerable party. This interpretation is contrary to the safeguard Congress provided in § 1129(a)(10). 11 U.S.C. § 1129(a)(10). Specifically, the plan has a detrimental impact on Under My Thumb's ability to keep its intellectual property by functionally assuming that it has the same interests as all impaired creditor under the plan.

Further, it is important to note that the main authority in support of the "per plan" interpretation does not even consider the harm to already impaired creditors. *JPMCC 2007-C1 Grasslawn Lodging, LLC,* 881 F.3d at 730. The entire rationale for the § 1129(a)(10) safeguard is to require the consent of creditors harmed by a given plan. *See* Suzanne T. Brindise, *Choosing The "Per-Debtor" Approach To Plan Confirmation in Multi-Debtor Chapter 11 Proceedings*, 108 NW. U. L. R. 1355, 1375 (2014). Instead, the Court dismissed the objection regarding the harm to the rights of creditors as simply a "hypothetical" concern and did not discuss the "parade of horribles . . . for lenders." *JPMCC 2007-C1 Grasslawn Lodging, LLC,* 881 F.3d at 730. However, this "parade of horribles" is quite real for many lenders like Under My Thumb. The "per plan" interpretation strips one of the last remaining safeguards for impaired creditors and cannot simply be dismissed. *See In re Tribune Co.*, 464 B.R. at 183-84. Safeguards are not in place to help only those in the majority, but instead ensure fair and equitable treatment for all parties involved.

The Petitioner may also argue that § 1129(a)(10) provides no substantive rights to creditors. However, the "per plan" interpretation dilutes the requirements for the confirmation of a plan. R. at 30. This results in a situation where the more voices and interests that are at stake, the lesser the number of confirmation requirements. Assume for simplicity's sake that there are fifteen debtors with three creditors each and that the parties choose joint administration, instead of substantive consolidation. Under the "per debtor" interpretation, one impaired class of creditors for each debtor needs to consent. However, under the "per plan" interpretation, the consent of one class of impaired creditors could bind all forty-five impaired creditors to a debtor-proposed plan. As is the case of the Under My Thumb, although there are many voices and

interests at stake, the "per plan" approach of the trial court places fewer requirements on an already nonconsensual process.

For the above reasons, this Court should adopt the "per debtor" approach, protecting Under My Thumb's rights as an impaired creditor.

CONCLUSION

Development cannot assume the Agreement made pre-petition with Under My Thumb. Not only would assumption expose Under My Thumb's intellectual property to a direct competitor, but it would violate the plain language of § 365(c). That Code section requires a "hypothetical test," wherein the counterparty to a contract can object to a debtor in possession's assumption if, under applicable non-bankruptcy law, the counterparty would have the ability to prevent the contract's assignment. The plain language of § 365(c) unambiguously requires a "hypothetical test." Moreover, neither the statute's relationship with other Code sections, nor policy concerns, nor legislative history render it unambiguous. Thus, the Court must enforce the "hypothetical test," and prohibit Development from assuming the Agreement over Under My Thumb's objection.

Further, the Debtors' plan does not meet the requirements of § 1129(a)(10). Although the Petitioner attempts to bluff its way out of the plain meaning of provisions in the Code, the "per debtor" interpretation is the appropriate interpretation under § 102(7) and an *in pari materia* analysis. Under My Thumb's last remaining rights are at stake with the alternative "per plan" interpretation. Safeguards must protect all parties involved and ensure fair and equitable treatment for Under My Thumb. Therefore, this Court should affirm the Thirteenth Circuit's ruling.

APPENDIX A

11 U.S.C. § 102(7)
Rules of Construction.
(7) the singular includes the plural;

APPENDIX B

11 U.S.C. § 302(b)
Joint cases.
(b) After the commencement of a joint case, the court shall determine the extent, if any, to which the debtors' estates shall be consolidated.

APPENDIX C

11 U.S.C. § 330(a)(1)
Compensation of officers.
(a)

(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103—

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

APPENDIX D

11 U.S.C. § 363(c)(2)
Use, sale, or lease of property.
(c)

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

APPENDIX E

11 U.S.C. § 365

Executory contracts and unexpired leases.

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

(b)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1)

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

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

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

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

(d) [omitted]

(e) [omitted]

(f)

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

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

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

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

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

APPENDIX F

11 U.S.C. § 546(a)
Limitations on avoiding powers.

(a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of—

(1) the later of—

(A) 2 years after the entry of the order for relief; or

(B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or

(2) the time the case is closed or dismissed.

APPENDIX G

11 U.S.C. § 547
Preferences.
(a) [omitted]
(b) Except as provided in subsections (c) and (i) of this section, the trustee may, based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses under subsection (c), avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;
(2) for or on account of an antecedent debt owed by the debtor before such transferwas made;
(3) made while the debtor was insolvent;
(4) made—
(A) on or within 90 days before the date of the filing of the petition; or
(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
(5) that enables such creditor to receive more than such creditor would receive if—
(A) the case were a case under chapter 7 of this title;
(B) the transfer had not been made; and
(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

(c) The trustee may not avoid under this section a transfer—
(1) to the extent that such transfer was—
(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and
(B) in fact a substantially contemporaneous exchange;
(2)to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was—
(A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or
(B) made according to ordinary business terms;
(3) that creates a security interest in property acquired by the debtor—
(A) to the extent such security interest secures new value that was—
(i) given at or after the signing of a security agreement that contains a description of such property as collateral;
(ii) given by or on behalf of the secured party under such agreement;
(iii) given to enable the debtor to acquire such property; and
(iv) in fact used by the debtor to acquire such property; and
(B) that is perfected on or before 30 days after the debtor receives possession of such property;
(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—
(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5)that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of—

(A)

(i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; or

(B) the date on which new value was first given under the security agreement creating such security interest;

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title;

(7) to the extent such transfer was a bona fide payment of a debt for a domestic support obligation;

(8) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600; or

(9) if, in a case filed by a debtor whose debts are not primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $5,000.

(d)-(i) [omitted]

APPENDIX H

11 U.S.C. § 1107(a)
Rights, powers, and duties of debtor in possession.
(a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

APPENDIX I

11 U.S.C. § 1121(a)
Who may file a plan.

(a) The debtor may file a plan with a petition commencing a voluntary case, or at any time in a voluntary case or an involuntary case

APPENDIX J

11 U.S.C. § 1124

Impairment of Claims or Interests.

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

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

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

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

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

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

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

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

APPENDIX K

11 U.S.C. § 1129
Confirmation of a plan.

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

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

(2) [omitted]

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

(4)-(6) [omitted]

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

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

(i) has accepted the plan; or

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

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

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

(A) such class has accepted the plan; or

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

(9) [omitted]

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

(b)

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

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

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

(i)

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

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the

plan, of at least the value of such holder's interest in the estate's interest in such property;

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

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

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

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

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claimor interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

(C) With respect to a class of interests—

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

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