Team Number P16

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 COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR PETITIONER

Team Number P16
Counsel for Petitioner

Oral Argument Requested

QUESTIONS PRESENTED

I. Whether a debtor in possession is permitted to assume an executory contract under 11 U.S.C. § 365(c)(1) despite the objection of the non-debtor party, even where applicable non-bankruptcy law excuses the non-debtor party from rendering performance to any entity other than the original contracting party.

II. In a case where an impaired class of claims exists under a jointly administered multi-debtor plan, whether 11 U.S.C. § 1129(a)(10) requires acceptance from only one impaired class of claims under the plan or, alternatively, acceptance from one impaired class under each debtor.

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OPINIONS BELOW

The bankruptcy court determined that Debtors are not precluded from assuming a non-exclusive software license over the objection of the licensor pursuant to § 365(c)(1) of Title 11 of the United States Code (the "Bankruptcy Code"), even where applicable non-bankruptcy law excuses the licensor from rendering performance to an entity other than the debtor. R. at 14–15. In the same instance, the bankruptcy court also concluded that a jointly administered plan involving multiple debtors which impairs any class of creditors pursuant to § 1129(a)(10) of Title 11 ("Chapter 11") of the Bankruptcy Code requires only that a single impaired class of creditors under the plan must accept the plan. R. at 21. The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the rulings of the bankruptcy court, but the United States Court of Appeals reversed on both issues. R. at 9, 21.

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 reproduced in Appendices A through F.

STATEMENT OF FACTS

Following the institution of Chapter 11 bankruptcy proceedings, a primary focus of both debtors and creditors is to reorganize debtor such that the remaining assets are maximized to benefit all parties. Providing time for a debtor to restructure its debts, Chapter 11 is a mechanism by which a debtor can preserve its assets.

Notably, the corporate structure in this case is rather complicated and must be described for clarity. Tumbling Dice, Inc. ("TDI") is the holding company of all affiliated debtors in this case. R. at 4. Of the affiliated debtors, Tumbling Dice Development, LLC (the "Development") was created for the limited purpose to act as licensee under a non-exclusive software license agreement with an unsecured creditor in this case, Under My Thumb, Inc. ("Under My Thumb"). R. at 4. The remaining eight affiliated debtors are subsidiaries of TDI operating as luxury casino and resort properties. R. at 4. TDI, Development, and the eight remaining subsidiaries (collectively, the "Debtors") filed bankruptcy under Title 11 of the United States Code in response to a leveraged buy-out which ultimately produced an unmanageable debt load. R. at 6.

Beginning around 1990, Debtors launched a casino loyalty program known as Club Satisfaction. R. at 4. This program is designed to incentivize and reward members who frequently engage in gaming and other activities at Debtors' casino and resort properties. R. at 4. Development first became acquainted with Under My Thumb during 2008 when Debtors sought to modernize Club Satisfaction through a comprehensive, integrated software system (the "Software"). R. at 4. In an underlying unsecured promissory note, Development agreed to reimburse to Under My Thumb a portion of the $10 million in costs incurred to create the Software pursuant to a Research and Development Agreement (the "R&D Note"). R. at 4. Development remained current on the R&D Note until June 2015 when payments ceased. R at 6.

Independent from the obligations under the R&D Note, Under My Thumb and Development entered into a non-exclusive license agreement (the "Agreement"). R. at 5. This Agreement not only granted to Development a license to use the patented Software, but also permitted Development to allow affiliated entities to benefit from the Agreement although the entities were not parties to the Agreement. R. at 5. Here, the affiliated entities are TDI and the eight remaining subsidiaries operating as casino and hotel resorts. R. at 3. Otherwise, Development and its affiliated entities are prohibited from assigning or sublicensing their rights to others without the express written consent of Under My Thumb. R. at 5.

In consideration for the license, Development agreed to pay a monthly fee to Under My Thumb based on the spending activity of the Club Satisfaction members using the Software. R. at 5. Upon the Debtors' introduction of the new and improved Club Satisfaction using the Software designed by Under My Thumb, customer loyalty and spending increased. R. at 5. As a result, Under My Thumb receives higher payments than expected under the Agreement. R. at 5–6. Furthermore, Under My Thumb benefits because they are permitted to license the Software to third parties. R. at 5. Although payments from Development on the R&D Note ceased in 2015, Development remains current on the Agreement. R. at 6.

As part of a leveraged buy-out transaction involving Start Me Up, Inc. in December 2011, TDI and the eight subsidiaries operating as luxury casino and resort properties granted to a group of lenders (the "Lenders") first priority liens on their assets in exchange for a significant loan. R. at 6. Under this particular transaction and in light of its limited purpose, Development was not required by Lenders to act as borrower or guarantor. R. at 6. In January 2016, the debt load became unmanageable and Debtors' filed these chapter 11 cases in an attempt rehabilitate the business and preserve the remaining assets. R. at 6. Indeed, the Software here is integral to

the continued operation of Debtors and assumption of the Agreement is essential to reorganization. R. at 5.

Upon filing bankruptcy, Debtors planned to reorganize in an effort to rehabilitate the business. R. at 6. In negotiations involving Debtors, Lenders, Start Me Up, Inc., and an unsecured creditors committee, a plan (the "Plan") came into existence whereby Start Me Up., Inc and Sympathy for the Devil were to receive 49% and 51% shares, respectively, in the reorganized TDI. R. at 6–7. Sympathy for the Devil is a parent company to several subsidiaries, some of which have interests directly adverse to and in competition with Under My Thumb. R. at 7–8. Although Under My Thumb originally favored the Plan, learning of Sympathy for the Devil's role in the reorganization of TDI prompted Under My Thumb to object to the Plan. R. at 7–8. Under My Thumb based its objection on the unreasonable fear that its competitors under Sympathy for the Devil might gain access to its exclusive Software. R. at 8. Thus, Under My Thumb now desires to withhold performance under the Agreement. R. at 7–8.

The Bankruptcy Appellate Panel for the Thirteenth Circuit properly held that, under 11 U.S.C. § 365(c)(1), Development may assume the Agreement involving license to the Software created by Under My Thumb because Under My Thumb is merely honoring an existing contract. R. at 9. In the same instance, the Bankruptcy Appellate Panel correctly held that 11 U.S.C. § 1129(a)(10) requires only that one impaired class of claims must accept the plan when the case involves multiple debtors and is jointly administered. R. at 9. The Thirteenth Circuit Court of Appeals reversed on both issues. This appeal followed.

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit improperly held that Debtors are precluded from assuming the non-exclusive license agreement to intellectual property over the objection of Under My Thumb.

Accordingly, this Court should reverse the decision of the Thirteenth Circuit on this issue for three reasons. First, a plain language reading of the Bankruptcy Code permits a "debtor in possession" to assume an executory contract over the objection of the non-debtor party. This is true even where intellectual property law respects the right of a licensor to control who uses its property. Second, legislative history informs the notion that Congress intended § 365(c)(1) to protect the ability of a debtor in possession to assume an executory contract. Lastly, application of the "actual test" supports the underlying purpose of business reorganization in Chapter 11 proceedings while also ensuring that the non-debtor maintains the benefit of its bargain.

A prevailing principle in Chapter 11 reorganization proceedings is the rehabilitation of the debtor. Common to Chapter 11 proceedings, the debtor becomes a "debtor in possession" and performs the duties that normally fall to a trustee. Section 365 gives a debtor in possession the power to assume executory contracts held by the debtor prior to the institution of bankruptcy proceedings. Pursuant to § 365(c), the Bankruptcy Code authorizes a trustee to assume an executory contract of the debtor only if (a) applicable non-bankruptcy law does not excuse the non-debtor from rendering performance to an entity other than the debtor; or (b) the non-debtor party consents to such assumption. Accordingly, the construction of "trustee" as "debtor in possession," such that a debtor in possession is precluded from assuming its own executory contract, leads to an absurd an inoperative result under § 365(c)(1).

In the circuit and bankruptcy courts, there is no uniformity about whether "trustee" must be construed as "debtor in possession." Notably, most courts are split as to the plain meaning of § 365(c)(1). Some courts use the "actual test" whereby a court evaluates whether the non-debtor party is *actually* compelled to accept performance from, or render performance to, any entity but the debtor or the debtor in possession. Other courts prefer the alternative "hypothetical test" by

which a court considers whether the debtor in possession *hypothetically* may assign the contract to a third party. The hypothetical approach does not consider whether the debtor in possession actually intends to assign the contract to a third party. The current split in authority regarding the interpretation of § 365(c)(1) must be resolved so as to refrain from hampering the rehabilitative efforts of Chapter11 debtors.

Similarly, the Thirteenth Circuit Court of Appeals incorrectly held that § 1129(a)(10) requires acceptance from an impaired class of claims under each debtor. Accordingly, this Court should reverse the decision of the Thirteenth Circuit on this issue for three reasons. First, the plain language of the provision is unambiguous such that it requires "*at least one* impaired class of claims" under the plan to accept the plan. Next, § 1129(a)(10) is merely a technical requirement for confirmation and does not afford to objecting creditors a substantive right such as veto power. Lastly, the requirement that only one impaired class of claims is required to accept the plan facilitates the underlying purpose of Chapter 11 reorganization so that a business may continue operation.

Generally, a proposed confirmation plan may be "crammed down" over the objection of dissenting creditors so long as the plan meets requirements listed under § 1129(a). Section 1129(a)(10) requires only that one impaired class of claims must accept the plan. Although this conclusion stems from the plain meaning of the language in the statute, courts are again divided on the plain meaning. Particularly, courts divided on the issue of whether § 1129(a)(10) applies "per debtor" or "per plan." A majority of courts recognize the "per plan" approach because § 1129(a)(10) is merely a technical requirement. The courts acknowledge that the provision is not intended to afford a substantive right, such as veto power, to objecting creditors, but only to provide "some indicia of creditor support" for the plan.

Moreover, the underlying purpose of Chapter 11 proceedings is impaired when a sole dissenting creditor is allowed to manipulate confirmation of a proposed plan despite overwhelming support otherwise. The "per plan" approach is the proper interpretation and better facilitates the policy of rehabilitation underlying Chapter 11. To be clear, this approach prevents a debtor from being forced into liquidation proceedings and furthers impairs the potential for economic misuse. Thus, the "per plan" approach is the proper interpretation of § 1129(a)(10).

In short, the proper interpretation of §§ 365(c) and 1129(a)(10) is evident from the plain meaning of the language in the statutes. In an effort to maximize the value of the bankruptcy estate, Chapter 11 encourages parties to collaborate and compromise. While it is reasonable to conclude that a trustee may not assume the executory contract of a debtor, it is unreasonable to find that a debtor in possession may not assume its executory contract. A trustee is distinguishable from a debtor in possession and a contrary construction of § 365(c)(1) renders the statute absurd and inoperative. Similarly, the "per plan" approach to the interpretation of § 1129(a)(10) better facilitates the underlying policy to rehabilitate the debtor under Chapter 11 proceedings. This conclusion is bolstered by the notion that § 1129(a)(10) is merely a technical requirement that does not afford to objecting creditors a substantive right such as veto power. In summary, dissenting creditors cannot manipulate Chapter 11 bankruptcy proceedings to the detriment of the debtor and various other creditors.

ARGUMENT

The issues presented on appeal are questions of law and reviewed according to the *de novo* standard of review. *Super Nova 330 LLC v. Gazes*, 693 F.3d 138, 141 (2d Cir. 2012). Both issues before this Court are legal determinations as the facts here are not in dispute. Thus, the appropriate standard of review is *de novo*.

I. A DEBTOR IN POSSESSION IS PERMITTED TO ASSUME A NON-EXCLUSIVE LICENSE TO INTELLECTUAL PROPERTY UNDER § 365(c)(1).

The Court of Appeals for the Thirteenth Circuit incorrectly held that a debtor in possession is precluded from assuming a non-exclusive license to intellectual property under Title 11 of the United States Code (the "Bankruptcy Code"). The purpose underlying Title 11 ("Chapter 11") of the Bankruptcy Code is the successful reorganization and rehabilitation of businesses with an unmanageable debt load. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984). Specifically, § 365(c)(1) permits a debtor in possession to assume an executory contract over the objection of the non-debtor party. *See* 11 U.S.C. § 365(c)(1). This is true even where applicable non-bankruptcy law excuses the non-debtor party from accepting performance from, or rendering performance to, an entity other than the debtor or debtor in possession. *See* 11 U.S.C. § 365(c)(1); *see also Summit Inv. & Dev. Corp. v. LeRoux (In re LeRoux)*, 69 F.3d 608, 613 (1st Cir. 1995).

Because a debtor in possession is distinguishable from a trustee under Chapter 11 bankruptcy proceedings, a debtor in possession may assume an executory contract to which debtor is an original party. *See* 11 U.S.C. §§ 1104, 1107; *see also In re Footstar, Inc.*, 323 B.R. 566, 573 (Bankr. S.D.N.Y. 2005). In evaluating the application of § 365(c)(1), courts must determine on a case-by-case basis whether a non-debtor will "*actually* be required to accept performance from, or render performance to, an entity other than the debtor or debtor in possession." *See Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997) (emphasis added) (finding that "[w]here the particular transaction envisions that the debtor-in-possession would assume and continue to perform under an executory contract, the bankruptcy court cannot simply presume as a matter of law that the debtor-in-possession is a legal entity materially distinct from the prepetition debtor with whom the nondebtor [sic] party contracted.").

Currently, a split among the circuits exists with regard to the interpretation of § 365(c)(1). The First Circuit correctly interprets § 365(c)(1) by using the aforementioned "actual test" to be applied on a case-by-case basis. *See id.* (citing to *In re Leroux*, 69 F.3d at 613). Other circuits have adopted the "hypothetical test," which strips away the ability of debtor to assume an executory contract if the debtor hypothetically lacks authority to assign said contract—regardless of whether the debtor actually intends to assign the contract. *See, e.g.*, *RCI Tech. Corp. v. Sunterra Corp.* (*In re Sunterra Corp.)*, 361 F.3d 257, 267 (4th Cir. 2004); *but see Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (finding that absurd and inoperative results offend central tenets of statutory construction). Courts are divided as to whether "the 'actual' purpose of the debtor in possession is not to assign the contract but to perform it, or rather, to *continue* performing it . . ." *In re Footstar, Inc*., 323 B.R. 566, 569 (Bankr. S.D.N.Y. 2005) (emphasis added).

This Supreme Court previously noted how important a resolution to the circuit split is "for bankruptcy courts and for businesses that seek reorganization." *N.C.P. Mktg. Grp., Inc. v. BG Star Prods., Inc.*, 129 S. Ct. 1577, 1578 (2009). This Court is convinced that "[a] central purpose of the [Bankruptcy] Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy a 'new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'" *Grogan v. Garner*, 498 U.S. 279, 286 (1991). Furthermore, the ability of Chapter 11 debtors to reorganize and rehabilitate is adversely affected when applying a hypothetical approach to concrete facts. *See In re Adelphia Commc'ns Corp.*, 359 B.R. 65, 72 (Bankr. S.D.N.Y. 2007). The application of the "actual test" better coincides with the plain language, legislative history, and overall purpose of § 365(c)(1).

Clearly, § 365(c)(1) provides to a debtor in possession the power to assume executory contracts held prior to the institution of bankruptcy proceedings. *See* 11 U.S.C. § 365(c)(1). Section 365(c)(1) expressly states:

> 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 . . . [a]pplicable 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….

Id. (emphasis added). In analyzing the plain language of § 365(c)(1), the "plain meaning" of the statute controls. *See United States v. Ron Pairs Enters., Inc.*, 489 U.S. 235, 241 (1989); *see also Laracuente v. Chase Manhattan Bank*, 891 F. 2d 17, 23 (1st Cir. 1989). Section 365(c)(1) is rendered entirely redundant if the term "trustee" is construed to mean "debtor in possession." *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003); *see also TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Moreover, the legislative history of § 365(c)(1) informs the notion that Congress intended to protect the ability of a debtor in possession to assume an executory contract under Chapter 11 proceedings. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 365(c)(1), 92 Stat. 2549 (1978).

A. *When "trustee" is construed to mean "debtor in possession," § 365(c)(1) is rendered entirely redundant.*

Statutory interpretation governs this case and the analysis begins with the plain language of § 365. *United States v. Ron Pair Enters, Inc.*, 489 U.S. 235, 241 (1989). Generally, the "plain meaning" of the language in the statute controls construction. *Laracuente v. Chase Manhattan Bank*, 891 F.2d 17, 23 (1st Cir. 1989). However, the meaning of discrete statutory language is to be "gleaned from the statute as a whole, including its overall policy and purpose." *Summit Inv. & Dev. Corp. v. LeRoux (In re LeRoux)*, 69 F.3d 608, 610 (1st Cir. 1995). When looking to plain

meaning, the First Circuit correctly stated, "[l]iteral interpretations which lead to absurd results are to be avoided." *Sullivan v. CIA*, 992 F.2d 1249, 1252 (1st Cir. 1993). Accordingly, the "actual test" gives effect to the plain language of the term "trustee" in § 365(c)(1). *See* 11 U.S.C. § 365(c)(1).

The "actual test" is the proper manner by which § 365(c)(1) is to be construed. If this Court follows the majority's "hypothetical test," then § 365(c)(1) becomes a "virtual oxymoron" and inoperative under the rule against surplusage. *In re Footstar, Inc.*, 323 B.R. 566, 573 (Bankr. S.D.N.Y. 2005). Because the plain language of § 365(c)(1) is unambiguous in that it applies only to a trustee, a debtor in possession is not precluded from assuming an executory contract over the objection of the non-debtor party. *See* 11 U.S.C. § 365(c)(1); *see also In re Adelphia Commc'ns Corp.*, 359 B.R. 65, 72 (Bankr. S.D.N.Y. 2007). Using canons of statutory construction, § 365(c)(1) clearly applies only to a trustee and, thus, a debtor in possession is free to assume the non-exclusive license agreement to intellectual property. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *see also Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). Finally, even if this Court construes "trustee" to mean "debtor in possession" and that § 365(c)(1) remains operative as a result, a debtor in possession may still assume an executory contract using the "actual test." *See Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997); *see also Summit Inv. & Dev. Corp. v. LeRoux (In re LeRoux)*, 69 F.3d 608, 610 (1st Cir. 1995).

1. The plain language of § 365(c)(1) is unambiguous such that the provision applies only to a "trustee" and not to a "debtor in possession."

Under the Bankruptcy Code, a debtor remains a debtor in possession until a trustee is appointed by court order pursuant to § 1104. 11 U.S.C. § 1104. Once appointed, the trustee

absorbs all the rights, duties, and properties of the debtor and the debtor is no longer the debtor in possession. *In re Footstar, Inc.*, 323 B.R. 566, 571 (Bankr. S.D.N.Y. 2005). At this point, the debtor is displaced from all remaining property interests. *Id.* The plain language of § 365(c)(1) is unambiguous such that Congress deliberately used the term "trustee" instead of "debtor in possession." *See* 11 U.S.C. § 365(c)(1). Section 365(c)(1) states only that the "trustee" may not assume or assign an executory contract and does not preclude a debtor in possession from assuming or assigning an executory contract. *See id.* In the case at bar, § 365(c)(1) does not apply to Development because Development is not categorically identified as a "trustee."

The Bankruptcy Code contains no language supporting the term "trustee" as indistinguishable from "debtor" or "debtor in possession." *In re Footstar, Inc.*, 323 B.R. 566, 571 (Bankr. S.D.N.Y. 2005). In fact, when the Bankruptcy Code uses the terms "trustee" and "debtor in possession" in the same statutory provision, as it does in §§ 365(c), (e) and (f), the terms are given different meanings. 11 U.S.C. §§ 365(c), (e) and (f). Under Chapter 11, the trustee and debtor, or debtor in possession, are distinct parties with distinct roles in the bankruptcy process. *See* 11 U.S.C. § 1107. Section 1107 states that a debtor in possession "shall have all the rights . . . and powers[] and shall perform all the functions and duties . . . of a trustee serving in a case under this chapter." 11 U.S.C. § 1107(a). Section 1107 may place a debtor in possession in the position of a trustee, however, it does not provide how, or even if, a trustee's limitations under § 365(c)(1) applies to a debtor in possession. *See* 11 U.S.C. § 1107(a); *see also* 11 U.S.C. § 365(c)(1). Therefore, § 1107 by its terms does not offer any clarity as to whether a trustee and debtor in possession are given the same meaning for the purposes of 365(c)(1).

To be clear, a trustee is an "entity other than the debtor or debtor in possession." *In re Footstar, Inc.*, 323 B.R. at 573. The United States Bankruptcy Court for the Southern District of

New York correctly stated in *Footstar*, "[t]he basic objective of the limitation under section 365(c)(1) is vindication of the right under applicable law of a contract counterparty to refuse to accept performance from or render performance to an entity 'other than the debtor or debtor in possession.'" *Id.* In other words, logic reasons that a trustee may not assume or assign a contract, but it is unreasonable to say a debtor in possession may not assume or assign an executory contract under § 365(c)(1). *See id.*

To further evidence that the terms "trustee" and "debtor in possession" are not interchangeable under § 365(c)(1), read literally the provision provides that "the debtor in possession may not assume or assign . . . any 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 . . . . " *In re Footstar*, *Inc.*, 323 B.R. at 573. This reading creates a "virtual oxymoron" because mere assumption would not compel the non-debtor party to accept or render performance to "an entity other than the debtor." *See id.*; *see also* 11 U.S.C. § 365(c)(1). This reading is a product of the "hypothetical test," however, this interpretation offends central tenets of statutory construction by producing an absurd and inoperative result. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004).

Thus, the proper manner by which this Court should interpret the plain language in § 365(c)(1) is to mean only a "trustee" and not a "debtor in possession." *See* 11 U.S.C. § 365(c)(1). The function of this Court is not to revise by addition or subtraction, but to give effect to the interpretation that renders the provision operative. *See* ANTONIN SCALIA & BRYAN A. GARDNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012). When § 365(c)(1) is interpreted to mean that a debtor in possession may not assume or assign any executory contract of the debtor, this interpretation renders the provision pointless and does not serve the

underlying purpose of Chapter 11 proceedings. In the case at bar, Development is not categorically identified as a trustee.

2. Canons of statutory construction render § 365(c)(1) inoperative when "trustee" is construed to mean "debtor in possession."

Critical to our legal system and bankruptcy proceedings in general is the interpretation of legal texts. Two mechanisms by which legal texts are interpreted include the canons of surplusage and negative implication. The canon of surplusage is characterized by Justice Antonin Scalia and legal scholar Bryan A. Gardner as a canon that "must be applied with judgment and discretion, and with careful regard to context." ANTONIN SCALIA & BRYAN A. GARDNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012). Similarly, the negative-implication canon depends heavily on context and assumes "the expression of one thing implies the exclusion of others." *Id.* at 107.

Failure to give plain meaning to the statutory language of § 365(c)(1) violates the canon of surplusage, which is consistently relied on by this Court. *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001). As stated by Antonin Scalia and Bryan A. Gardner:

> If possible, every word and every provision is to be given effect. [] None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence. The surplusage canon holds that it is no more the court's function to revise by subtraction than by addition. A provision that seems to the court unjust or unfortunate must nonetheless be given effect.

ANTONIN SCALIA & BRYAN A. GARDNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012). In other words, the surplusage canon fosters the idea that courts must favor the construction which renders every word operative. *See id.* at 174. Similarly, this Court, in *Andrews*, noted that "[c]ourts should be reluctant to treat statutory terms as surplusage in any setting . . . ." *Andrews*, 534 U.S. at 31.

The surplusage canon renders § 365(c)(1) absurd and inoperative. Notably, the surplusage canon does not apply to the doublet "assume or assign" in § 365(c)(1) because an executory contract must be assumed before the contract may be assigned. *See* 11 U.S.C. § 365(f)(2)(A) (noting a contract must first be assumed before the contract may be assigned); *see also* SCALIA & GARDNER, *supra*, at 176–77 (commenting that this canon must be applied with judgment and discretion and "sometimes drafters *do* . . . include words that add nothing of substance." (emphasis in original)). Section 365(f) provides that an executory contract cannot be assigned unless it is first assumed and, therefore, assumption is a prerequisite to assignment. 11 U.S.C. § 365(f)(2)(A). The phrase "assume *or* assign" must be read as the conjunctive "assume and assign" to be reasonably applicable to a trustee who is construed to mean debtor in possession. The Bankruptcy Court for the Southern District of New York stated,

> [A] literal interpretation of the disjunctive "or" is utterly incongruent with the objectives of the Bankruptcy Code and would lead to the anomalous result that a debtor in possession would be deprived of its valuable but unassignable contract solely by reason of having sought the protection of the Bankruptcy Court, even though it did not intend to assign it.

In re Footstar, Inc., 323 B.R. 566, 570 (Bankr. S.D.N.Y. 2005). In *Adelphia*, the same court affirmed their *Footstar* decision by stating, "[T]he law in this district, and by far the better view, is that where the assumption is to be effected by debtor in possession (as contrasted to a trustee), the right to object to assignment does not by itself affect the right to assume." *In re Adelphia Commc'ns Corp.*, 359 B.R. 65, 72 (Bankr. S.D.N.Y. 2007).

In further support of a construction which renders the provision operative, failure to use the plain meaning of § 365(c)(1) violates the interpretative canon of negative implication. This Supreme Court, in *Barnhart*, reiterated that "the [negative-implication canon] . . . has force only when the items expressed are members of an 'associated group or series,' justifying the inference

that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (*citing U.S. v. Vonn*, 535 U.S. 55, 56 (2002)). In other words, this canon recognizes that a set of correlating terms results in a "sensible inference that the term left out must have been meant to be excluded." *Id.* (citing to *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 81 (2002)). Because § 365(c)(1) refers only to a "trustee," the inference is that "debtor in possession" is meant to be excluded.

In sum, the term "trustee" must be given its plain meaning to render § 365(c)(1) operative under the canons of surplusage and negative implication. Even if the term "trustee" is construed as "debtor in possession," the "actual test" still allows a debtor in possession to assume an executory contract under § 365(c)(1).

3. Even if this Court finds that "trustee" means "debtor in possession" and that § 365(c)(1) remains operative as a result, a debtor in possession may still assume an executory contract using the "actual test."

Application of the "actual test" requires courts to evaluate whether the non-debtor party is *actually* being compelled to accept performance under the executory contract from someone other than the original contracting party. *Summit Inv. & Dev. Corp. v. LeRoux (In re LeRoux)*, 69 F.3d 608, 612 (1st Cir. 1995). In *Institut*, Honorable Conrad Keefe Cyr—a principal architect of the current Bankruptcy Code—discredited the "hypothetical test" because, under this approach, the debtor "lose[s] its option to assume the contract, even though it never intended to assign the contract to another entity . . . ." *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997). Here, Development does not intend to assign the Agreement and, therefore, under the "hypothetical test," the rights of Development are unduly impaired.

The "applicable law" provision of § 365(c)(1) is not triggered because Development only wishes to assume its executory contract with Under My Thumb. R. at 7. In other words, the

anti-assignment language never comes into play because Under My Thumb is not required to render performance to anyone other than the Development. *See* 11 U.S.C. § 365(c)(1). The applicable law provision referenced in § 365(c)(1) is not triggered where the debtor in possession seeks to assume, but not assign, an executory contract.

Under the Plan, Debtors ask that Under My Thumb do nothing more than honor its existing contractual obligations. R. at 9. The Plan expressly states, "the Debtors' estates are not being substantively consolidated [sic] and no Debtor is to become liable for the obligations of another." R. at 7. The ability of Development to assume the Agreement is crucial to the continued operation of its business because the Software is so integrated in Debtors' business model. R. at 5. Under the "actual test," the "applicable law" provision under § 365(c)(1) is not triggered because Development is attempting only to assume the Agreement to which it was an original party. R. at 5. Thus, even if a "trustee" is construed to mean a "debtor in possession" and § 365(c)(1) is considered still operative, Development has the right to assume the Agreement under § 365(c)(1) by virtue of the "actual test."

B. *Legislative history informs the notion that Congress intended § 365(c)(1) to protect the ability of a debtor in possession to assume an executory contract.*

Although plain language does not allow courts to diverge from countervailing history, legislative history is a useful tool to discern unclear statutory language. *See Summit Inv. & Dev. Corp. v. LeRoux*, 69 F.3d 608, 610 (1st Cir. 1995). The legislative history of § 365(c)(1) is consistent with the notion that Congress intended a flexible application to protect the ability of a debtor in possession to assume an executory contract, notwithstanding applicable law to the contrary or lack of consent from the non-debtor. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 365, 92 Stat. 2549, 2574–75 (1978). Application of the "actual test" to § 365(c)(1) furthers congressional intent by recognizing the right of a debtor in possession to

assume an executory contract. The First Circuit correctly stated that "Congress did not envision the abstract analysis proposed by [the majority], but contemplated a case-by-case inquiry into the actual consequences . . . of permitting these executory contracts to be performed by the debtor party following the institution of bankruptcy proceedings." *In re LeRoux*, 69 F.3d at 613.

In 1978, § 365(c)(1) stated that a trustee could not "assume or assign an executory contract" if "applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to *the trustee* . . . ." Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 365(c)(1), 92 Stat. 2549, 2575 (1978) (emphasis added). In 1980, Congress considered replacing "the trustee" with "an entity other than the debtor or the debtor in possession." *See* Bankruptcy Technical Correction Act of 1980, H.R. Rep. No. 96-1195, at 57 (1980) (proposing minor substantive changes to the Bankruptcy Reform Act of 1978). In the 1980 report, Congress contemplated making this revision to § 365(c)(1), but instead looked to § 365(e)—companion to § 365(c)(1). *See id.* During these discussions, Congress sought to ensure the strength of debtor's ability to assume, but also that the non-debtor party would receive the "benefit of its bargain." *See* Allen F. Corotto & Irving H. Picard, *Business Reorganization under the Bankruptcy Reform Act of 1978*, 28 DEPAUL L. REV. 961, 970 n.55 (1979) (citing to S. Rep. No. 989, 95th Cong., 2d. Sess., at 9–10 (1978)). To defeat the ability of a debtor to assume, the non-debtor party must show that it would not receive "the full benefit of [its] bargain." *Summit Inv. & Dev. Corp. v. LeRoux (In re LeRoux)*, 69 F.3d 608, 613 (1st Cir. 1995).

In 1984, Congress revisited § 365(c)(1) and followed through with the 1980 revision. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 362(a), 98 Stat. 333 (1984). However, Congress chose not to alter the language in § 365(e)(2)(A) because it

believed § 365(e)(2) permits a debtor in possession to avoid automatic termination of its executory contract rights. *See id.* Without this contemplation, the right of a debtor in possession is terminated immediately under § 365(e), leading to an absurd result. *See Sullivan v. CIA*, 992 F.2d 1249, 1252 (1st Cir. 1993). Based on these discussions, Congress envisioned a case-by-case analysis of § 365(c)(1) and the actual test as opposed to an "overly rigid and abstract hypothetical test" that would contradict the purpose of § 365(c)(1). R. at 25 (Jones, J., dissenting).

Legislative history alone may not be enough to support the proper statutory construction of § 365(c)(1). However, the Bankruptcy Court for the Southern District of New York correctly held in *Footstar*, "[t]here is no sound reason to ignore this 1980 Judiciary Committee Report. The Report clearly addressed the very amendment adopted in 1984 and just as clearly expressed that Committee's view as to the inapplicability of § 365(c)(1) to a debtor in possession's assumption." *In re Footstar, Inc.*, 323 B.R. 566, 575 (Bankr. S.D.N.Y. 2005). The *Footstar* court continued to lay out the legislative history of § 365(c)(1) by stating,

> In any event, this legislative history does no more than confirm the conclusion which is compelled by both the plain meaning of the statute as it is written and its logic and purpose limits the trustee's power to assume or assign by confirming rights under applicable law of a contract counterparty. Applying this limitation to the trustee, the trustee cannot either assume or assign because in either case the counterparty would be forced to accept performance by "an entity other than the debtor or the debtor in possession." Likewise, applying the limitation to the debtor, a debtor in possession cannot assign because the counterparty would be in the same position. However, also applying the limitation of applicable law to the debtor, the debtor in possession *can* assume because by the limitation's express terms it can have no consequence or effect as to a debtor in possession, which is *not* "an entity other than" itself.

In re Footstar, Inc., 323 B.R. 566, 575 (Bankr. S.D.N.Y. 2005) (emphasis in original). Because the express terms of § 365(c)(1) do not limit a debtor in possession, § 365(c)(1) does not

preclude a debtor in possession from assuming an executory contract even where the non-debtor party objects.

In short, the long history of reports, revisions, and concerns of statutory construction regarding § 365(c)(1) furthers the notion that Congress heavily debated and delicately crafted § 365(c)(1) to protect the ability of a debtor in possession to assume an executory contract. The "actual test" better aligns with legislative history of § 365(c)(1) and supports the overarching policy of Chapter 11—rehabilitation of the debtor.

C. *Application of the "actual test" supports the underlying purpose of business reorganization in Chapter 11 proceedings while also ensuring that the non-debtor maintains the benefit of its bargain.*

The central goal of Chapter 11 is to promote reorganization and rehabilitation for the debtor. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). The "actual test" balances the policy goals of Chapter 11 with the rights of non-debtors by allowing a court to consider the "facts and circumstances of each case to determine whether a debtor in possession intends to actually assign an executory contract." R. at 26 (Jones, J., dissenting). This Supreme Court stated in *Bildisco*, "[t]he fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." *Bildisco & Bildisco*, 465 U.S. at 528. Although the primary focus of Chapter 11 relates to the ability of a debtor to reorganize, this Chapter also contemplates the "benefit of [non-debtor's] bargain." *Summit Inv. & Dev. Corp. v. LeRoux (In re LeRoux)*, 69 F.3d 612, 613 (1st Cir. 1995).

Under the "actual test," Debtors have the ability to assume the Agreement and Under My Thumb is receiving the full, if not maximum, "benefit of its bargain." *See id.* In the case at bar, Development wishes to assume the Agreement with Under My Thumb solely for reorganization purposes. R. at 7. Development has remained current on the Agreement with Under My Thumb,

and Development has not breached the Agreement. R. at 7. Under the Plan, Development continues to maintain monthly payments to Under My Thumb and fulfill contractual obligations under the Agreement. R. at 7. In addition, Under My Thumb receives 55% pro rata distribution under the proposed confirmation plan—including the $6 million obligation owed to Under My Thumb under the R&D Note. R. at 7. Notably, Under My Thumb initially favored the proposed confirmation plan before it learned of the role played by Sympathy for the Devil. R. at 7. Most importantly, Development desires only to assume the Agreement and not to assign the Agreement. R. at 7.

Under the "hypothetical test," Development does not have the ability to assume the Agreement. This approach allows Under My Thumb to freely rescind its contractual duties premised solely on the institution of bankruptcy proceedings, a result prohibited by other provisions of the Bankruptcy Code. By following the "hypothetical test," a court favors the interests of creditors to the "detriment of the debtors, its employees, and its other stakeholders." R. at 7. Any interpretation of § 365(c)(1) which ignores the policy of Chapter 11 in favor of "automatic termination of a debtor's contractual rights frequently hampers rehabilitation efforts by depriving the Chapter 11 estate of valuable property interests at the very time the debtor and estate need them most. " *In re LeRoux*, 69 F.3d at 610 (referencing S. Rep. No. 95-989, at 59). In sum, the "actual test" is the appropriate interpretation of § 365(c)(1) as it furthers the policies of Chapter 11.

To conclude, the "actual test" is the proper interpretation of § 365(c)(1) because it supports the underlying policy and purpose of Chapter 11—reorganization and rehabilitation. The "actual test" not only furthers the policies underlying Chapter 11, but also gives meaningful effect to the canons of construction when interpreting the statutory language of § 365(c)(1).

Similarly, legislative history informs the notion that Congress intended to protect the ability of a debtor in possession to assume executory contracts during bankruptcy proceedings in an effort to facilitate the underlying policies of Chapter 11.

II. THE "PER PLAN" APPROACH ALIGNS WITH THE LANGUAGE OF § 1129(a)(10) AND PRESERVES THE STATUTORY SCHEME.

Generally, Chapter 11 is an alternative course of filing to Chapter 7 liquidation proceedings and exists to allow businesses to reorganize. *See* H.R. Rep. No. 95-595, at 5 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6179 ("The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provides its employees with jobs, pay its creditors, and produce a return for its stockholders."). Creditors often recover more from a reorganization in which a debtor is allowed to continue operation than if the debtor were to immediately liquidate. *See id.* To be confirmed, a plan of reorganization must meet certain criteria under § 1129(a). *See* 11 U.S.C. § 1129(a) (listing several prerequisites to plan confirmation in order to "cram down" a plan over the objection of dissenting creditors).

One such criterion is § 1129(a)(10), which states that a bankruptcy court "shall confirm a plan only . . . [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*, determined without including any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(10) (emphasis added). Section 1129(a)(10) outlines the "per plan" approach by which a plan must be voted for and accepted by *at least* one impaired class of creditors under the plan. *See* 11 U.S.C. § 1129(a)(10). Furthermore, congressional intent underlying the purpose of § 1129(a)(10) is not to provide creditors with a substantive right as evidenced by the lack of amendments to the provision. *See JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc.* (*In re Transwest Resort Props.)*, 881

F.3d 724, 729–30 (9th Cir. 2018); *but see In re Tribune Co.*, 464 B.R. 126, 136–37 (Bankr. D. Del. 2011).

Although there exists very little jurisprudence with regard to the interpretation of § 1129(a)(10) plan confirmations, a majority of courts have applied the "per plan" approach without controversy due to the express requirement of one affirmative vote from any impaired creditor under the plan. *See JPMorgan Chase Bank, N.A. v. Charter Commc'ns Operating, LLC (In re Charter Commc'ns)*, 419 B.R. 221, 266 (Bankr. S.D.N.Y. 2009) (citing to *In re SGPA, Inc.*, No. 1-01-02609, 2001 WL 34750646 (Bankr. M.D. Pa. Sept. 28, 2001); *In re Enron Corp.*, No. 01-16034, 2004 Bankr. LEXIS 2549 (Bankr. S.D.N.Y. July 15, 2004)). To be clear, the "per plan" approach aligns with the overall policy of Chapter 11 and, more specifically, § 1129(a)(10). *See* 11 U.S.C. § 1129(a)(10).

By requiring that only one impaired class of creditors must assent to the plan, the threshold for acceptance is seemingly below average in that the provision allows for plans to be easily confirmed, but this result is consistent with the purpose and policies underlying Chapter 11 reorganization and rehabilitation. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984) (stating that rehabilitation of the debtor in Chapter 11 proceedings is a primary concern). If the "per debtor" approach is adopted, then only one impaired creditor may hold all parties to the plan confirmation hostage—contrary to the purposes of Chapter 11 bankruptcy. *See id.* Allowing a sole impaired creditor to dictate or manipulate the reorganization of a business may force liquidation of a debtor's assets, leaving large debts unpaid and economic misuse as a result. This result is inconsistent with the purpose of Chapter 11 reorganization and rehabilitation. Thus, the "per plan" approach is the proper interpretation of § 1129(a)(10) as it furthers the policies underlying Chapter 11 reorganization and rehabilitation.

A. *Section 1129(a)(10) requires that only one impaired class of claims must accept the plan under Chapter 11.*

The statutory text of § 1129(a)(10) helps to explain the lack of case law such that the plain language is unambiguous. In the first decisions to address this issue, the Middle District of Pennsylvania and the Southern District of New York agreed that a joint plan of reorganization requires only one impaired class of claims to accept the proposed confirmation plan under § 1129(a)(10). *See JPMorgan Chase Bank, N.A. v. Charter Commc'ns Operating, LLC (In re Charter Commc'ns)*, 419 B.R. 221, 266 (Bankr. S.D.N.Y. 2009) (citing to *In re SGPA, Inc.*, No. 1-01-02609, 2001 WL 34750646 (Bankr. M.D. Pa. Sept. 28, 2001); *In re Enron Corp.*, No. 01-16034, 2004 Bankr. LEXIS 2549 (Bankr. S.D.N.Y. July 15, 2004)). Arguably, however, the controversy with respect to the "per debtor" versus "per plan" approach did not come to full fruition until the Bankruptcy Court for the District of Delaware decided that § 1129(a)(10) requires a "per debtor" approach wherein the impaired accepting class rule applies "per debtor." *In re Tribune Co.*, 464 B.R. 126, 180–83 (Bankr. D. Del. 2011).

In the only circuit precedent, the Ninth Circuit considered this issue and held that the plain language of § 1129(a)(10) supports the "per plan" approach wherein only one impaired class of claims is required to accept the plan. *In re Transwest Resort Props.*, 881 F.3d 724, 730 (9th Cir. 2018); *see also King v. Burwell*, 135 S. Ct. 2480 (2015) (noting that courts must enforce a statute according to its terms). Presumably, when the Ninth Circuit did not discuss any substantive rights or interests that the provision may confer or protect in prior cases, the court implicitly recognized that the only purpose of § 1129(a)(10) is to demonstrate some indication of creditor support. *See In re L & J Anaheim Assocs.*, 995 F.2d 940, 942 (9th Cir. 1993) (hosting no discussion on any substantive rights provided to impaired creditors under § 1129(a)(10)); *see*

also In re Figter Ltd., 118 F.3d 635, 636–37 (9th Cir. 1997) (lacking any reference to a substantive right or interest provided to impaired creditors under § 1129(a)(10)).

Accordingly, § 1129(a)(10) is merely a technical requirement which does not afford to objecting creditors a substantive right such as veto power due to its underlying purpose to provide only "*some* indicia of creditor support." *In re Bataa/Kierland LLC*, 476 B.R. 558, 578 (Bankr. D. Ariz. 2012) (emphasis added). Furthermore, all claims in a single class must be treated alike and, pursuant to § 1122(b), a separate class of claims consisting of only unsecured claims may be designated by the proposed confirmation plan. *See* 11 U.S.C. § 1122(b); *see also In re LOOP 76*, LLC, 442 B.R. 713, 723 (Bankr. D. Ariz. 2010). Such a classification in this case renders the "per debtor" approach unreasonable.

In short, the "per plan" approach is the proper interpretation of § 1129(a)(10). In evaluating the interpretation this provision, courts conclude differently. *Compare In re Transwest Resort Props.*, 881 F.3d 724, 730 (9th Cir. 2018) (holding that § 1129(a)(10) applies on a "per plan" basis) *with In re Tribune Co.*, 464 B.R. 126, 183 (Bankr. D. Del. 2011) (finding that § 1129(a)(10) must be satisfied by each debtor in a joint plan). As illustrated by the plain language of the statute, the Ninth Circuit correctly interpreted § 1129(a)(10) to require that only one impaired class must accept the proposed confirmation plan. *In re Transwest Resort Props.*, 881 F.3d at 730. All things considered, the application of § 102(7) does not influence the outcome. Similarly, the overall purpose of the Bankruptcy Code, and Chapter 11 proceedings more specifically, is better facilitated when only one impaired class of claims is required to accept the plan. The "per plan" approach not only facilitates the reorganization and rehabilitation of businesses, but also is compatible with other requirements under § 1129(a).

1. Section 1129(a)(10) must be analyzed on a "per plan" basis because the plain language is unambiguous.

In essence, § 1129(a)(10) states that at least one impaired class of claims must accept the plan if any impaired class of claims exists. *See* 11 U.S.C. § 1129(a)(10). Controversy recently arose as to whether the "per plan" or "per debtor" approach is supported by the plain meaning of § 1129(a)(10). *Compare In re Transwest Resort Props.*, 881 F.3d 724, 729–30 (9th Cir. 2018) *with In re Tribune Co.*, 464 B.R. 126, 183 (Bankr. D. Del. 2011). For instance, the Ninth Circuit concluded that the "per debtor" approach is in no way indicated by the terms of § 1129(a)(10) when a plan is jointly administered for the convenience of multiple debtors in a Chapter 11 proceeding. *In re Transwest Resort Props.*, 881 F.3d at 730. By contrast, the Bankruptcy Court for the District of Delaware is convinced that § 1129(a)(10) requires acceptance by one impaired class of creditors for each debtor under a jointly administered plan. *In re Tribune Co.*, 464 B.R. at 183. In sum, controversy now exists as to whether the plain language of § 1129(a)(10) calls for the "per plan" approach to approve plan confirmations under Chapter 11.

The analysis of § 1129(a)(10) begins and ends with the plain language of the provision. *See* 11 U.S.C. § 1129(a)(10); *see also BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004) ("[O]ur inquiry begins with the statutory text[] and ends there as well if the text is unambiguous."). The direct language requires, at a minimum, that one impaired class of claims votes in favor of the reorganization plan before the plan may be confirmed. *See* 11 U.S.C. § 1129(a)(10). Generally, if the statutory language is plain, courts must enforce the statute according to its terms. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (reiterating that it is not the role of the judiciary to modify the plain, unambiguous language of statutes passed by the legislature). If § 1129(a)(10) is interpreted to include the "per debtor" approach, then the law is effectively rewritten "under the pretense of interpreting it." *See King v. Burwell*, 135 S. Ct. 2480, 2506 (2015) (Scalia, J., dissenting). Because there exists no clear basis of congressional

intent to the contrary and the plain language is unambiguous, § 1129(a)(10) requires a "per plan" approach by which only one impaired creditor under the plan must accept the plan.

If Congress did intend to adopt the "per debtor" approach to § 1129(a)(10), then Congress had the opportunity to amend the language. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978). Because nothing in § 1129(a)(10) contemplates a "per debtor" approach to plan confirmation, Congress must alter the language of § 1129(a)(10) to include the phrase "of each debtor." *See* R. at 27 (Jones, J., dissenting). Including this phrase changes the reading of § 1129(a)(10) to: "[i]f a class of claims is impaired under the plan, at least one class of claims *of each debtor* that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider." *See* 11 U.S.C. § 1129(a)(10). The Bankruptcy Code promulgated in 1973 was amended multiple times since its inception and Congress declined these opportunities to change the language of § 1129(a)(10) to indicate that it either originally, or subsequently, intended for a "per debtor" approach. *See* Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. 137, 93d Cong., 1st Sess. (1973); *see also* S. Rep. No. 2565, 93d Cong., 1st Sess. (1973); H.R. Rep. No. 10792, 93d Cong., 1st Sess. (1973). Thus, presuming Congress "says in a statute what it means," this Court must reject the "per debtor" approach to the § 1129(a)(10) requirement for plan confirmation. *See BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004).

2. Even if this Court finds the language to be ambiguous, § 102(7) does not change the provision's effect as a technical requirement.

Applying § 102(7) does not impact the meaning of § 1129(a)(10). *See* 11 U.S.C. §§ 102(7), 1129(a)(10). Generally, § 102 enumerates the rules of construction for the Bankruptcy Code. 11 U.S.C. § 102. Section 102(7) states that "the singular includes the plural." 11 U.S.C. § 102(7). As noted by Judge Jones in the Thirteenth Circuit's dissent, this rule of construction

does not incorporate the "per debtor" approach into § 1129(a)(10). R. at 28 (Jones, J., dissenting). Reading the singular to include the plural in § 1129(a)(10) changes the provision to read "[i]f classes of claims are impaired under the *plans*, at least one of the classes that are impaired under the *plans* has accepted the *plans* . . . ." *See* 11 U.S.C. § 1129(a)(10).

The statutory scheme and intent of § 1129(a)(10) remains intact when using § 102(7) due to the fact that only one plan exists here. R. at 6–7. Furthermore, the purpose of § 1129(a)(10) remains unaffected because some indication of support among impaired classes still exists. R. at 8 ("The Plan enjoyed near universal support from all creditor groups."). Reading a "per debtor" requirement into § 1129(a)(10) is a contortion and improper. Given the § 102(7) modification, it is unreasonable to impart the "per debtor" approach upon § 1129(a)(10).

3. Section 1129(a)(10) is merely a technical requirement for confirmation and does not afford to objecting creditors a substantive right such as veto power.

Section 1129(a)(10) does not confer to creditors a substantive right such as veto power; it is merely a technical requirement to ensure some indication of creditor support for confirmation of a reorganization plan. *See In re LOOP 76, LLC*, 442 B.R. 713, 722 (Bankr. D. Ariz. 2010). Generally, § 1129(a) facilitates plan confirmation by providing criteria for the approval of a multi-debtor plan that is jointly administered. *See* 11 U.S.C. § 1129(a); *see also In re Transwest Resort Props.*, 881 F.3d 724, 729 (9th Cir. 2018). As it stands today, the only purpose underlying § 1129(a)(10) is to demonstrate "some indicia of creditor support" for the proposed plan. *In re Bataa/Kierland LLC*, 476 B.R. 558, 578 (Bankr. D. Ariz. 2012).

The implicit adoption of this reasoning is demonstrated by the Ninth Circuit in *Anaheim*. *In re L & J Anaheim Assocs.*, 995 F.2d 940, 942 (9th Cir. 1993) (finding that "a favorable vote by at least one impaired class was necessary before the bankruptcy court could allow [debtor] to

cram down the [p]lan over the dissenting creditors"). The Ninth Circuit's purpose in *Anaheim* was to determine whether there was necessary acceptance with regard to the § 1129(a)(10) requirement, but the Ninth Circuit did not analyze any substantive rights the provision may confer. *See id.* In *Anaheim*, the Ninth Circuit inherently implies it regards § 1129(a)(10) to be a highly technical requirement and not a grant of substantive rights to objecting creditors. *See id.* at 942; *see also In re Bataa/Kierland LLC*, 476 B.R. at 578. The *Figter* decision by the Ninth Circuit lends itself to the same conclusion. *See In re Figter Ltd.*, 118 F.3d 635, 636–37 (9th Cir. 1997). In *Figter*, the Ninth Circuit never considered any rights or interests of creditors under § 1129(a)(10). *See id.*; *see also In re Bataa/Kierland LLC*, 476 B.R. at 578. Thus, the trend in the Ninth Circuit is to recognize § 1129(a)(10) as nothing more than a technical requirement indicating some amount of creditor support exists for the plan.

Moreover, § 1129(a)(10) is not an "all-purpose creditor protection mechanism." *In re SGPA, Inc.*, No. 1-01-02609, 2001 WL 34750646, at *19–20 (Bankr. M.D. Pa. Sept. 28, 2001). In order to approve a plan for "cram down" notwithstanding the objection of creditors, the proposed plan must meet other requirements under § 1129(a). *See* 11 U.S.C. § 1129(a); *see also In re Transwest Resort Props.*, 881 F.3d 724, 729 (9th Cir. 2018). These other requirements include the "best interest of the creditors" test under § 1129(a)(7) and the feasibility requirement under § 1129(a)(11). *See* 11 U.S.C. §§ 1129(a)(7), 1129(a)(11). In the "cram down" context, the plan proponent must establish the plan does not "discriminate unfairly" and "is fair and equitable" under § 1129(b)(1). 11 U.S.C. § 1129(b)(1).

Under the Bankruptcy Code in general, all claims in a single class must be treated alike. One function of classification is determining which claims vote together and which claims may divest others. *In re LOOP 76, LLC*, 442 B.R. 713, 722 (Bankr. D. Az. 2010). Creditors may

favor or disfavor a plan for a variety of reasons, including those reasons apart from the claim or the plan. Under Chapter 11, § 1122(b) states that "a plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience." 11 U.S.C. § 1122(b).

In the case at bar, Under My Thumb is the sole creditor of Development. R. at 8. In the TDI corporate structure, Development serves only a limited purpose by acting as the licensee of the Agreement with Under My Thumb. R. at 4. Development agreed to reimburse Under My Thumb for a portion of the costs to create the Software pursuant to the R&D Note. R. at 4. Section 1122 provides a bankruptcy court with the authority to be flexible while classifying parties in the reorganization plan. *See* 11 U.S.C. § 1122(b). Section 1122(b) promotes the flexibility of courts to classify parties in such a way that results in creating "some indicia of creditor support." *See* 11 U.S.C. § 1122(b). If Under My Thumb is classified with the remaining unsecured creditors, both the "per plan" and the "per debtor" approach are satisfied, as Under My Thumb is the sole dissenting creditor. This discretionary ability of the courts further suggests that purpose of § 1129(a)(10) is not to substantively protect creditors, but that *some* support exists within the various impaired creditors in the midst of a debtor's reorganization. This conclusion lends itself to the "per plan" approach of Chapter 11 reorganizations.

Following this logic, this Court may reasonably classify the unsecured claim asserted by Under My Thumb as combined with the remaining unsecured loans under the plan. Such a classification renders the objection of Under My Thumb, as the sole dissenter, inconsequential. The court in *In re LOOP* notes that "when the sole issue is satisfaction of § 1129(a)(10), the classification rule should be more flexible and should be designed to enable or enhance the

court's ability to determine whether some creditor support exists for the plan. *In re LOOP 76, LLC*, 442 B.R. 713, 723 (Bankr. D. Ariz. 2010). Under this logic, it would be 'entirely appropriate' to define classification with the creditor's various interests in mind." *Id.* In sum, this Court has the ability to classify all unsecured creditors together for voting purposes, and, if so, the objection of Under My Thumb is negated by the overwhelming support of the unsecured creditors' committee.

B. *The "per plan" approach not only furthers the overall purpose of the Bankruptcy Code, but also is consistent with other requirements under § 1129(a).*

Chapter 11 is designed to "mitigate the effects of financial failure" for both debtors and creditors and the policy behind Chapter 11 is the idea that "oftentimes businesses are worth more alive than dismantled." *See* Alexander J. Gacos, *Reconciling the "Per-Plan" Approach to 11 U.S.C. § 1129(a)(10) with Substantive Consolidation Principles Under In Re Owens Corning*, 14 SETON HALL CIR. REV. 295, 296 (2018). Unlike liquidation cases, the idea in reorganization cases is to restructure the finances of a debtor in order to allow continued operation. *Id.* at 295–96. Reorganization provides employees with jobs, pays company creditors, and produces returns for company stockholders. *See* H.R. Rep. No. 95-595, at 5 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6179. Such reorganization is reasonable such that certain assets may be worth more for the purposes for which they were designed than liquidated. Here, Under My Thumb is set to receive a 55% pro rata distribution from the reorganization plan. R. at 7. Under My Thumb initially viewed this plan favorably, as 55% is a much greater distribution than they would otherwise receive under liquidation proceedings. R. at 7.

1. The "per plan" approach is better suited to promote the rehabilitation and reorganization of a business under Chapter 11 to facilitate continued operations.

Jointly administered plans exist as a convenience for the courts and the parties involved in the proceedings. *See* Alexander J. Gacos, *Reconciling the "Per-Plan" Approach to 11 U.S.C. § 1129(a)(10) with Substantive Consolidation Principles Under In Re Owens Corning*, 14 SETON HALL CIR. REV. 295, 300 (2018). The "per plan" approach to the interpretation of § 1129(a)(10) furthers the purpose of Rule 1001 by assisting in the efficient, speedy, and inexpensive administration of bankruptcy cases. *See* Fed. R. Bankr. P. 1001. The majority in the opinion below seems to implicitly suggest that a joint, multi-debtor plan constitutes a de facto substantive consolidation. R. at 18. This is not true, especially considering that the Debtors' business is consistently managed on an integrated basis and Development is not an autonomous entity. *See* R. at 30.

By contrast, substantive consolidation is an equitable remedy not commonly used by courts and irrelevant to a technical requirement like § 1129(a)(10). *See In re Owens Corning*, 419 F.3d 195, 211 (3d Cir. 2007). Here, a joint plan is appropriate because Development is operating as a subsidiary of TDI. R. at 4. In fact, bankruptcy courts have approved on multiple occasions a jointly administered Chapter 11 plan in which each specific debtor did not have an impaired class. *In re Charter Commc'ns*, 419 B.R. 221, 266 (Bankr. S.D.N.Y. 2009). Bankruptcy courts set judicial precedent by approving joint plans under similar circumstances. *See In re Enron Corp.,* No. 01-16034, 2004 Bankr. LEXIS 2549 (Bankr. S.D.N.Y. July 15, 2004); *see also In re SGPA Inc.*, No. 1-01-02609, 2001 WL 34750646, at *19–20 (Bankr. M.D. Pa. Sept. 28, 2001). Further, the current proceeding is distinguishable from *Tribune*, one of the only two cases in which a "per debtor" approach has been adopted, because there are far fewer parties involved. In *Tribune*, multiple plans comprising over 100 debtors were involved whereas, in the present case, there is far fewer debtors and only one plan. *See In re Tribune Co.*, 464 B.R. 126, 136–37

(Bankr. D. Del. 2011). Thus, the case at bar is far more similar to *Transwest* and this Court should follow the reasoning of the Ninth Circuit when adopting the "per plan" approach. *See In re Transwest Resort Props.*, 881 F.3d 724, 729–30 (9th Cir. 2018).

The "per plan" approach more clearly aligns with the purpose of Chapter 11. Under My Thumb initially viewed the Plan favorably as a 55% pro rata distribution is more than it may recover under liquidation proceedings. R. at 7. Upon learning that Sympathy for the Devil receives 51% of the voting shares in the reorganized TDI, Under My Thumb then perceived the Plan much differently. R. at 7–8. As noted by the Thirteenth Circuit, the Plan maintained widespread support from Lenders, Start Me Up, Inc., Sympathy for the Devil, and the unsecured creditors' committee. R. at 8. Upon voting, all Debtors except Development had at least one impaired class of creditors vote in the affirmative. R. at 8. By contrast, Under My Thumb controlled the only class of impaired creditors under Development and voted against the Plan. R. at 8. Because the purpose of Chapter 11 is to provide a clear path to the reorganization and rehabilitation of a debtor, adopting a "per debtor" approach allows the vote from a single dissenting creditor to negate the near universal support of a plan—antithetical to the premise of Chapter 11 bankruptcy proceedings. A de facto "veto power" is imparted upon Under My Thumb when it is allowed to override such widespread support. This "veto power" sets a dangerous precedent wherein one dissenting creditor may override the widespread support of a reorganization plan, potentially causing a business to fold and liquidate. This result conflicts with the underlying purpose of Chapter 11 reorganization and rehabilitation. In short, adopting a "per debtor" approach is against the financial interests of Under My Thumb as well as Debtors, as Under My Thumb is likely to receive a much smaller distribution if Debtors are forced to liquidate.

2. The "per plan" approach is consistent with the other requirements for "cram down" under § 1129(a).

The narrower reading of § 1129(a)(10) is more consistent with the generally acknowledged overall policies of Chapter 11, such as encouraging reorganization and preventing economic misuse. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). As noted previously, Chapter 11 exists as a sometimes more preferable alternative to Chapter 7. Johnathan Hicks, *Foxes Guarding the Henhouse: The Modern Best Interest of Creditors Test in Chapter 11 Reorganizations*, 5 NEV. L.J. 820, 841 (2005). Reading the "per debtor" approach into § 1129(a)(10) provides a sole dissenting creditor with the ability to block an otherwise universally-supported plan. *See In re LOOP 76, LLC*, 442 B.R. 713, 722 (Bankr. D. Ariz. 2010). TDI is composed of multiple subsidiaries and, presumably, employs a large amount of people. R. at 4. TDI controls each of the affiliated subsidiary debtors—all operating a hotel and casino except for Development's limited role as a licensee to the Agreement governing Debtors' use of the Software. R. at 4. If this Court reads the "per debtor" approach into § 1129(a)(10) and finds for Under My Thumb, the *single* objection of Under My Thumb causes a ripple effect which negatively impacts all parties involved in these Chapter 11 proceedings.

The "per plan" approach aligns with the other requirements for "cram down" under § 1129(a). 11 U.S.C. § 1129(a). Most significantly, the "per plan" approach satisfies the "best interest of creditors" test found in § 1129(a)(7), which seeks to protect an impaired creditor when the creditor acts adversely to its own interests. *See* 11 U.S.C. § 1129(a)(7); *see also* Johnathan Hicks, *Foxes Guarding the Henhouse: The Modern Best Interest of Creditors Test in Chapter 11 Reorganizations*, 5 NEV. L.J. 820, 841 (2005). Under this doctrine, a Chapter 11 reorganization plan may be successful despite the dissent of an impaired creditor. *Id.* The basic premise of § 1129(a)(7) is that a plan may be confirmed, regardless of dissenting creditors, so long as the

creditor receives *at least* what it would have received under Chapter 7 liquidation proceedings. *Id.*

Here, Under My Thumb receives a 55% pro rata distribution under the Plan, which passes the bar set by § 1129(a)(7). R. at 7. Even if this Court interprets the "per debtor" approach to apply under § 1129(a)(10), the result is the same. The best interest of Under My Thumb is to receive the 55% pro rata distribution rather than the far lesser amount recoverable under a Chapter 7 liquidation proceeding. *See* R. at 7. Under My Thumb is *not* unduly prejudiced under the proposed plan, as shown by its lack of objection on numerous other grounds. R. at 30. Although Under My Thumb is impaired by nature of being a creditor in a bankruptcy proceeding, Under My Thumb is not unduly impaired as evidenced by its favorable view of the Plan at the outset of negotiations. R. at 7. In short, Under My Thumb objects solely on a basis that is wholly unrelated to bankruptcy proceedings. Thus, the best interest of creditors test is satisfied, and this Court should adopt the "per plan" approach to better effectuate the best interest of the creditor here.

In conclusion, § 1129(a)(10) must be interpreted using the "per plan" approach. The language of § 1129(a)(10) is unambiguous and further unimpaired by § 102(7). Section 1129(a)(10) is merely a technical requirement for confirmation and does not afford any substantive rights to a creditor. Additionally, the "per plan" approach is better suited to enable the rehabilitation and reorganization process under Chapter 11 bankruptcy proceedings, maintaining consistency with the overall purpose and scheme of the Bankruptcy Code in general. In sum, a primary goal of this bankruptcy proceeding is to allow the continued operation of the business and this Court should therefore reverse the decision of the Thirteenth Circuit.

CONCLUSION

For these reasons, Debtors respectfully request this Court reverse the judgment of the Court of Appeals for the Thirteenth Circuit.

APPENDIX A

11 U.S.C. § 102(7)

Rules of Construction.

. . . .

(7) the singular includes the plural

. . . .

APPENDIX B

11 U.S.C. § 365(c)

Executory Contracts and Unexpired Leases

. . . .

(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—

(c)(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

(c)(1)(B) such party does not consent to such assumption or assignment.

. . . .

(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract ro lease that is conditioned on—

(e)(1)(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(e)(1)(B) the commencement of a case under this title; or

(e)(1)(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(e)(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(e)(2)(A)(i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(e)(2)(A)(ii) such party does not consent to such assumption or assignment; or

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

. . . .

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

(f)(2)(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(f)(2)(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.

APPENDIX C

11 U.S.C. § 1104

Appointment of trustee or examiner

(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee . . .

. . . .

APPENDIX D

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 E

11 U.S.C. § 1122(b)

Classification of claims or interests

. . . .

(b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

APPENDIX F

11 U.S.C. § 1129(a)

Confirmation of plan

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

. . . .

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

(a)(7)(A) each holder of a claim or interest of such class—

(a)(7)(A)(i) has accepted the plan; or

(a)(7)(A)(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;

. . . .

(a)(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.

(a)(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.