**No. 19-1004**

IN THE

# Supreme Court of the United States

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

TUMBLING DICE, INC., *ET AL*.

*Petitioner,*

v.

UNDER MY THUMB, INC.,

*Respondent.*

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

BRIEF FOR RESPONDENT

Team R15
Counsel for Respondent

## QUESTIONS PRESENTED

1. 11 U.S.C. § 365(c)(1) provides that a trustee may not "assume or assign" an executory contract when applicable non-bankruptcy law excuses the nondebtor party from accepting or rendering performance to an entity other than the debtor or the debtor in possession. In a case where applicable non-bankruptcy law excuses the nondebtor party's performance, can a debtor in possession, nevertheless, assume an executory contract over the objection of the nondebtor party?

2. In a case with a joint, multi-debtor plan where a class of claims is proposed to be impaired, does 11 U.S.C. § 1129(a)(10) of the Bankruptcy Code require acceptance from at least one impaired class of claims of each debtor or, alternatively, acceptance from one impaired class of claims of any one debtor?

## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## CASES

**STATUTES**

**OTHER AUTHORITIES**



**RULES**

## OPINIONS BELOW

The United States Bankruptcy Court for the District of Moot ruled in favor of Tumbling Dice Inc., *et al.* (collectively, the "Debtors" or the "Petitioner") when it held that: (1) 11 U.S.C. § 365(c)(1) did not preclude the Petitioner's assumption of a non-exclusive software license over the objection of the licensor, Under My Thumb (the "Respondent"); and (2) 11 U.S.C. § 1129(a)(10) did not require the proponents of a joint, multi-debtor plan to obtain acceptance from at least one impaired class of creditors from each debtor in order to confirm a plan. R. 3.

The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the ruling of the bankruptcy court. R. 3.

The Respondent appealed to the United States Court of Appeals for the Thirteenth Circuit, which reversed the bankruptcy court on both grounds. R. 3.

The Petitioner appealed, and this Court granted certiorari. R. 1.

## STATEMENT OF JURISDICTION

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

## RELEVANT STATUTORY PROVISIONS

11 U.S.C. § 365(c)(1)

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

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or 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 assumption or assignment[.]

11 U.S.C. § 1129(a)(10)

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

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

## STATEMENT OF FACTS

Respondent Under My Thumb, Inc. ("Under My Thumb" or the "Respondent"), is a software design company that specializes in creating customer loyalty software for the hospitality industry. R. 4. In 2008, the Respondent entered into a Research and Development Agreement (the "R&D Agreement") with Tumbling Dice Development, LLC ("Development"), one of nine wholly owned subsidiaries of Tumbling Dice, Inc. ("TDI"). R. 4. TDI is a holding company that owns the membership interests of eight operating subsidiaries (the "Operating Debtors") and Development (collectively, the "Debtors" or the "Petitioner"). R. 2-3. TDI is the lead bankruptcy case amongst the ten jointly administered, but not substantively consolidated, voluntary cases filed by the Petitioner. R. 3-4.

The R&D Agreement provided for the Respondent to develop a software system that would modernize TDI's customer rewards program, branded by TDI as "Club Satisfaction." R. 4. The Respondent expended approximately $10 million to fulfill the R&D Agreement and create a new customer loyalty and rewards software program for Club Satisfaction (the "Software"). R. 4. The Respondent completed the Software within one year and patented and copyrighted the Software. R. 4-5. Thereafter, the Respondent entered into a non-exclusive license agreement (the "Agreement") with Development that permitted Development to "extend the benefits of the Agreement to its affiliated entities only[,]" meaning the casino properties owned and operated by the Operating Debtors and TDI. R. 5. This case partially concerns the Debtors' ability to assume the Agreement.

The Agreement permitted the Operating Debtors to use the Software, but otherwise broadly prohibited the Petitioner from assigning or subleasing its rights without the Respondent's written consent. R. 5. The Agreement provided for a monthly fee to the Respondent based on aggregate spending activity by members of the Club Satisfaction rewards program. R. 5. Additionally, Development agreed to reimburse the Respondent for $7 million in the form of an unsecured promissory note for costs related to the development of the Software (the "R&D Note"). R. 4.

The Software modernized the Petitioner's customer rewards program and had a positive financial impact for both the Petitioner and Respondent. R. 4-5. The Software's success attracted interest from other licensees and the Respondent licensed similar versions of the Software. R. 5. Monthly payments under the Agreement also exceeded expectations. R. 5. Membership in Club Satisfaction and spending by members both increased on account of the Software, which became an important part of the Petitioner's ongoing business model. R. 5.

Several years later in December 2011, Start Me Up, Inc. ("Start Me Up"), a hedge fund, acquired TDI's stock through a leveraged buy-out (the "Acquisition"). R. 6. A syndicated group of lenders (the "Lenders") provided financing for the Acquisition through a $3 billion loan secured by first priority liens on the assets of TDI and the Operating Debtors. R. 6. The Acquisition did not affect the rights or interests of Development because the Lenders did not require Development to act as a borrower or guarantor under the terms of the loan. R. 6.

Despite the Agreement's mutual benefit to both the Petitioner and the Respondent in the preceding years, in June 2015, the Petitioner abruptly stopped making payments on the R&D Note with over $6 million remaining due. R. 6. The Petitioner ultimately lost the ability to service all of its post-Acquisition debt load and consequently, the Debtors each filed for chapter 11 relief in January 2016. R. 3. The Debtors' cases were jointly administered for the convenience of the parties pursuant to Bankruptcy Rule 1015(b), but the cases were not substantively consolidated. R. 3, 6. Ultimately, the Lenders were owed approximately $2.8

billion and unsecured creditors, including the Respondent, were owed an additional $120 million. R. 6.

The Respondent is the only creditor of Development. R. 8. Despite this fact, the Respondent was excluded from negotiations and mediation that the Petitioner, the Lenders and Start Me Up engaged in to develop a plan support agreement. R. 6-8. Nevertheless, in August 2016, the Debtors filed a plan consistent with the support agreement (the "Plan"). R. 7. Though jointly proposed by the Debtors, the Plan expressly stated that "the Debtors' estates are not being substantively consolidated" and provided that TDI, the Operating Debtors, and Development would not be liable for each other's obligations. R. 7.

The Plan called for the Petitioner to assume the Agreement under section 365(a), which provides that "the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a); R. 7. The Respondent initially supported the Plan because the proposed assumption of the Agreement would allow for the continuation of monthly payments under the Agreement. While the value of the distribution for the unsecured R&D Note (which was part of a $66 million, 55% pro rata distribution to unsecured creditors) exceeded the total value of Development's assets, the details of the funding of the distribution fundamentally changed the Respondent's perception of, and attitude towards, the Plan. R. 7.

The Plan provided that the existing shares and membership interests in TDI, the Operating Debtors and Development would be cancelled, and new shares and membership interests would be issued. R. 7. The distribution to unsecured creditors called for Start Me Up to fund $31 million of the $66 million, with the remaining $35 million contributed by a separate entity, Sympathy for the Devil, LP ("SFD"). R. 7-8. In exchange for SFD's capital contribution, the Plan provided that SFD would receive 51% of the voting shares of the reorganized TDI ("New TDI") and several seats on New TDI's reconstituted board of directors. R. 8.

SFD is a private equity group and its portfolio of companies includes a software company that is a direct competitor of the Respondent. R. 8. Moreover, SFD's portfolio company had tried to replicate the Software for several years. R. 8. When the Respondent reviewed the disclosure statement and learned that the Plan called for majority ownership of New TDI by SFD, it perceived the Plan as providing indirect support for a direct competitor, and shortly thereafter, the Respondent objected to the Plan. R. 8. First, the Respondent argued that the proposed assumption of the Agreement was impermissible under section 365(c). R. 8.

The Petitioner and Respondent had stipulated that the Agreement was non-assignable under applicable non-bankruptcy law, which excuses the Respondent from rendering or accepting performance to an entity other than Development and the affiliated Operating Debtors and TDI. R. 8. Applicable law limits the trustee's ability to assume or assign the Agreement if applicable law excuses performance to a third party. R. 8. Therefore, the Respondent argued that the Agreement could not be assumed absent its consent. R. 8. And the Respondent did not give its consent for assumption or assignment. R. 8.

Second, the Respondent argued that the Plan was not confirmable under section 1129(a)(10) because the Respondent, the only impaired class of creditors of Development, did not vote to accept the Plan. R. 8. Section 1129(a) provides that "[t]he court shall confirm a plan only if all the following requirements are met" in sections 1129(a)(1)-(16). 11 U.S.C. § 1129(a). Section 1129(a)(10) states the Plan may only be confirmed "[i]f 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 [excluding insiders]." 11 U.S.C. § 1129(a)(10).

The bankruptcy court overruled both of the Respondent's objections and confirmed the Plan. R. 8. The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court on both objections. R. 9. The Respondent then timely appealed to the Circuit Court of Appeals for the Thirteenth Circuit. R. 9. The Court of Appeals reversed the decisions of the bankruptcy court and held in favor of the Respondent on both issues. R. 21. The Petitioner timely petitioned this Court for writ of certiorari, which this Court granted.

## SUMMARY OF THE ARGUMENT

While successful rehabilitation of a distressed enterprise is the goal of chapter 11 reorganization, debtors are not unconstrained in their attempts to successfully reorganize. Rather, the Bankruptcy Code[1] has a number of limitations that restrict a debtor's ability to reorganize in order to protect the rights and privileges of creditors and nondebtor parties. Section 365(c)(1), which limits the ability of the debtor to assume or assign executory contracts, is one such a limitation. Section 1129(a)(10) imposes a further limitation by requiring at least one impaired class of creditors of each debtor to accept the "joint" plan of reorganization. The plain meaning of each section is clear and unambiguous, leading to neither confusing nor absurd results. Accordingly, application of the plain language of sections 365(c)(1) and 1129(a)(10) requires that this Court rule in favor of Respondent.

I. Section 365(c)(1)

The text, structure, and purpose of section 365(c)(1) and related provisions confirm that a debtor in possession may not assume an executory contract over the objection of the nondebtor party when applicable law excuses the nondebtor party from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession.

Federal law protects nonexclusive intellectual property licenses from nonconsensual assignment to third parties. In bankruptcy, section 365(c)(1) provides that such licenses may not be "assum[ed] *or* assign[ed]" by the trustee. 11 U.S.C. § 365(c)(1). "Or" is a deliberate word choice that requires the statute to be read in the disjunctive. Therefore, if the trustee may not assign such a license to a hypothetical third party, he may not assume it either. This language is plain and unambiguous, and the Court must enforce it by its terms.

[1] 11 U.S.C. § 101 *et seq.* (2012) (the "Bankruptcy Code" or the "Code").

Section 365(c)(1) remains equally unambiguous when read in connection with the statutory scheme. Section 365 grants the trustee a broad, general power to assume executory contracts. Section 365(c)(1) is a carefully crafted limitation of this power and reflects Congress's careful balance of the rights of the debtor and his creditors. And such limitation applies to a debtor in possession, who may only assume an executory contract "subject to any limitations on a trustee . . . ." 11 U.S.C. § 1107(a). As section 365(c)(1)'s plain language is unambiguous when read with the entire statutory scheme, the Court's analysis should end here.

The Petitioner's claim that section 365(c)(1)'s plain text is clearly at odds with the statute is unpersuasive. A single snippet of legislative history cannot trump the plain language of the statute. Further, Petitioner overlooks the substantive policy interest in extending forceful federal protections to intellectual property owners. Section 365(c)(1) reflects Congress's intent to limit the hostility towards anti-assignment provisions in section 365 by extending the shield of intellectual property law to nondebtor licensors of intellectual property where the identity of the licensee is material.

The "hypothetical test" aligns with the plain meaning of the statute without producing absurd or ambiguous results and the limitation expressed in section 365(c)(1) is supported by Congressional intellectual property policy. The Court should enforce the limitation in section 365(c)(1) according to its terms and hold for the Respondent.

II. Section 1129(a)(10)

Section 1129(a)(10)'s impaired accepting class rule requires at least one impaired class of the debtor's creditors accept the plan. 11 U.S.C. § 1129(a)(10). When considering the statute's plain language and orientation within the entire statutory scheme of the Bankruptcy Code, in order for a multi-debtor "joint" plan to be confirmed, this requirement must be satisfied on a *per debtor* basis.

Though section 1129(a)(10) refers to "plan" in the singular, this is not a basis to conclude that only one debtor subject to a "joint" plan must satisfy this standard. Congress provided rules to construe the Bankruptcy Code found in section 102, and specifically, section 102(7) provides that "the singular includes the plural." 11 U.S.C. § 102(7).

The plain language of section 1129(a)(10) supports the "per debtor" approach because such "joint plans" are nothing more than multiple individual plans proposed with respect to each individual debtor subject to the plan. Joint administration does not modify the substantive rights of parties, nor does it consolidate the joint bankruptcy estates. And the Bankruptcy Code provides that absent substantive consolidation, the bankruptcy estates of each debtor subject to a "joint" plan remain distinct and separate entities. Estate separateness also conceptually accords with the Bankruptcy Rules drafted by this Court, which heavily emphasize the importance of estate separateness and the protection of creditors with respect to each debtor entity. Thus, in a joint plan, the estates remain separate entities to be treated under multiple plans, one for each debtor.

The per debtor approach to section 1129(a)(10) is the sole interpretation congruent with its statutory scheme. The other requirements for plan confirmation only make sense when interpreted on a per debtor basis. Section 1129(a) was not designed to accommodate a single joint plan of reorganization and must be interpreted in a manner so as to avoid the absurd result of sanctioning noncompliance with the Bankruptcy Code.

The policy considerations surrounding the "per plan" approach are also unpersuasive. The policy favoring reorganization must be balanced against the substantive rights granted to creditors under the Bankruptcy Code. The right to vote on plan confirmation is one such right, which the per debtor approach protects. Reorganizing debtors cannot be allowed to reap the benefit of maintaining separate estates while manufacturing a *de facto* consolidation of those estates in an effort to elude confirmation requirements.

For the foregoing reasons, the Court should affirm the Court of Appeals for the Thirteenth Circuit and additionally hold that section 1129(a)(10) requires acceptance by an impaired class of creditors on a per debtor basis.

## ARGUMENT

Although the purpose of chapter 11 reorganization is to avoid liquidation, Congress imposed certain limitations on the debtor's efforts to reorganize in the interests of all creditors. Section 365(c)(1) provides one such limitation, and its plain text requires debtors and debtors in possession to obtain consent of nondebtor counterparties before an executory contract can be assumed or assigned when applicable non-bankruptcy law excuses performance. Such limitation balances the policy goals of reorganization with intellectual property policy.

Further, section 1129(a) imposes upon debtors sixteen requirements for successful confirmation of a plan of reorganization. Section 1129(a)(10) specifically requires that an impaired class of creditors accept the debtor's plan of reorganization. Absent substantive consolidation of the debtors' estates, when multiple debtors propose to collectively reorganize pursuant to a joint plan, section 1129(a)(10) requires that an impaired class of *each debtor* accept the plan of reorganization.

Accordingly, this Court should affirm the ruling of the Court of Appeals for the Thirteenth Circuit and hold in favor of the Respondent.

### I. SECTION 365(C)(1) PROHIBITS A DEBTOR IN POSSESSION FROM ASSUMING AN EXECUTORY CONTRACT WITHOUT CONSENT WHEN APPLICABLE NON-BANKRUPTCY LAW EXCUSES THE NONDEBTOR PARTY'S PERFORMANCE TO AN ENTITY OTHER THAN THE DEBTOR OR THE DEBTOR IN POSSESSION.

This Court should affirm the court of appeals and rule in favor of the Respondent because section 365(c)(1) specifically prohibits the Debtors from assuming the Agreement. The statute plainly and unambiguously allows for no other result—the Debtors may not "assume *or* assign" the Agreement. 11 U.S.C. § 365(c)(1) (emphasis added). Moreover, the plain meaning leads to predictable and consistent outcomes and reflects federal policy that protects intellectual property creators and owners.

Section 365(c)(1) protects the rights of creators and owners of intellectual property by limiting the rights of licensees. Creators, such as the Respondent, rely on the protections offered under patent and copyright law to restrict and control the identity of licensees who use its intellectual property. Accordingly, such licenses will often contain a so-called "anti-assignment provision," as the Agreement did here, that prohibits licensees from transferring their rights under the license absent the licensor's consent.

Bankruptcy law grants trustees and debtors in possession the power to assume and assign executory contracts irrespective of whether such contracts have any restraints on their assignment. *See* 11 U.S.C. § 365(f)(1) (providing that the trustee may assign executory contracts "notwithstanding a provision in an executory contract . . . or in applicable law."). Such power, however, is not unlimited. One critical limitation is found in section 365(c) of the Bankruptcy Code, which provides, in pertinent part:

> The trustee[2] may not assume or assign any executory contract or unexpired lease of the debtor . . . if—
>
> > (1)(A) applicable law excuses a party, other than the debtor, to such [an executory] contract or lease 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 give consent to assumption or assignment . . . .

11 U.S.C. § 365(c). Nonexclusive intellectual property licenses, such as the Agreement, are executory contracts that are widely recognized as satisfying the criteria in section 365(c)(1)(A).[3]

[2] In chapter 11 cases, as is here, the debtor in possession has the rights of a trustee. *See* 11 U.S.C. § 1107(a). There is some debate about whether the limitation imposed under section 365(c) applies to a debtor in possession in the same manner it applies to a trustee. *See, e.g. In re Footstar, Inc.*, 323 B.R. 566, 570-71 (Bankr. S.D.N.Y. 2005) (stating that this limitation does not apply to a debtor in possession). Under My Thumb rejects this contention below.

[3] This issue is not in dispute.

*See, e.g.*, *Everx Sys. Inc. v. Cadtrak Corp.* (*In re CFLC, Inc.*), 89 F.3d 673, 679 (9th Cir. 1996) ("Federal law holds a nonexclusive patent license to be personal and nonassignable and therefore would excuse [the licensor] from accepting performance from, or rendering it to, anyone other than [the licensee]."). Thus, the right to assign a license such as the Agreement is constrained.[4] Because it is, the right to assume such a contract is also constrained. The plain language of the statute allows for no other result—the Debtors "may not assume *or* assign" the Agreement if applicable law excuses performance to a party other than the Debtors. 11 U.S.C. § 365(c)(1) (emphasis added).

Nonetheless, despite the statute's clear and unambiguous text, a split in authority has developed on the issue. The courts adhering to the plain meaning of the section 365(c)(1) apply the so-called "hypothetical test." *See RCI Tech. Corp. v. Sunterra Corp.* (*In re Sunterra Corp.*), 361 F.3d 257, 271 (4th Cir. 2004); *Perlman v. Catapult Entm't, Inc.* (*In re Catapult Entm't, Inc.*), 165 F.3d 747, 754–55 (9th Cir. 1999); *In re West Elec., Inc.*, 852 F.2d 79, 82–83 (3d Cir. 1988). In contrast, some courts have deviated from the statutory text in order to adopt the so-called "actual test," reading section 365(c)(1) as only barring a party from assuming an executory contract where such party intends to assign it. *See, e.g.*, *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 494 (1st Cir. 1997); *see also Bonneville Power Admin. v. Mirant Corp.* (*In re Mirant Corp.*), 440 F.3d 238, 248–49 (5th Cir. 2006) (adopting the "actual test" for purposes of section 365(e)(2)); *In re Footstar, Inc.*, 323 B.R. at 570-71 (adopting the actual test because section 365(c)(1) "applies on its face to the 'trustee[,]'" and not a debtor in possession) (internal quotation marks in original) (referred herein as the "*Footstar* Approach.").

[4] Section 365(c)(1)(B) is also satisfied because Under My Thumb does not consent to any proposed assumption or assignment of the Agreement.

The hypothetical test is the correct interpretation of section 365(c)(1). The statutory language is plain and unambiguous, rendering any use of legislative history unnecessary. Application of the plain meaning also leads to predictable and consistent outcomes that reflect Congress's intent to protect intellectual property creators and owners, and properly balances a debtor's efforts to rehabilitate with Congress's policy goal to encourage the creation of intellectual property.

A. Section 365(c)(1)'s Plain Text Unambiguously Prohibits the Assumption of the Agreement Absent Under My Thumb's Consent.

Section 365(c)(1)'s words are clear—it cannot be reasonably interpreted in any manner other than to preclude the Petitioner from assuming the Agreement with the Respondent. *See* 11 U.S.C. § 365(c)(1). The analysis begins, as do all matters of statutory interpretation, with the text. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). Here, it is also where the inquiry must end, because there is no ambiguity found within the statute. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("When the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete.'") (internal quotations in original); *see also Hillman v. I.R.S.*, 263 F.3d 338, 341 (4th Cir. 2001) (citing *Caminetti v. United States*, 242 U.S. 470, 485 (1917)) (stating that without some ambiguity present in the language of the statute, "a court's analysis must end with the statute's plain language.").

Section 365(c)'s operating clause clearly states, "may not assume *or* assign an executory contract." 11 U.S.C. § 365(c) (emphasis added). "Or" is a disjunction that when applied to the rest of the statute, clearly indicates that the trustee cannot assume an executory contract if applicable law "excuses a party . . . from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession[,]" 11 U.S.C. § 365(c)(1)(A), and such party "does not consent to such assumption or assignment . . . ." 11 U.S.C. § 365(c)(1)(B). The text cannot plausibly be read in any other manner—if a party cannot assign an executory contract based on subsections (1)(A) and (1)(B), he cannot assume it either.

Nonetheless, the Petitioner argues for the application of the so-called "actual test," under which section 365(c)(1) bars a debtor in possession from assuming an executory contract only when he has the actual intent to assign it. *See, e.g.*, *Institut Pasteur*, 104 F.3d at 493. But nothing in the plain text can be read to imply that a debtor may assume an executory contract if no party intends to assign the contract. Such an interpretation improperly attempts to gloss the statute with the potential for multiple outcomes where the plain text points to only one outcome. *See Caminetti*, 242 U.S. at 485 ("Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise."). Moreover, this interpretation also improperly invites a discretionary case-by-case analysis that could lead to disparate results. *See* 11 U.S.C. § 365(c)(1) (using the language "may not" to qualify the trustee's power to assume and assign executory contracts); *see also* 11 U.S.C. § 102(4) (providing that "may not" as used in the Bankruptcy Code "is prohibitive, and not permissive . . . .").

In advocating for the application of the actual test, the Petitioner essentially pleads for this Court to read the statute as if it prohibited a debtor from "assuming *and* assigning." But that is not what the statute says. Such a plea offends the plain meaning rule and demands from the Court an interpretation that quite obviously "does the most violence to the text." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 529 (1989) (Scalia, J., concurring); *see also Germain*, 503 U.S. at 249 ("[A] legislature says in a statute what it means and means in a statute what it says there."); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) ("There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.”). This Court should reject the Petitioner’s arguments.

B. <u>The Hypothetical Approach Best Comports with the Rest of Section 365 and the Bankruptcy Code by Balancing Competing Policy Interests.</u>

Not only is the hypothetical test supported by the plain text of section 365(c)(1), this interpretation properly comports with the rest of section 365 and the Bankruptcy Code as a whole. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”). Section 365(c)(1) is a deliberate limitation upon the broad powers granted to the Debtors under section 365. And such limitation’s purpose is to balance the goals of reorganization with the federal interest in promoting and protecting the rights of intellectual property owners and creators.

2. *Section 365(c)(1) is a Carefully Crafted Limitation to the Broad Assumption and Assignment Powers Granted under Section 365.*

Three pertinent sections found in section 365 outline the assumption and assignment powers. Section 365(a) operates as a general power grant to assume and assign executory contracts. *See* 11 U.S.C. § 365(a). And section 365(f)(1) clarifies that section 365(a) applies broadly to counteract general prohibitions on assuming and assigning executory contracts. *See* 11 U.S.C. § 365(f)(1) (providing that the trustee may assign executory contracts “notwithstanding a provision in an executory contract . . . or in applicable law.”); *see also In re Sunterra Corp.*, 361 F.3d at 266.

On the other hand, Section 365(c)(1) is a limitation on this power to negate anti-assignment provisions. *See In re Sunterra Corp.*, 361 F.3d at 266 (stating that section 365(c)(1) is “a carefully crafted exception to the broad rule . . . .”). The hostility towards anti-assignment provisions in section 365(f)(1) does not conflict with the specific limitations on assumption or assignment provided in section 365(c)(1). And to the extent there is any such conflict, the statutory canon that the specific trumps the general demands the same result; the specific limitations imposed under section 365(c)(1) supersede the general rights elucidated in 365(f)(1). *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general . . . .").[5]

The Petitioner's argument to the contrary is misguided. The Petitioner takes issue with the fact that "applicable law" appears in both sections, contending that a literal application of section 365(c)(1) renders section 365(f)(1) superfluous.[6] However, this contention overlooks this Court's duty to read statutes in a manner so as to coexist and complement each other. *See Pittsburgh & Lake Erie R.R. Co. v. Ry. Labor Execs. Ass'n*, 491 U.S. 490, 510 (1989) (citation omitted) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.").

Nevertheless, any surplusage found here is the result of reading the statutes too narrowly. In section 365(f)(1), the trustee is permitted to assign an executory contract notwithstanding applicable law "*that prohibits, restricts, or conditions* the assignment of such contract . . . ." 11 U.S.C. § 365(f)(1) (emphasis added). Section 365(c)(1), on the other hand, prohibits the trustee from assuming or assigning an executory contract where "applicable law *excuses a party* . . .

[5] Though Under My Thumb contends that resorting to legislative history is wholly unnecessary here, in doing so, it is a detour that arrives at the same destination. Section 365(c)(1) is a specific exception that invokes contextually specific anti-assignment law to ensure that the nondebtor party will have the option to reject performance if it perceives that the debtor's bankruptcy will deny the nondebtor party the full benefit of its bargain. *See Summit Inv. & Dev. Corp. v. Leroux*, 69 F.3d 608, 612–13 (1st Cir. 1995). No case-by-case analysis, as required by the "actual test," is needed because the "hypothetical test" places the decision in the hands of the nondebtor party as a matter of plain language and policy.

[6] It should be noted that this Court has stated "[the] preference for avoiding surplusage constructions is not absolute[,]" when doing so contravenes the statute's plain meaning. *Lamie v. U.S. Tr.*, 540 U.S. 526, 536 (2004).

*from accepting performance from or rendering performance to* an entity . . . . whether or not such contract [restricts assignment].” 11 U.S.C. § 365(c)(1) (emphasis added).

This language is vastly different. That each section contains the term “applicable law” does not necessarily imply that each provision applies the same law. Section 365(f)(1) permits the trustee to assign “[e]xcept as provided in subsections (b) and (c)[,]” demonstrating that 365(f)(1) is the general rule and 365(c)(1) is a specific limitation of the general rule. Because 365(c)(1) is a limitation on – and a pre-condition to – the exercise of the general power in 365(f), “each subsection recognizes an ‘applicable law’ of markedly different scope.” *Reiser v. The Dayton Country Club Co.* (*In re Magness*), 972 F.2d 689, 695 (6th Cir. 1992); *see also In re Catapult Entm’t., Inc.*, 165 F.3d at 752; *City of Jamestown v. James Cable Partners, L.P.* (*In re James Cable Partners, L.P.*), 27 F.3d 534, 537–38 (11th Cir. 1994) (“[T]he ‘applicable law’ to which subsection (c) refers must mean ‘applicable law’ other than general prohibitions barring assignment.”) (internal quotation marks in original). In doing so, it becomes clear that section 365(c)(1) is a specific limitation of the general rights afforded to debtors under section 365(f)(1).

By interpreting section 365(f)’s “applicable law” to concern general prohibitions on assignment, the alleged surplusage bemoaned by the Petitioner is nonexistent. Section 365(c)(1)’s “applicable law” concerns federal intellectual property law that “excuses [Under My Thumb] . . . from rendering performance . . . .” 11 U.S.C. § 365(c)(1); *see also* R. 11-12. No conflict exists between the sections. Rather, section 365(c)(1) is a specific limitation on the general rights afforded under section 365(f)(1).

*2. The Footstar Approach Distinguishing the Trustee from the Debtor in Possession Cannot Be Reconciled with the Statutory Scheme of the Bankruptcy Code.*

Section 365 does not expressly provide that the debtor in possession (or the debtor) has the power to either assume or assign an executory contract. *See* 11 U.S.C. § 365(a) (providing that "the *trustee* . . . may assume or reject any executory contract or unexpired lease of the debtor.") (emphasis added). Such power is granted via section 1107(a), which gives the debtor in possession "all the rights . . . and powers . . . of a trustee serving in a case under [chapter 11]." 11 U.S.C. § 1107(a).

Section 1107(a) confers on the debtor in possession all the rights and powers of a trustee and the debtor in possession accordingly also takes these powers subject to the limitations of the trustee.[7] *Id.* (stating that the debtor in possession takes the trustee's powers "[s]ubject to any limitations on a trustee"). Such constraints also are widely recognized to include the limitations outlined throughout section 365. *See N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 522 (1984) ("The text of [section] 365(a) indicates that Congress was concerned about the scope of the *debtor-in-possession*'s power regarding certain types of executory contracts, and purposely drafted § 365(a) to limit the debtor-in-possession's power of rejection or assumption in those circumstances.") (emphasis added); *see also Eagle Ins. Co. v. BankVest Capital Corp.* (*In re BankVest Capital Corp.*), 360 F.3d 291, 295 (1st Cir. 2004) (applying section 365(b)(1) to prohibit a debtor in possession from assuming a contract unless the debtor in possession cures the default, compensates for any pecuniary loss resulting from default, and provides adequate protection of future performance); *In re United Airlines*, *Inc.*, 368 F.3d 720, 722 (7th Cir.

[7] Though arguably unnecessary here, legislative history confirms this point. *See* S. REP. NO. 95-989, at 116 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5902 ("This section places a debtor in possession in the shoes of a trustee in every way. The debtor is given the rights and powers of a chapter 11 trustee . . . [and] [h]e is also subject to any limitations on a chapter 11 trustee . . . .").

2004) (debtor in possession constrained under section 365(c)(2) from assuming executory contracts that create loans or extend debt financing).

The foregoing precedent and section 1107 illustrate that the debtor in possession cannot receive greater rights and powers than would a chapter 11 trustee. So too here. In order to avoid the absurd result of a debtor in possession having rights and powers greater than that of a trustee, section 365(c)(1) must also be read to limit a debtor in possession's power to assume or assign executory contracts. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

C. Petitioner's Other Arguments Supporting the Actual Test Are Unpersuasive Because Legislative History is Inconclusive and Policy Favors the Respondent.

The legislative history relied on by proponents of the actual test is inconclusive and insufficient to trump the plain meaning of the statute. The offered legislative history is derived from a different Congressional session than the one that passed the amendment to section 365(c)(1). Moreover, the Petitioner's argument that policy favors their position discounts competing federal policy interests outside of bankruptcy.

*2. The Legislative History of Section 365(c)(1) Cited by the Petitioner is Insufficient Evidence to Trump the Statute's Plain Meaning.*

Given that the hypothetical test is supported by the statute's plain meaning and statutory scheme, it is unnecessary to rely on other tools to interpret the statute. *See Lamie*, 540 U.S. at 539; *see also Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 809 n.3 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute."). Nonetheless, the implied qualification of the plain language required by the actual test must be supported by evidence of an alternative legislative intent. *See TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (referencing *Andrus v. Glover Const. Co.*, 446 U.S. 608, 616-17 (1980)).

Here, the Petitioner (as well as the courts applying the "actual test") attempts to bolster support for the application of the actual test by pointing to a single statement made in a 1980 committee report.[8] *See Leroux*, 69 F.3d at 613; *see also Footstar*, 323 B.R at 574; *In re Cardinal Indus., Inc.*, 116 B.R. 964, 979 (Bankr. S.D. Ohio 1990). The extent to which these courts rely on this history is unwarranted. Not only was this statement made four years before the statute was eventually amended, this is not the sort of conclusive legislative history required to trump the plain language of the statute. *See U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 600 (1982) ("Passing references and isolated phrases are not controlling when analyzing a legislative history.").

*2. The Hypothetical Test, and Not the Actual Test, Reflects Congress's Intent to Balance the Competing Interests of Reorganization and Intellectual Property Innovation.*

The Petitioner additionally claims that the Bankruptcy Code's policy goals favoring reorganization demand the application of the actual test. In so doing, however, the Petitioner overlooks the purpose of section 365(c)(1), which is to protect nondebtor parties just like Under My Thumb. *See In re Catapult Entm't, Inc.*, 165 F.3d at 752 n. 4. ("[T]he federal law principle against the assignability of nonexclusive patents is rooted in the personal nature of a nonexclusive license—the identity of the licensee may matter a great deal to a licensor.") Rather, section 365(c)(1)'s limitation balances the countervailing interest in extending forceful federal protections to intellectual property owners. As nonexclusive licenses are personal and

[8] H.R. REP. NO. 96-1195, at 12 (1980) ("[The proposed amendment] makes it clear that the prohibition against a trustee's power to assume an executory contract does not apply where it is the debtor that is in possession and the performance to be given or received . . . will be the same as if no petition had been filed . . . ."); *but see In re Sunterra Corp.*, 361 F.3d at 270 (stating that the report on the proposed amendment "is not conclusive on congressional intent concerning [the 1984 amendment].").

nondelegable, the identity of the person or entity controlling a licensee is material to the license agreement. *Id.* (citing *In re CFLC, Inc.*, 89 F.3d at 679).

The facts here are particularly illustrative of the statutory purpose. Start Me Up ceded 51% ownership and board control to Sympathy for the Devil. The Respondent correctly perceives that the reorganized TDI is an entity other than the debtor or the debtor in possession. Section 365(c)(1) was intended to vest in the nondebtor party a right to object to assumption if the reorganized debtor becomes an entity that is materially distinct from the debtor or the debtor in possession. Both federal patent law and certain state laws recognize that objections to assignment typically arise when "the identity of the original contracting party [is] material." *In re Magness*, 972 F.2d at 699–700 (Guy Jr., J., concurring). Section 365(c)(1)'s limitation on assumption relies upon applicable law—federal patent law, in this instant—excusing performance "to an entity other than the debtor or the debtor in possession." 11 U.S.C. § 365(c)(1). Section 365(c)(1) was intended to limit the broad policy of hostility towards anti-assignment provisions in section 365 by extending the shield of intellectual property law to nondebtor licensors of intellectual property.

The "hypothetical test" respects the plain meaning of the statute without producing absurd or ambiguous results. Moreover, the limitation expressed in section 365(c)(1) is supported by Congressional intellectual property policy. Worse, the "actual test" produces uncertainty by requiring a case-by-base analysis "at the cost of departing from . . . the plain text of the law." *N.C.P. Mktg. Grp., Inc. v. BG Star Prods., Inc.* (*In re N.C.P. Mktg. Grp., Inc.*), 556 U.S. 1145 (2009) (denying certiorari). However, the inconclusiveness of the legislative history cannot justify departing from the plain text. Moreover, the sum of federal policy interests supports the plain text reading. Because the statute's language is plain, "the sole function of the courts . . . is to enforce it according to its terms." *Lamie*, 540 U.S. at 534.

For the foregoing reasons, section 365(c)(1) prohibits the Debtors from assuming the Agreement without the Respondent's consent.

## II. SECTION 1129(A)(10) MUST BE SATISFIED BY EACH DEBTOR SEEKING TO REORGANIZE UNDER A JOINT PLAN.

This Court should affirm the circuit court's ruling in favor of the Respondent because section 1129(a)(10) requires at least one impaired class of claims of each Debtor to accept the Plan. This "per debtor" approach is the only approach that recognizes that a "joint" plan, such as the Plan, consists of multiple plans, one for each Debtor. Moreover, the per debtor approach is the only interpretation that works in the entire scheme of section 1129(a) as a whole.

The purpose of reorganization under chapter 11 is the rehabilitation of the debtor. Because achieving such purpose requires, in most instances, a compromise of creditor claims, the Bankruptcy Code balances the debtor's interest in reorganizing with the interests of creditors. Congress has balanced these competing interests in section 1129(a), which places statutory constraints on plan confirmation and voting, by outlining sixteen specific requirements that a plan must meet in order to be confirmed. *See* 11 U.S.C. § 1129(a). At issue here is the impaired accepting class rule, found in section 1129(a)(10), which provides:

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

11 U.S.C. § 1129(a)(10). In other words, in order for a debtor's plan to be confirmed, the impaired accepting class rule requires at least one impaired class of the debtor's creditors accept the plan. *Id.*

When a plan involves multiple cases for affiliated entities, the question is how that impaired accepting class is determined. Because businesses often operate using multiple affiliated entities for regulatory, liability, and tax purposes, it is unsurprising that such a business's bankruptcy will often consist of multiple bankruptcy cases. Though the Bankruptcy Code dictates that each entity must commence a separate bankruptcy case, *see* 11 U.S.C. § 301(a) (each case is commenced by "an entity that may be a debtor"), when multiple related cases exist, the debtors often propose a single "joint" plan of reorganization meant to address the debt of all the debtors. Courts are divided as to whether the impaired accepting class rule must apply to each debtor subject to a joint plan (the so-called "per debtor" approach), or whether it applies only to the plan at issue (the so-called "per plan" approach). *Compare In re Woodbridge Grp. of Cos., LLC*, 592 B.R. 761, 778 (Bankr. D. Del. 2018), *In re Tribune Co.*, 464 B.R. 126, 180–84 (Bankr. D. Del. 2011), *and In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293, 301 (Bankr. D. Del. 2011), *with JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc.* (*In re Transwest Resort Props., Inc.*), 881 F.3d 724, 729 (9th Cir. 2018).

The per debtor approach is correct. When multiple debtors propose a joint plan, as is here, what they are in fact doing is proposing multiple identical plans for each respective debtor. *In re Tribune Co.*, 464 B.R. 182–83. While a bankruptcy plan may provide for substantive consolidation, *see* 11 U.S.C. § 1123(a)(5)(C), that determination generally concerns the implementation of the plan, and not for plan voting. Otherwise, the separate legal existence of each debtor, and thus the claims against such debtors, must be respected.

This Court should affirm the circuit court and hold that the so-called "per debtor" approach is the proper interpretation of section 1129(a)(10) because it is the most tenable construction of the statute's plain language within the statutory scheme of the Bankruptcy Code.

A. Section 1129(a)(10) Supports the "Per Debtor" Approach Because Joint Plans (such as the Plan) Consist of Multiple Individual Plans Proposed With Respect to Each Debtor Subject to the Plan.

Though multiple debtors in jointly administered cases often propose a single "joint" chapter 11 plan, these debtor's bankruptcy estates remain separate legal entities from one another, each with its own creditors and obligations. The per debtor approach to section 1129(a)(10) correctly identifies that absent substantive consolidation, such a plan actually consists of multiple plans, one for each debtor.

*2. Joint Administration Does Not Substitute for Substantive Consolidation.*

In order to understand why a "joint" plan is actually comprised of multiple plans, it is helpful to first consider the joint administration of cases under Bankruptcy Rule 1015(b), which provides, in pertinent part:

> If a joint petition [for spouses pursuant to section 302] or two or more petitions are pending in the same court by . . . a debtor and an affiliate, the court may order a joint administration of the estates. Prior to entering an order the court shall give consideration to protecting creditors of different estates against potential conflicts of interest.

FED. R. BANKR. P. 1015(b) (2010). Joint administration is a procedural tool utilized for convenience and cost-saving purposes. *See e.g., Reider v. Fed. Deposit Ins. Corp.* (*In re Reider*), 31 F.3d 1102, 1109 (11th Cir. 1994) (stating that joint administration is a useful tool permitting the use of "a single docket for administrative matters, including the listing of filed claims, the combining of notices to creditors of the different estates, and the joint handling of other ministerial matters that may aid in expediting the cases.") (citing FED. R. BANKR. P. 1015 advisory committee's note to 1983 amendment).

While procedurally useful, joint administration does not, however, modify the substantive rights of parties, nor does it consolidate the joint bankruptcy estates. *Id.*; *see also Woburn*

*Assocs. v. Kahn* (*In re Hemingway Transp., Inc.*), 954 F.2d 1, 11 (1st Cir. 1992) ("[J]oint administration is designed in large part to promote procedural convenience and cost efficiencies which do not affect the substantive rights of claimants or the respective debtor estates . . . .") (citing *Unsecured Creditors Comm. v. Leavitt Structural Tubing Co.*, 55 B.R. 710 (N.D. Ill. 1985)). In this manner, the bankruptcy estates of each debtor subject to a "joint" plan remain distinct and separate entities. *See In re Tribune Co.*, 464 B.R. at 182 ("Absent compelling circumstances, courts respect 'the general expectation of state law and of the Bankruptcy Code, and thus of commercial markets.'") (quoting *In re Owens Corning*, 419 F.3d 195, 211 (3d Cir. 2007)).

Substantive consolidation, on the other hand, is a judicially created remedy in which separate entities merge into a single entity comprised of the cumulative assets and liabilities of all the entities. *See In re Owens Corning*, 419 F.3d at 206–11. Bankruptcy courts generally substantively consolidate cases prior to confirmation by entering an order pursuant to section 105.[9] *See, e.g.*, *Alexander v. Compton* (*In re Bonham*), 229 F.3d 750, 764 (9th Cir. 2000). If the cases become consolidated, section 1123(a)(5)(C) provides for the implementation of such consolidation in a chapter 11 plan. *See* 11 U.S.C. § 1123(a)(5)(C) ("[A] plan shall . . . provide adequate means for the plan's implementation, such as . . . merger or consolidation of the debtor with one or more persons . . . .")

Unlike joint administration, the standards for substantive consolidation are very strict and, as the remedy is extraordinary, it is widely recognized that courts are reluctant to substantively consolidate cases absent the parties' consent. *See In re Owens Corning*, 419 F.3d at 216 (declining to grant substantive consolidation when it was to be used "as a sword and not a

---

[9] Section 105(a) provides that the court "may issue any order . . . that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a).

shield."); *see also Eastgroup Props. v. S. Motel Ass'n, Ltd.*, 935 F.2d 245, 249 (11th Cir. 1991) (adopting a two-part inquiry where the debtors must show that "(1) there is substantial identity between the entities to be consolidated; and (2) consolidation is necessary to avoid some harm or to realize some benefit."); *Drabkin v. Midland-Ross Corp.* (*In re Auto-Train Corp., Inc.*), 810 F.2d 270, 276 (D.C. Cir. 1987) ("Before ordering consolidation, a court must conduct a searching inquiry to ensure that consolidation yields benefits offsetting the harm it inflicts on objecting parties.") (citing *In re Snider Bros., Inc.*, 18 B.R. 230, 234 (Bankr. D. Mass. 1982)).

2. *Absent Substantive Consolidation, the Debtors' Estates Remain Separate Entities to Be Treated Under Multiple Chapter 11 Plans.*

Without substantive consolidation, the bankruptcy court must respect entity separateness. *See, e.g.*, *Owens Corning*, 419 F.3d at 211. Here, at no point prior to confirmation did the Debtors seek substantive consolidation. In fact, the Plan specifically provided that "the Debtors' estates are not being substantively consolidated and no Debtor is to become liable for the obligations of another." R. 7. Therefore, each Debtor, including Development, must organize its own bankruptcy estate in the only manner consistent with the Bankruptcy Code, through its own individual plan.

The concept of estate separateness can be found within the Bankruptcy Code in various places. *See, e.g.*, *In re Appalachian Fuels, LLC*, 493 B.R. 1, 21 (B.A.P. 6th Cir. 2013) ("Administrative expenses incurred in each jointly administered debtor's bankruptcy estate are not treated as a joint debt.") (citing *In re Las Torres Dev., L.L.C.*, 413 B.R. 687, 698 (Bankr. S.D. Tex. 2009)). For reference, consider a joint bankruptcy petition commenced by spouses under 11 U.S.C. § 302. While section 302 does permit spouses to file jointly, the assets of each spouse are not automatically consolidated. *See* 11 U.S.C. § 302(b) ("After the commencement of a joint case, the court shall determine the extent, if any, to which the debtors' estates shall be consolidated."); *see also Wornick v. Gaffney* (*In re Wornick*), 544 F.3d 486, 491 (2d Cir. 2008) ("A joint filing does not vest the trustee with the power to reach a spouse's assets that would have otherwise been insulated."); *In re Ben Franklin Retail Stores, Inc.*, 214 B.R. 852, 857 (Bankr. N.D. Ill. 1997) (Under a jointly administered case, "[t]he estates remain separate, and a creditor with a claim in one case has no right to distribution from the estate in any other case.").

The Bankruptcy Rules drafted by this Court also heavily emphasize the importance of estate separateness and the protection of creditors with respect to each debtor entity. For example, Bankruptcy Rule 2009(e) requires the trustee to keep and maintain separate bank accounts for each estate of a jointly administered case. FED. R. BANKR. P. 2009(e) ("The trustee or trustees of estates being jointly administered shall keep separate accounts of the property and distribution of each estate."). Additionally, Bankruptcy Rule 2009(d) requires a court to appoint separate trustees for each jointly administered estate upon "a showing that creditors . . . of the different estates will be prejudiced by conflicts of interest." FED. R. BANKR. P. 2009(d).

Thus, the concept of estate separateness provides certainty over where a creditor looks for repayment—it must explore the assets of the specific debtor to which it extended credit. As aforementioned, each corporate subsidiary or affiliate must file its own bankruptcy petition and commence separate cases. 11 U.S.C. § 301(a). Each affiliate's petition creates a separate bankruptcy estate comprised of each debtor's assets. 11 U.S.C. § 541(a). And most importantly, each debtor may reorganize only the assets and liabilities of its own bankruptcy estate.

So too here. In this instant, the Plan outlines the responsibilities of each Debtor for furtherance of the reorganization. Though the Debtors each are subject to the Plan, they did not seek substantive consolidation. By providing that each Debtor's individual bankruptcy estate is to remain a separate entity, "the practical effect . . . is that [the Plan] actually consists of a separate plan for each Debtor." *In re Tribune Co.*, 464 B.R. at 182. The Debtors seek to effectively consolidate their "plans" for the purposes of voting yet have adamantly rejected consolidating their estates. The Debtors cannot have it both ways.

B. <u>Section 1129(a)(10) Is Equally Unambiguous When Considered in Light of the Overall Statutory Scheme.</u>

Further, the per debtor approach is the sole interpretation that sensibly conforms with the Bankruptcy Code and the rest of section 1129(a). The language of section 1129(a)(10), as with all statutory language, must be read in connection with the rest of the statute. *Williamson*, 529 U.S. at 133 ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (quoting *Davis*, 489 U.S. at 809) (internal quotation marks omitted)); *see also King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (stating that "a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context.") (citations omitted). Courts must also interpret statutes as a "symmetrical and coherent regulatory scheme," *Williamson*, 529 U.S. at 133 (quoting *Gustafson v. Alloyd Co.,* 513 U.S. 561, 569 (1995)), and "fit, if possible, all parts into a harmonious whole." *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959).

As a threshold matter, the fact that section 1129(a)(10) refers to "plan" in the singular does not lead of itself to the conclusion that only one debtor in a joint plan must satisfy this standard. *See In re Tribune Co.*, 464 B.R. at 182. This inference overlooks the rules to construe the Bankruptcy Code found in section 102. 11 U.S.C. § 102. Particularly relevant here is section 102(7), which provides that "the singular includes the plural." 11 U.S.C. § 102(7). Second, the analysis of whether the impaired accepting class rule applies per debtor or per plan must take into account the manner in which the other subsections of section 1129(a) are applied. Under this analysis, section 1129(a)(10)'s sister provisions unquestionably require a per debtor interpretation.

For example, section 1129(a)(7), commonly referred to as the so-called "best interest of creditors test," requires that the plan provides for dissenting creditors to receive at least what such creditors would receive in a hypothetical chapter 7 liquidation. 11 U.S.C. § 1129(a)(7). This test applies to each creditor individually, not to a class of creditors as a whole. *See id.* (section 1129(a)(7) applies with respect to "each holder of a claim or interest of [a] class"); *see also In re Valley View Shopping Ctr., L.P.*, 260 B.R. 10, 29 (Bankr. D. Kan. 2001) ("The plain language of [section] 1129(a)(7) makes clear that this test applies to each creditor rather than to each class of creditors."); *In re Tribune Co.*, 464 B.R. at 183 ("[Section 1129(a)(7) cannot be read fairly other than as an entitlement to the prescribed treatment for every impaired class of creditors for each debtor which is part of a joint plan.").

Additionally, the classification rule in section 1122(a), which a debtor must satisfy pursuant to section 1129(a)(1), only works if applied on a per debtor basis. Section 1129(a)(1) requires that the plan comply with the applicable provisions of the Bankruptcy Code. 11 U.S.C. § 1129(a)(1). As the lower court correctly noted, "[c]learly, section 1129(a)(1) cannot be satisfied in a jointly administered bankruptcy case if only one or more, but fewer than all, debtors comply with the Bankruptcy Code." R. 19; *see also In re Tribune Co.*, 464 B.R. at 183 (stating that section 1129(a)(1) could not be satisfied on a per plan basis). The per debtor approach to section 1129(a)(10) avoids such an absurd result. *See Griffin*, 458 U.S. at 575.

Once the impaired accepting class rule is read with respect to its sister provisions, it becomes clear that section 1129(a) was not designed to accommodate a single joint plan of reorganization where the debtors, as the case is here, are not substantively consolidated.

C. <u>The Policy Considerations Surrounding the "Per Plan" Approach are Unpersuasive.</u>

Last, the Petitioner points to the policy goal of chapter 11 favoring reorganizations in order to support a per plan approach to the impaired accepting class rule. But suggesting that convenience in enforcement shoud somehow override the express statutory language drafted by Congress is contrary to centuries of law on statutory interpretation. More so, this Court has repeatedly cautioned against substituting policy considerations for the words of Congress. *E.g. SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods.*, LLC, 137 S. Ct. 954, 967 (2017) ("[W]e cannot overrule Congress's judgment based on our own policy views."); *see also Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017) (stating that "the proper role of the judiciary . . . [is] to apply, not amend, the work of the People's representatives."). And if Congress should feel the need for change, it may always do so by removing the requirement from the statute. But it is not the Court's job to do so here. *See, e.g.*, *In re Catapult Entm't, Inc.*, 165 F.3d at 754 ("[T]here may be policy reasons to prefer [a different result] but Congress is the policy maker.").

The Petitioner also overlooks that the policy favoring reorganizations must be balanced against the substantive rights granted to creditors under the Bankruptcy Code. The chapter 11 reorganization process does not give debtors *carte blanche* in furtherance of their restructuring efforts. *See Mission Prods. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1665 (2019) ("The Code of course aims to make reorganizations possible. But it does not permit anything and everything that might advance that goal."). The right of an impaired creditor class to object to a proposed plan is one such right. Despite the Petitioner's suggestions, the plan confirmation process is not a "popularity contest"; the requirements of the Bankruptcy Code must be satisfied. *In re Adelphia Commn'cs Corp.*, 368 B.R. 140, 284 (Bankr. S.D.N.Y. 2007).

In this case, all hope for reorganization is not lost for the Debtors. They could move forward by dropping Development, as a debtor who cannot meet the requirements of section 1129(a)(10), from the Plan. Additionally, the Debtors could have asked for substantive consolidation at the appropriate time. Instead, the Debtors try to proceed in a manner inconsistent with the choices they have made—attempting to obtain the benefit of all possible choices without the burdens of any. The Debtors made a choice and must bear the consequences of such choice.

## **CONCLUSION**

For the foregoing reasons, the judgment of the Thirteenth Circuit Court of Appeals should be affirmed.