No. 19-1004

IN THE

Supreme Court of the United States

OCTOBER TERM, 2019

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

Debtor,

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 R17
Counsel for Respondent

Oral Argument Requested

QUESTION PRESENTED

I. Whether § 365(c) prevents a debtor in possession from assuming an executory contract without consent of the non-debtor party when applicable law prohibits assignment of that contract to an entity other than the debtor in possession?

II. Whether § 1129(a)(10) requires acceptance from at least one class of creditor claims for each debtor when such class of claims is impaired under a jointly administered multi-debtor plan?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

UNITED STATES CIRCUIT COURT OF APPEALS

BANKRUPTCY APPELLATE PANEL CASES

UNITED STATES DISTRICT COURT AND BANKRUPTCY COURT CASES

STATUTES & RULES

LEGISLATIVE MATERIALS

SECONDARY SOURCES

OPINIONS BELOW

The United States Bankruptcy Court for the District of Moot overruled both of Under My Thumb's objections, allowing Development to assume the contract and confirming the Plan. R at 8. On appeal, the Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court on both issues. *Id.* at 9. Under My Thumb appealed that ruling to the United States Court of Appeals for the Thirteenth Circuit which reversed the decision of the bankruptcy appellate court on both issues. *Id*. The Debtors now appeal both issues to this Court, and this Court granted certiorari. *Id*.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS INVOLVED

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

STATEMENT OF THE CASE

Under My Thumb, Inc. ("Under My Thumb") is a leading software designer, specializing in customer loyalty and reservation programs for the hospitality industry. R. at 4. In 2008, Under My Thumb contracted with Tumbling Dice Development ("Development"), a subsidiary of Tumbling Dice, Inc. ("TDI"), to create and license Club Satisfaction's patented software system ("Software"). *Id.* TDI is a holding company formed to own a membership interest in nine wholly owned debtor-subsidiaries, ("the Debtors"), eight of which each operate a luxury casino and resort, plus Development who acts as a licensee. *Id*.

Pursuant to their non-exclusive license agreement (the "Agreement"), Under My Thumb only permitted Development to extend the benefits of the Software to its affiliated entities without Under My Thumb's written consent. *Id.* at 5. Development made timely payments under to Under My Thumb under the Agreement. *Id*. at 6. However, in 2011, Start Me Up, Inc. acquired the TDI's stock through a leveraged buy-out of $3 billion, which involved granting lenders "first priority liens" on the Debtors' assets. *Id.* Left with approximately $2.8 billion of unserviceable debt after the buy-out, the Debtors filed chapter 11 bankruptcy petitions in 2016. *Id.* The Debtors proposed a consolidated reorganization plan ("the Plan") to pay back a 55% of $120 million to their unsecured creditors, including $6 million owed to Under My Thumb, making Under My Thumb an impaired class of unsecured creditors. *Id.*

Under the Plan, Start Me Up would fund $31 million of the $66 million distribution to unsecured creditors, while Sympathy for the Devil, LP ("the Devil") would fund the rest. *Id.* 7–8. In return for its $35 million investment, the Devil would receive a 51% controlling interest in the Debtors' stock as well as several seats on TDI's board of directors. *Id.* at 8. Under My Thumb refused to consent to Development's assumption of the Agreement under § 365(c)(1) because the Devil's portfolio contains a direct competitor of Under My Thumb who has been attempting to copy Under My Thumb's Software for years. *Id*.

While the Plan called for cancellation of the existing shares and membership interest of Debtors, it issued new shares and membership interest at the same time, all without changing the overall corporate structure. *Id*. at 7. Additionally, the Plan expressly stated that "the Debtors' estates are not being substantively consolidated, and no Debtor is to become liable for the obligations of another." *Id.* Because Under My Thumb voted to reject the Plan, Development had no accepting impaired class of creditors. *Id*. Under My Thumb argued that the Plan was not confirmable under § 1129(a)(10) because no impaired class of Development's creditors voted for its acceptance. *Id.*

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit properly held that Development, as debtor in possession, cannot assume the Agreement under § 365(c) without Under My Thumb's consent where Federal patent law excuses Under My Thumb from rendering services to an entity other than Development. The plain meaning of § 365(c) conditions assumption of an executory contract on the assignability of such contract under applicable non-bankruptcy law. Federal patent law excuses Under My Thumb from rendering performance of its software to a party other than Development. Therefore, because Under My Thumb does not consent to Development's assumption of the Agreement, § 365(c) prevents Development's assumption of the Agreement.

The plain language in § 365(c) creates what is called the "hypothetical test," which makes assumption of an executory contract dependent on the contract's ability to be assigned under applicable law. Use of the term trustee in this statute applies to this case involving a debtor in possession because the Code defines Trustee as including a debtor in possession in a chapter 11 case. The term "or" in the phrase "assume or assign" must have its ordinary, disjunctive meaning in order to give effect to the debtor in possession's distinct choice to either assume or assign a contract. The hypothetical test interpretation seamlessly interacts with neighboring provisions § 365(e) and §365(f) by providing a narrow policy exception to free assignability for contracts where identity is material.

Because of the strong presumption for the plain language when a statute is unambiguous, neither legislative history nor policy overturns the hypothetical test. Legislative history is generally a less reliable source of Congressional intent than the plain language of a statute, and the scant legislative material for § 365(c) is particularly unreliable. Section 365(c)'s policy of preventing a non-debtor party from becoming party to an executory contract with an unintended party is served in this case. If Development assumes the Agreement, Under My Thumb would be required to render services to Development, as partially owned and operated by the Devil. However, even if the Court disagrees with this policy, it is not free to override the plain language because the hypothetical test's policy is at least plausible, thus not absurd.

The Thirteenth Circuit properly held that, because § 1129(a)(10) is a substantive right afforded to impaired creditor classes, the statute must be interpreted under the per-debtor approach. The per-debtor approach requires that at least one impaired class of claims vote to affirm to plan from each debtor in a chapter 11 reorganization plan. Under My Thumb was an impaired creditor class of Development because it stood to gain only 55% of its investment under the Plan. The Bankruptcy Code therefore requires that Under My Thumb confirm the Plan or become an unimpaired class before the Plan can either be confirmed or enforced by the bankruptcy court. Because Under My Thumb did not vote to accept the Plan as the only impaired creditor class of Development, the Plan failed to satisfy the requirement of the impaired accepting class rule pursuant to § 1129(a)(10).

Debtors, such as TDI, must maintain their separate corporate identity before and after the chapter 11 bankruptcy process pursuant to § 349 of the Code. The only exception to this rule is when entities bargain for substantive consolidation at the on-set of negotiations. Such bargaining did not happen in this case because the Plan expressly rejected substantive consolidation in favor of joint administration, and no other Debtor became liable for the obligations of another. Therefore, the Thirteenth Circuit, by respecting state corporate law and the Code, correctly rejected the per-plan interpretation of § 1129(a)(10) because such an interpretation results in de facto substantive consolidation

ARGUMENT

I. A DEBTOR IN POSSESSION CANNOT ASSUME AN EXECUTORY CONTRACT WHICH APPLICABLE LAW WOULD PROHIBIT FROM ASSIGNING WITHOUT CONSENT OF THE NON-DEBTOR.

Among the greatest achievements of modern bankruptcy law is the chapter 11 reorganization because it allows the debtor to repay creditors without liquidating an otherwise profitable business. *See United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203 (1983) ("Congress presumed that the assets of a debtor would be more valuable if used in a rehabilitated business than if 'sold for scrap.'"). The code accomplishes this in part by allowing the trustee—or debtor in possession in cases where no trustee is assigned—to manage property of the estate created by 11 U.S.C. § 541. Property of the estate includes executory contracts, which are generally defined as ongoing agreements between two parties where obligations are still due. *See Olah v. Baird (In re Baird)*, 567 F.3d 1207, 1211 (10th Cir. 2009) (citations omitted) ("[T]he obligation of both the bankrupt and the other party are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other."). Because the value of an executory contract varies depending on the circumstances, the debtor in possession is given options to either assume, assign, or reject an executory contract. *See* 11 U.S.C. § 365(a).

Before the trustee can assume an executory contract, the trustee must first comply with the requirements in §§ 365(b), (c), and (d). *See id.* One reason for this is to ensure adequate protection for non-debtor parties by requiring compliance with § 365(b). *See* 11 U.S.C. § 365(b) (requiring "adequate protection" and "assurance of future performance" before allowing a debtor in breach to assume an executory contract). The code also makes assumption and assignment of contracts relatively easy for the trustee because doing so facilitates reorganization. *See RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257, 268 (4th Cir. 2004). For example, 11 U.S.C. § 365(e) creates an *ipso facto* clause restriction which inhibits the parties from terminating or modifying the contract merely because one party files a petition for bankruptcy. § 365(e). Likewise, § 365(f) prohibits parties from making assignment restrictions contingent on a bankruptcy petition. *See* § 365(f). Because allowing the trustee to freely assume and assign contracts advances a fundamental policy for chapter 11 reorganizations, the Code strikes a balance between allowing free assignability and protecting creditors. *See In re Lil' Things*, 220 B.R. 538, 591 (Bankr. N.D. Tex. 1998) ("[Section] 365(c)(1)(A) acts to balance the rights of third parties who contracted with the debtor and whose rights may be prejudiced by having the contract or lease performed by an entity with which they did not enter into the agreement.").

While §§ 365(e) & (f) regulate the parties themselves from restricting assumption and assignment, § 365(c) provides a narrow but important exception to these rules when "applicable law excuses a party, other than the debtor, from rendering performance to a party other than the debtor or debtor in possession." § 365(c). In this case, federal patent law excuses Under My Thumb from rendering performance to any party other than Development. *See Everex Systems, Inc. v. Cadtrak Corp.*, 89 F.3d 673, 680 (9th Cir. 1996). Federal patent law restricts assignment without the consent of the patent holder because free assignability "would undermine the reward that encourages invention . . . ." *Id.* ("[A] party seeking to use the patented invention could either seek a license from the patent holder or seek an assignment of an existing patent license from a licensee."). Despite the general bankruptcy policy of allowing the debtor in possession to freely assume and assign, § 365(c) creates this exception to prevent the bankruptcy proceeding from forcing a non-debtor party into an executory contract with an unintended party. *See Lil' Things*, 220 B.R. at 591 (noting the importance of the exception "under § 365(c)(1)(A), where the identity of the party rendering performance under the contract is material to the contract, and the contract is non-delegable under applicable non-bankruptcy law."). Therefore, Development may not assume the agreement without Under My Thumb's consent.

A. The plain language of § 365(c) only permits the debtor in possession to assume an executory contract without consent of the non-debtor party if applicable law would allow assignment of that contract.

Section 365(c) unambiguously conditions assumption of an executory contract on assignability of that contract under applicable law. Section 365(c) states that "[t]he trustee may not assume or assign any executory contract [. . .] if applicable law excuses a party, other than the debtor, to such contract . . . from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession." § 365(c). Simply put, "if a contract could not be assigned under applicable nonbankruptcy law, it may not be assumed or assigned by the trustee [or the DIP]." *Cinicola v. Scharffenberger*, 248 F.3d 110, 121 (3d Cir. 1996). This interpretation follows the literal language of the statute, which creates a "hypothetical test" to determine whether a debtor in possession may assume an executory contract. *Perlman v.*

Catapult Entertainment (In re Catapult Entertainment), 165 F.3d 747, 750 (9th Cir. 1999) ("The literal language of § 365(c)(1) is thus said to establish a 'hypothetical test'"). In this way, § 365(c) is unambiguous because it is not capable of more than one interpretation based on the ordinary meaning of the words in the statute. *See Sunterra Corp.*, 361 F.3d at 270.

Despite § 365(c) having apparent meaning based on the plain language, a minority of circuits reject this interpretation because of its policy implications of restricting free assignability. *See In re Access Beyond Techs., Inc.*, 237 B.R. 32, 48 (Bankr. D. Del. 1999); *see also ex. Summit Inv. and Dev. Corp. v. Leroux*, 69 F.3d 608, 612 (1st Cir. 1995). Courts have called this interpretation the "actual test" because it looks to whether the intent of the party is to assign the contract before allowing assumption, despite the fact that nothing in the statute creates a *mens rea* requirement. *See In re Planet Hollywood Int'l, Inc.*, 2000 U.S. Dist. LEXIS 23309 at *13 ("Criticized as ignoring the plain language of Section 365(c)(1), some courts have applied an 'actual test' to allow assumption of contracts which are non-assignable under the applicable law if the debtor has no intention of assigning the contract."). However, this interpretation directly conflicts with decades of Supreme Court authority on statutory construction by departing from the plain language. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) ("plain meaning should be conclusive except in the 'rare cases [in which] the literal application of [the] statute will produce a result demonstrably at odds with the intentions of its drafters.'") (quoting *Griffin v. Oceanic Contractors, Inc*., 458 U.S. 564, 571 (1982)); *N.C.P. Marketing Grp. Inc. v. BG Star Prods. Inc.*, 129 U.S. 1577 (2009) (denying cert.) (noting "fidelity to the Bankruptcy Code's text" as an advantage for the hypothetical test). Therefore, this Court should apply the hypothetical test created by § 365(c)'s plain language.

1. *Section 365(c) applies to the debtor in possession because the code makes the authority of the "trustee" synonymous with that of the "debtor in possession."*

While on its face, § 365(c) applies to the trustee, the Code uses "trustee" interchangeably with "debtor in possession." *In re Cybergenics Corp*. 226 F.3d 237, 243 (3rd Cir. 2000) (noting that trustee and debtor in possession are "essentially interchangeable in the bankruptcy code"); Rule 9001(11) ("Trustee includes a debtor in possession in a chapter 11 case"). The Code defines the role of trustee in section § 1106, giving various powers to handle cases where the trustee is operating instead of the debtor. *See* 11 U.S.C. § 1106. However, not every case has a trustee, and in fact, the majority in chapter 11 are debtor in possession cases. *See SunTrust Bank v. Matson (In re CHN Constr., LLC)*, 531 B.R. 126, 128 (Bankr. E.D. Va. 2015) ("In most chapter 11 cases, the debtor will remain in possession of its property and operate the debtor's business as the fiduciary of the bankruptcy estate). Therefore, § 1107 makes provisions governing the "trustee" also applicable to a "debtor in possession" by giving the same responsibilities powers and limitations to each. *See* § 1107.

Some courts have refused to apply § 365(c) to a debtor in possession, reasoning that if two different terms in the statute must have different meanings, then trustee and debtor in possession cannot be synonymous. *See In re Footstar Inc*, 323 B.R. 566, 570 (Bankr. S.D.N.Y. 2005) (holding that section 365(c) limits a *trustee's* ability to assume a contract but does not limit a debtor in possession's ability to assume) (emphasis in original); *see generally In re Adelphia Communs. Corp.*, 359 B.R. 65 (Bankr. S.D.N.Y. 2007) (same). This argument relies on the idea that different terms in the same provision must have different meanings in order to avoid rendering any term superfluous. *See Footstar*, 323 B.R. at 571. However, this argument misapplies the superfluity canon and inexplicably omits decades of Supreme Court precedent construing the two as interchangeable. *See generally*, *Florida Dep't of Rev. v. Picadilly*

Cafeterias, Inc., 554 U.S. 33 (2008) (citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 528 (holding that "§ 365 permits a *debtor-in-possession* to reject a collective-bargaining agreement like any other executory contract.")) (emphasis added).

The purpose of the superfluity canon is for effect to be given to every word of a statute. *See Abney v. Fulton County (In re Fulton Air Service, Inc.)*, 34 Bankr. 568, 572 (Bankr. N.D. Ga. 1983) ("effect is to be given, if possible, to every word of a statute.") (citing *United States v. Menasche*, 348 U.S. 528, 538 (1955)). Use of the word "trustee" in § 365(c) does not render "debtor in possession" superfluous because the terms do have different meaning. Section 1107 recognizes that the debtor in possession does not have "the right of compensation under § 330" and exempts duties, such as investigation of the debtor, under 1106(a)(2), (3), and (4). Even though "trustee" and "debtor in possession" take on the same function, one does not render the other superfluous because each term still has different meaning under the code. *See* § 1101(1). Thus, the debtor in possession is both distinct for purposes of avoiding superfluity, and yet similar enough in function to be used interchangeably in § 365(c).

Furthermore, the Supreme Court has unwaveringly construed trustee as interchangeable with debtor in possession in the Code. *See N.C.P. Mktg. Group, Inc. v. BG Star Prods.*, 556 U.S. 1145 (2009) ("Section 365 gives the debtor-in-possession the power to assume."); *see also Bildisco & Bildisco*, 465 U.S. at 529 (applying § 365(g) to allow a debtor in possession to reject a collective bargaining agreement). The Bankruptcy Code is a complete statutory scheme in which the terms used are intended to have consistent meaning throughout. *See Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (reading the same term used in different parts of the same Act to have the same meaning). If the Court construes trustee to apply to a debtor in possession in one part of the Code, then it must apply to other sections because the Code requires consistent interpretation throughout. *See id.* Therefore, the Court should continue to recognize that trustee is interchangeable with debtor in possession.

2. *The term "or" in § 365(c) must convey disjunctive meaning to give the debtor in possession the choice to either "assume" or "assign."*

Assumption and assignment are related, yet distinct concepts in the Bankruptcy Code. Rather than conflating the two, § 365(c) treats each term differently by separating them with the disjunctive term "or" in recognition of each term's distinct meaning. *See Sunterra Corp.*, 361 F.3d at 267. Assumption is when the debtor steps back into the contract's rights and obligations, while assignment is delegating the contract rights to another party. *See* BLACK'S LAW DICTIONARY (10th ed. 2014) ("The act of taking [. . .] for or on oneself."); *id.* ("The transfer of rights or property."). The ordinary meaning of the term "or" in § 365(c) recognizes the difference between these two terms, thereby recognizing the debtor in possession's choice to either assume the contract for itself or assign the contract to another party. *See United States v. Woods*, 571 U.S. 31, 45–46 (2013) ("While [or] can sometimes introduce an appositive — a word or phrase that is synonymous with what precedes it ('Vienna or Wien,' 'Batman or the Caped Crusader') — its ordinary use is almost always disjunctive, that is, the words it connects are to 'be given separate meanings.'").

In order to assign a contract, a debtor in possession must assume the contract. *See* § 365(f)(2)(A); *see also* § 365(f)(1) ("Except as provided in subsections (b) and (c) [. . .]"). Section 365(c) requires consent from the non-debtor party when applicable law excuses rendering or accepting performance to an entity other than the debtor or debtor in possession. *See* § 365(c). Some courts contend that this literal interpretation of the statute makes § 365(c) a "statute at war with itself." *Catapult Entertainment*, 165 F.3d at 751 (citing *In re Cardinal Indus.*, 116 B.R. 964, 977 (Bankr. S.D. Ohio 1990) (finding the phrase "or assign" to be surplusage because assumption is a prerequisite to assignment). While the requirements for assignment are the same as assumption under § 365(c), "assign" is not superfluous because it recognizes the choice of the debtor in possession to exercise either option. *Sunterra Corp.*, 361 F.3d at 267. On the contrary, construing "or" as "and" effectively erases the term "assume" because conflating it with "assign" would render every assumption an assignment, thus erasing the choice. *Id.* at 269 ("Under the actual test, the disjunctive "or" of § 365(c) is read as the conjunctive "and," and the term "assume" is effectively read out of the Statute."). Therefore, "or" must be given its ordinary disjunctive meaning in section 365(c) to preserve the choice between two options.

3. *The plain language of § 365(c) does not conflict with §§ 365(f) and (e).*

Just as the literal interpretation does not makes § 365(c) a provision "at war with itself", neither is it "at war with its neighboring provisions." *Catapult Entertainment*, 165 F.3d at 751. Some courts contend § 365(c) conflicts with neighboring provisions in § 365 to the point that its plain language should be interpreted to mean something other than the ordinary meaning. *See Breeden v. Catron (In re Catron)*, 158 B.R. 629, 637 (E.D. Va. 1993) ("Conflict between subsections (c) and (f) of § 365 is inescapable because of the contradictory language found at the beginning of § 365(f)(1)"). However, no conflict exists between § 365(c) and §§ 365(e) & (f) because the provisions work together harmoniously to balance various interests of the parties.

a. No conflict exists with § 365(e).

Section 365(e) consists of two parts—a rule and an exception. Section 365(e)(1) is known as the *ipso facto* provision because it states that parties may not terminate or modify an executory contract when one party files a petition for bankruptcy. *See Moe's Franchisor, LLC v. Taylor Inv. Partners II, LLC (In re Taylor Inv. Partners II, LLC)*, 533 B.R. 837, 840 (Bankr. N.D. Ga.

2015). In other words, the court will disregard a contractual provision that excuses performance solely because one party files for bankruptcy. *See id.* The purpose of this provision is to "protect the benefit of the bargain" for the parties by preventing dissolution of an executory contract through a contract clause. *See Institute Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st. Cir. 1997) (citing *Leroux*, 69 F.3d at 612–13) (citations omitted).

Some courts have found that the policy behind the *ipso facto* provision conflicts with § 365(c) because the plain language of § 365(c) excuses performance of certain executory contracts under applicable law. *See In re Jacobsen*, 465 B.R. 102, 106 (Bankr. N.D. Miss. 2011). However, § 365(e)(2) is the exception to the *ipso facto* provision, and it states that "[p]aragraph (1) [. . .] does not apply [. . .] if – (A)(i) applicable law excuses a party, other than the debtor, to contract to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract [. . .]." Because of the similarity in language between §§ 365(c)(1)(A) and 365(e)(2)(A)(i), courts have noted that "[i]f § 365(c)(1) is applicable, so is § 365(e)(2). *Allentown Ambassadors, Inc. v. Northeast Am. Baseball, LLC (In re Allentown Ambassadors, Inc.)*, 361 B.R. 422, 448 (Bankr. E.D. Pa. 2007) ("Once § 365(e)(2) is applicable, it overrides § 365(e)(1)."). Thus, courts have easily dismissed the allegation that section 365(c) conflicts with the policy of § 365(e) because "§ 365(e)(2)(A) expressly revives 'ipso facto' clauses in precisely the same executory contracts that fall within the scope of § 365(c)(1)." *Catapult Entertainment*, 165 F.3d at 753 n.6. Therefore, § 365(c) does not conflict with § 365(e) because § 365(c) is coextensive with the exception found in § 365(e)(2).

b. No conflict exists with § 365(f).

Section 365(f) restricts anti-alienation clauses in executory contracts, and § 365(c) creates a narrow exception. *See Scharffenberger*, 248 F.3d at 120. The policy of § 365(f)(1) allows the debtor in possession to realize the full value of assets in the debtor's estate by restricting parties from making anti-alienation provisions in executory contracts. *See In re Headquarters Dodge, Inc.*, 13 F.3d 674, 682 (3d Cir. 1994). The caveat to that policy is "the authority of the trustee or debtor in possession to assume a contract under § 365(a) and/or assign a contract under § 365(f)(1) is expressly limited by the exceptions set forth in Section 365(c)." *In re Planet Hollywood Int'l, Inc.*, 2000 U.S. Dist. LEXIS 23309 at *12 (D. Del. Nov. 21, 2000). Thus, § 365(c) takes priority over § 365(f).

Some proponents of the actual test have found these provisions to conflict because the plain meaning of § 365(c) would render § 365(f) superfluous. *See Sunterra*, 361 F.3d at 266. Section 365(f) seems to give the right of assumption to a debtor in possession "notwithstanding applicable law," while 365(c) seems to limit assumption subject to "applicable law." *See Schick*, 235 B.R. 318, 323 (Bankr. S.D.N.Y. 1999). However, no conflict exists because "applicable law" applies to law of different scopes in the context of each respective section. *In re Magness*, 972 F.2d 689, 695 (6th Cir. 1992) ("[A] careful reading reveals that each subsection recognizes an 'applicable law' of markedly different scope."). The applicable law in the context of § 365(f) refers to state law that would permit parties to write an anti-assignment clause in their contract. *See id.* at 698 (Guy, J. concurring) ("Section 365(f) is considered the 'general rule' and, by nullifying anti-assignment provisions in private contracts and in 'applicable law,' embodies the policy favoring the alienability of executory contracts."). On the other hand, applicable law in § 365(c) refers to "nonbankruptcy law that excuses the nondebtor from accepting performance from or rendering performance to anyone other than the debtor." *In re Neuhoff Farms, Inc.*, 258 B.R. 343, 349 (Bankr. E.D.N.C. 2000) (citing *Schick*, 235 B.R. 318, 323 (Bankr. S.D.N.Y. 1999) (citations omitted)).

The difference between applicable law in § 365(c) and § 365(f) is evident through the facts in this case. The general rule in § 365(f) would have allowed Development to assign the executory contract, notwithstanding the contract provision that "broadly prohibited the Debtors from assigning or sublicensing their rights to others without Under My Thumb's express written consent." R. at 4. Had § 365(f)(1) been the final word, Under My Thumb would appear to have no objection to Development's assumption or assignment of the contract because § 365(f) applies "notwithstanding a provision in an executory contract." § 365(f). However, the exception to this rule in § 365(c) steps in to prohibit assumption or assignment of the executory contract where federal patent law prohibits assignment of the contract to a third party. Thus, § 365(c) prohibits assumption and assignment in this case "whether or not such contract or lease prohibits or restricts assignment [. . .]". § 365(c)(1)(A). Therefore, the plain language of § 365(c) does not conflict with § 365(f).

B. The hypothetical test serves Congress's policy in § 365(c) of protecting parties to executory contracts when the identity of a party is material.

Congress's intent controls policy. *See Hartford Underwriters v. Union Planters Bank*, 530 U.S. 1, 13–14 (2000) ("Achieving a better policy outcome—if what petitioner urges is that -- is a task for Congress, not the courts."). The plain language of a statute reveals Congress's intent. *See Patterson v. Shumate*, 504 U.S. 753, 757 (1992) ("[T]he plain language of the Bankruptcy Code . . . is our determinant."). When language of a statute is clear, the court cannot rely on legislative material to depart from the intent expressed in the statute because doing so would undermine the law as Congress enacted it. *See Patterson*, 504 U.S. at 761 ("Although courts 'appropriately may refer to a statute's legislative history to resolve statutory ambiguity,' the clarity of the statutory language at issue in this case obviates the need for any such inquiry."). For the same reason, the court cannot depart from the plain language to further a different policy than that which Congress enacts. *See Union Planters Bank*, 530 U.S. at 13–14. Even if the court could depart from the intent of Congress, doing so in this case is imprudent because the policy furthered by the literal interpretation of § 365(c) protects parties in executory contracts when identity of a party is material. *See In re Magness*, 972 F.2d at 699–700 (Guy, J. concurring).

1. *The plain language of § 365(c) trumps legislative material.*

Legislative history is not the law—"[i]t is only when a statute is ambiguous that a court is permitted to look behind the words to attempt to derive the legislature's intent." *Patterson*, 504 U.S. at 761. Legislative history is rightly ignored when the Court can decide the meaning from the face of the statute because legislative history often obscures rather than illuminates the meaning. Legislative history is merely an opinion of some members of Congress and does not always accurately reflect the political process and final result of the legislation. *See Sigmon Coal v. Apfel*, 226 F.3d 291, 306 (4th Cir. 2000) (declining to let legislative history to displace the plain meaning of the statute because the history consisted merely of a statement made by a single member of Congress).

For § 365(c) there is no legislative history in the traditional sense. *See Cardinal*, 116 B.R. at 978 ("Importantly, § 365, as it now reads, was added to the Bankruptcy Code in 1984 (the '1984 Act'), and there is no relevant legislative history for the 1984 Act."). Some courts contend, however, that "the 1984 amendments had their genesis in a 1980 House amendment to an earlier Senate technical corrections bill." *Sunterra Corp.*, 361 F.3d at 270. That amendment "was accompanied by 'a relatively obscure committee report.'" *Catapult Entertainment*, 165 F.3d at 754 (quoting David G. Epstein, et al., Bankruptcy § 5–15 (1992)). It states that the 1980 proposal would allow a debtor in possession to assume an executory contract under a personal service contract if the service will be the same as if petition had not been filed. *See* H.R. Rep. No. 1195, 96th Cong., 2d Sess. § 27(b) (1980).

This opinion of a single House Committee carries very little weight for the plain meaning of § 365(c) in its current form because it reflects on the purpose of the law in the context of an unenacted draft proposal. *See United States v. Morison*, 844 F.2d 1057, 1064 (4th Cir. 1988) ("[T]he 1980 Report relates to a 1980 proposal, which was never enacted, rather than to the 1984 Act; and we have held that courts are not free to replace a statute's plain meaning with 'unenacted legislative intent.'"). Furthermore, Congress as a body is at least complicit in allowing the hypothetical test to go forward because it has failed to amend § 365(c) in over thirty years since the first court applied the hypothetical test. For these reasons, the Ninth Circuit correctly stated that the 1980 Report is not "the sort of clear indication of contrary intent that would overcome the unambiguous language of subsection (c)(1)." *Catapult Entertainment*, 165 F.3d at 754. Therefore, this Court should reject the legislative history in general, and this House Committee report in particular, when the plain language of § 365(c) is clear on its face.

2. *The hypothetical test protects a non-debtor's executory contract interests when identity of the party is material.*

Executory contracts arise in various contexts, including personal services, government contracts, and non-exclusive licensing agreements to patented technology. *See Metro. Airports Comm'n. v. N.W. Airlines, Inc. (In re Midway Airlines, Inc.)*, 6 F.3d 492, 495 (7th Cir. 1993) ("Since the statutory language does not limit the applicability of § 365(c) exclusively to 'personal service contracts,' we agree with those circuits holding that it need not be so constrained."). One common element in these types of contracts is that identity of the parties is an essential element. *See Catapult Entertainment*, 165 F.3d at 752 ("Only if the law prohibits assignment on the rationale that the identity of the contracting party is material to the agreement will subsection (c)(1) rescue it."). A textbook example of this is that a non-debtor party who contracts for Luciano Pavarotti to sing "could not be compelled to accept performance from pop-star Michael Jackson in the event of the great tenor's bankruptcy." *Midway Airlines*, 6 F.3d at 495. In this way, § 365(c) protects non-debtor parties by requiring consent when applicable law would excuse the non-debtor party from rendering or accepting performance from anyone other than the debtor or debtor in possession.

In the context of non-exclusive licensing for patented technology, identity of the parties to the contract is also material. Patent license agreements are personal to the licensee and not assignable unless expressly made so in the agreement because federal patent policy seeks to "foster and reward invention." *In re Access Beyond Techs., Inc.*, 237 B.R. 32, 45 (Bankr. D. Del. 1999). Federal patent law encourages innovation by "allowing a patent holder to choose who, if anyone, may use the patented invention" for seventeen years. *Id.* When the patent holder chooses to assign rights, the patent holder retains value by limiting assignability to licenses in "which the patent holder expressly agrees to assignment." *Id*. Thus, "[f]ree assignability of a non-exclusive patent license without the consent of the patent holder is inconsistent with patent monopoly" because it would take away the patent holder's control over the license. *In re CFLC, Inc.*, 174 B.R. 119, 123 (N.D. Cal. 1994), aff'd sub nom., *Everex Systems, Inc. v. Cadtrak Corp. (In re CFLC, Inc.)*, 89 F.3d 673 (9th Cir. 1996).

Section 365(c)(1)(A) protects when assignment would be prohibited by applicable law because identity of the parties is material to those contracts are material. *See Lil' Things*, 220 B.R. at 591. The current balance interests allows free assignability for most contracts—the narrow exception being when applicable law excuses performance, and the non-debtor refuses consent. *See* § 365(c). Proponents of the actual test argue that this balance would produce an absurd result because it would mean that Luciano could not assume his own contract for the sole reason of filing bankruptcy. *See RCC Tech. Corp. v. Sunterra Corp*., 287 B.R. 864, 866 (D. Md. 2003). However, the hypothetical test's balance makes sense by including a restriction on assumption because it anticipates that parties' ownership and control might change in the course of a bankruptcy proceeding. *See contra, Institute Pasteur v. Cambridge Biotech Corp*. 104 F.3d 489, 491 (allowing assumption of a non-exclusive licensing agreement for patented technology under the actual test even when plan included stock sale to a major competitor). However, this result directly conflicts with the intended policy of § 365(c). *See* 3 Collier on Bankruptcy P 365.06[1][d][i] (Lawrence P. King ed., 15th ed. 1999.) ("365(c) was intended to relieve the nondebtor party . . . from having to deal with a party other than the debtor in situations in which, under nonbankruptcy law, the nondebtor party would be relieved of any obligation to continue such dealings."). Thus, § 365(c) does not force parties together where applicable law would let them be separate without each party's consent.

When Under My Thumb and Development entered into the Agreement, the Operating Directors "wholly owned" the nine debtor subsidiaries. R. at 4. But now, the Devil plans to have a majority shareholder interest and several seats on TDI's the newly formed board of directors. *Id.* at 7–8. Given the Devil's ownership of a direct business competitor of Under My Thumb, the Devil's acquisition of TDI constitutes a material change to the contract because Under My Thumb would never have agreed to this deal with the Devil. *See id.* at 8. Thus, Development's assumption of the agreement would change the essential identity of the entity performing the services under the contract, and Under My Thumb is prejudiced because the essential bargain would be affected by Development's assumption.

Even if the Court disagrees with the policy that the literal interpretation of § 365(c) creates, the Supreme Court has repeatedly emphasized that Congress is the policymaker—not the courts. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 13 (2000) (citing *Kawaauhau v. Geiger*, 523 U.S. 57, 64 (1998); *United States v. Noland*, 517 U.S. 535, 541–42 (1996); *Union Bank v. Wolas*, 502 U.S. 151, 162 (1991)). Any modification of a statutory provision to achieve a preferable policy outcome is a task reserved to Congress as the legislative body. *See Union Planters Bank*, 530 U.S. at 13. Regardless if it likes the result, the Court is bound by the policy set forth by the plain meaning of the statute. *See id.*

Proponents of the actual test rely on a narrow exception to application of a statute's plain language–absurdity. *See Sunterra Corp.*, 361 F.3d at 265 ("when literal application of the statutory language at issue results in an outcome that can truly be characterized as absurd, i.e., that is so gross as to shock the general moral or common sense . . . ."). This exception to the Plain Meaning Rule "[is], and should be, exceptionally rare" because it is an override of Congressional authority. *Hillman v. IRS*, 263 F.3d 338, 342 (4th Cir. 2001) (quoting *Sigmon Coal v. Apfel*, 226 F.3d 291, 304 (4th Cir. 2000)). However, a policy is not absurd even when it might produce an anomalous result so long as a plausible explanation exists. *See Sigmon Coal*, 226 F.3d at 308. The policy of protecting non-debtor parties from assumption of an executory contract by a debtor in possession whose identity has changed control is plausible because "Congress did not sacrifice every right of a nondebtor party to the reorganization process, and that courts should not assume that 'sections of the Bankruptcy Code unfavorable to the debtor were enacted in error.'" *Sunterra Corp.*, 361 F.3d at 268. Therefore, because the hypothetical test's policy has practical application, particularly in this case, the Court is bound by the plain language of § 365(c).

II. CONFIRMATION OF A MULTI-DEBTOR PLAN REQUIRES ACCEPTANCE FROM AT LEAST ONE IMPAIRED CLASS OF CLAIMS FROM EACH DEBTOR.

A successful chapter 11 case reincarnates the soul of the corporate debtor who will enjoy a new life, wiser, and ideally capable of one day reaching corporate Nirvana. *See In re Gary Aircraft Corp.*, 698 F.3d 775, 780 (5th Cir. 1983). Creditors, the relatives left behind, must take what they can from the remnants of the corporation's corporal form. *See id.* Bankruptcy judges, governed by the Bankruptcy Code, act as spiritual guides and comforters, dividing up the corporation's remnants to the aggrieved creditors. *See id.*

The bankruptcy judge may also deny the spiritual awakening of the corporate debtor or force the creditor who refuses to accept their losses to acquiesce through a process called cramdown. *See Dewsnup v. Timm*, 502 U.S. 410, 430 (1992) (reasoning that the Code permits "'cram-down' of [a] reorganization plan over objections of secured creditors if creditors are to receive payments equal in present value to the cash value of the collateral, and if creditors retain liens securing such payments."). Cramdown is the procedure in which the bankruptcy court approves a plan without full creditor approval. *See* 11 U.S.C. §§ 1129(b)(2)(A), 1325(a)(5). The Code has two requirements for cramdown: (1) all requirements of § 1129(a) must be met, and (2) if an impaired creditor class objects, such objection may only be overridden if the plan does not unfairly discriminate and is fair and equitable with respect to each class of claims that is impaired under the plan. *See* 11 U.S.C. § 1129(b)(1).

The concept of impairment is unique to chapter 11 cases and applies to a class of creditor claims unless the plan "leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest." 11 U.S.C. § 1124(1). In other words, "any alteration of a creditor's rights, no matter how minor, constitutes impairment." *Windsor on the River Assocs. v. Balcor Real Estate Fin. (In re Windsor on the River Assocs.)*, 7

F.3d 127, 130 (8th Cir. 1993). Section 1129(a)(10), or the impaired accepting class rule, mandates that there be at least one consenting impaired class of creditors before the bankruptcy court can confirm the plan. *See* 11 U.S.C. § 1129(a)(10) ("[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.").

Courts disagree whether the confirmation requirement under § 1129(a)(10) is satisfied from an affirmative vote from one impaired class from *any* debtor or from an impaired class from *each* debtor under a plan. *Compare JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props. (In re Transwest Resort Props.)*, 881 F.3d 724, 730 (9th Cir. 2018) (holding that "section 1129(a)(10) applies on a 'per-plan' basis.") *and In re Charter Commc'n*, 419 B.R. 221 (Bankr. S.D.N.Y. 2009) (same), *with In re Tribune Co.*, 464 B.R. 126, 183 (Bankr. D. Del. 2011) (holding that "absent substantive consolidation . . . [§ 1129(a)(10)] must be satisfied by each debtor in a joint plan."). The former interpretation is known as the "per-plan" approach, and the latter is known as the "per-debtor" approach. *See Tribune*, 464 B.R. at 180.

Impairment affords creditors the right to vote. *See* 11 U.S.C. §§ 1129(a), (f). Impaired creditor classes almost always exercise their right to vote because they are otherwise presumed to have voted in favor of a plan. *See* 11 U.S.C. § 1126(f) (impaired classes "are conclusively presumed to have accepted the plan."). This right to vote is an impaired creditor's "bargaining chip at the negotiating table, and it represents a creditor's only opportunity to stop a plan of reorganization from being pushed through the bankruptcy process." Suzanne T. Brindise, *Note and Comment: Choosing the "Per-Debtor" Approach to Plan Confirmation in Multi-Debtor Chapter 11 Proceedings*, 108 Nw. U.L. Rev. 1355, 1362-63 (2014).

The Thirteenth Circuit correctly held that the per-debtor approach best complies with the purpose of § 1129(a)(10) which is to give a debtor's plan minimal support from impaired creditors and to protect the important role voting plays in the plan confirmation process. R. at 21. The Debtors in this case argue for the adoption of the per-plan approach, but the per-plan approach ignores the doctrine of corporate separateness under state law. *See, e.g.*, *In re Internet Navigator Inc.*, 301 B.R. 1, 6 (B.A.P. 8th Cir. 2003) ("It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation . . . is not liable for the acts of its subsidiaries."). The per-debtor approach should be applied here because courts must uphold the doctrine of corporate entity separateness in jointly administered cases. *See Tribune*, 464 B.R. at 182 ("In the absence of substantive consolidation, entity separateness is fundamental.") (citation omitted).

A. The plain language of § 1129(a)(10) requires confirmation of the plan from an impaired class of claims from each debtor.

The impaired accepting class rule under § 1129(a)(10) ensures that the debtor's reorganization plan receives support from at least one impaired class of creditors by giving those creditors the power to vote for or against the plan. Courts should look to the statutory scheme of the Code to determine Congress's intent when it enacted this rule. *See Panama Ref. Co. v. Ryan*, 293 U.S. 388, 439 (1935) (Cardozo, J., dissenting) ("[T]he meaning of a statute is to be looked for, not in any single action, but in all parts together and in their relation to the end in view."). A proper interpretation of the plain language of § 1129(a)(10) includes the rule of construction that "the singular includes the plural." 11 U.S.C. § 102(7). Applying this canon to § 1129(a)(10) compels adoption of the per-debtor approach.

1. *The per-debtor approach best aligns with the plain language of § 1129(a)(10).*

Interpretation of a statue begins with the language of the statute itself. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 ("[R]esolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself.") (citation omitted). The plain language of § 1129(a)(10) provides that "[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." § 1129(a)(10). Under the rules of construction codified in the Bankruptcy Code, this statute must be read to comply with the canon that "the singular includes the plural." § 102(7). Applying this canon to § 1129(a)(10) changes its reading to "[i]f a class of claims is impaired under the *plan*s, at least one class of claims that is impaired under the *plans* has accepted the *plans*." § 1129(a)(10) (emphasis added).

Congress deemed § 102(7) as a necessary addition to the Code because it often "uses only the singular, even when the item in question most often is found in plural quantities." *See* H.R. Rep. No. 95-595, at 316 (1977), reprinted in 1978 U.S.C.C.A.N. 5964, 6273. For example, if a statute punishes a person for setting off a "rocket" within city limits, that person would be in violation of the statute whether he set off one or one-hundred rockets. Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 130 (2012). In the same way, the word "plan," read in the singular, includes the plural "plans." The debts of each debtor are often restructured under more than one plan in the context of a jointly administered case. *See Transwest*, 881 F.3d at 731 (reasoning that joint administration is a tool of convenience where "[t]here is no merging of assets and liabilities of the debtors," and "[c]reditors of each debtor continue to look to that debtor for payment of their claims.") (Friedland, J., concurring) (citation omitted). Thus, each debtor's plan must be confirmed independently to satisfy the requirements of § 1129(a)(10).

A common-sense understanding of the language of § 1129(a)(10) compels the "per-debtor" approach and has specific application in jointly administered cases. Using § 102(7), the Bankruptcy Court for the District of Delaware, an important district for corporate bankruptcy decisions, concluded that the per-plan approach failed to protect the substantive rights afforded to impaired creditors in jointly administered cases. *See Tribune*, 464 B.R. at 183 (finding that "convenience alone is not a sufficient reason to disturb the rights of impaired classes of creditors of a debtor not meeting confirmation standards."). Thus, "absent substantive consolidation or consent, [§ 1129(a)(10)] must be satisfied by each debtor in a joint plan." *Id.* at 183. Reading § 1129(a)(10) as including the word "plans," as § 102(7) instructs, not only complies with the plain language of the statute, but also respects corporate entity separateness by ensuring that creditor's claims remain distinct from claims of other creditor classes.

The *Tribune* case starts with a cynical parable: the fable of the Scorpion and the Fox who seemingly agree to cross a river, but rather than working together, the scorpion stings the fox and they both perish. *See Tribune*, 464 B.R. at 134-35. This parable reflects the often contentious nature of chapter 11 proceedings when debtors and creditors cannot agree on a plan. Among the 111 debtors and two plans in *Tribune,* neither side enjoyed support from an impaired accepting class of creditors. *Id.* at 180. The debtors' estates were also jointly administered under the two plans; each estate remained distinct and "each joint plan actually consiste[ed] of a separate plan for each Debtor." *Id.* at 182. In *Tribune* the court ruled that confirmation would ultimately require acceptance of the plans from one impaired class of claims for *each* debtor. The court applied the plain language of § 1129(a)(10) and held that confirmation would require parties to work together—lest they all perish. *Id.* at 183.

Courts that apply the per-plan approach incorrectly conclude that the application of the canon "the singular includes the plural" under § 102(7) is not dispositive. As one commenter has suggested, courts that adopt the per-plan approach are swayed not by sound statutory interpretation of § 1129(a)(10), but by the facts of the cases before them. *See* Brindise, *supra* at 1370 ("[I]n reaching its conclusion that a per-plan approach satisfied the requirement of § 1129(a)(10), the court relied on both the plain language of the statute as well as the fact that the debtors had agreed to both joint administration and substantive consolidation of their Chapter 11 proceedings."). This Court has cautioned against dismissing established canons so readily when interpreting the Code because "[the] Bankruptcy Code standardizes an expansive (and sometimes unruly) area of law, and it is our obligation to interpret the Code clearly and predictably using well established principles of statutory construction." *RadLax Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 649 (2010).

In this case, no impaired class of Development's creditors voted in favor of the plan because Under My Thumb was Development's only impaired creditor. R. at 8. The Debtors were likewise not substantively consolidated, and the Plan consisted of ten separate plans—one for each debtor. *Id.* at 19. If one impaired class were to speak for the whole, the powerful voting rights of the other impaired debtors would be ignored, and "the substantive rights of the parties would undoubtedly be altered." *Id.* In order to avoid such a result, the Thirteenth Circuit correctly held that § 1129(a)(10) "must be read, as section 102(7) allows it to be, to require the use of the per-debtor approach." *Id.*

2. *The legislative history reveals that § 1129(a)(10) serves as a powerful voting tool for creditors*.

The legislative history § 1129(a)(10) provides clear guidance of § 1129(a)(10)'s role as a significant voting power for impaired creditors. *See* 7 Collier on Bankruptcy P 1129.LH (16th 2019) ("[T]he legislative history of section 1129 is somewhat tortuous, owing in part to its importance."). Legislative history suggests that the purpose of § 1129(a)(10) is to ensure that a reorganization plan enjoys the support from at least "one actual voting class" or "one 'real' class" of creditors. *See In re Bloomingdale Partners*, 170 B.R. 984, 994 (Bankr. N.D. Ill. 1994). As one commenter suggests, Congress added § 1129(a)(10) to the Code in 1978 to address inherent inequities during single-asset real estate cases and to promote consensus among creditors for reorganization plan confirmation. *See* Michael Chaisanguanthum, *Charter: The Most Important Recent Bankruptcy Decision for Secured Creditors*, 27 Emory Bankr. Dev. J. 9, 14 (2010). Thus, the overall purpose of §1129(a)(10) is to give impaired creditors a vote to either consent or dissent dependent on their interests as individual creditors. Therefore, § 1129(a)(10) operates as a powerful voting right and important safeguard from potentially abusive cramdown practices by a debtor, rather than merely serving as a technical requirement as the dissent in the Thirteenth Circuit implies. R. at 29.

3. *The per-debtor approach best aligns with the comprehensive scheme of § 1129(a)*.

The provisions of the Code that serve as a safeguard against abusive cramdown practices only work if read in conjunction with each other. Courts must conduct an *in pari materia* analysis of § 1129(a)(10) to determine whether it compels the per-plan or per-debtor interpretation. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (The "cardinal rule" of statutory construction is that "a statute is to be read as a whole, since the meaning of the statutory language, plain or not, depends on context.”). A review of § 1129(a)(10) in conjunction with the other subsections of § 1129(a) compel this Court to adopt the per-debtor interpretation.

First, § 1129(a)(3) mandates that a plan be “proposed in good faith and not by any means forbidden by law.” 11 U.S.C. § 1129(a)(3). This good faith requirement applies to *every* debtor under a Chapter 11 plan—especially in a jointly administered plan where corporate entities must remain separate once the case is dismissed. *See* 11 U.S.C. § 349 (governing the effect of dismissal). Section 1129(a)(3) would not be satisfied unless each individual debtor met the good faith requirement. *See Tribune*, 464 B.R. at 183. The placement of § 1129(a)(3) in the list of confirmation requirements “signifies Congress’s intent that there be some check on the mechanical requirements found in other subsections of section 1129.” 7 Collier on Bankruptcy P 1129.02 (16th 2019). To satisfy the good faith requirement, the plan must “fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code.” *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 214 (3d Cir. 2004) (citation omitted.) The good faith requirement provides a check on a debtor’s intentional impairment of claims in the same way that § 1129(a)(10) prevents a plan from cramdown absent impaired creditor affirmation. *See In re Greate Bay Hotel & Casino, Inc.*, 251 BR 213, 240 (“If an impaired class accepts the plan, the requirement of § 1129(a)(10) is satisfied. Of course, the classification and treatment of classes of claims is always subject to the good faith requirements under § 1129(a)(3).”). Thus, if this Court applies § 1129(a)(10) under the per-plan approach, the good faith requirement check is moot because a debtor could always falsely impair a class for gerrymandering purposes.

The rights afforded to each creditor under § 1129(a)(7) are unduly infringed if § 1129(a)(10) is applied on a per-plan basis. Section 1129(a)(7), known as the “best interests of the creditors test,” requires that dissenting creditors receive not less than they would under a chapter 7 liquidation. *See* 11 U.S.C. § 1129(a)(7) (requiring a non-accepting creditor to receive under the plan an amount "not less than the amount that such [creditor] would so receive . . . if the debtor were liquidated under chapter 7."). The "best interests" test is considered to be one of the "cornerstones" of chapter 11 reorganization cases. *See ACC Bondholder Grp. v. Adelphia Communs. Corp. (In re Adelphia Communs. Corp.)*, 361 B.R. 337, 365 (S.D.N.Y. 2007) ("If even one dissenting member of an impaired class would get less under the Plan than in a hypothetical liquidation, the fact that the class as a whole approved the Plan is immaterial. Consequently, section 1129(a)(7) is one of the strongest protections individual creditors have in chapter 11."). This section "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." *Tribune*, 464 B.R. at 183. Thus, the "best interests" of each creditor under their affiliated debtors would be impossible to predict under the per-plan approach because the interest of each creditor would be hopelessly intermingled.

Section 1129(a)(10) requires that an impaired creditor to accept the plan or become unimpaired. *See* 11 U.S.C. §§ 1129(a)(10), (8). This requirement applies to "*each* class of claims or interest." *Tribune*, 464 B.R. at 183 (emphasis in original). In complex, multi-debtor cases that are jointly administered and under a single plan designed for convenience, confirmation remains achievable through building consensus without objection. *Id.* However, stripping impaired creditors of one of the limited safeguards available to them cannot be done in the name of convenience alone. *See id.* Thus, because this case is not substantively consolidated, Debtors can only satisfy § 1129(a)(10) through an affirmative vote by at least one impaired creditor from each debtor. *See id.*; *see also In re Jer/Jameson Mezz Borrower II, LLC*, 461 B.R. 293, 297 (Bankr. D. Del. 2011) ("[Debtor] cannot confirm a plan over [the creditor's] objection because it could get no accepting class.").

Finally, § 1129(a)(10) must comply with the absolute priority rule under § 1129(b)(2)(B)(ii). The absolute priority rule requires that dissenting classes of unsecured creditors must be provided for in full before any junior class can receive any priority under the reorganization plan. *See Northwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202 (1988) ("[T]he absolute priority rule provides that a dissenting class of unsecured creditors must be provided for in full before any junior class can receive or retain any property [under a reorganization] plan.") (citation and internal quotations omitted). A reorganization plan that fails to comply with the absolute priority rule may not be confirmed without creditor approval. *See In re Green*, 98 B.R. 981, 982 (B.A.P. 9th Cir. 1989) ("No Chapter 11 plan for reorganization that fails to comply with the long-standing "absolute priority rule" incorporated into the Bankruptcy Code in § 1129(b)(2)(B)(ii) may be confirmed without the approval of creditors."). If a chapter 11 case is dismissed under the absolute priority rule, then the Code provides for a restoration of prepetition financial status quo. *See* 11 U.S.C. § 349(b). Under the per-plan approach, restoration of the status quo could not be adequately achieved as creditors—who did not consent to substantive consolidation—would get hopelessly lost at sea among the ocean of debtor's assets floating like driftwood among the wreckage of the failed reorganization plan.

A major flaw in the per-plan interpretation is reading § 1129(a)(10) in a vacuum. A jointly administered plan is not a *single* plan but an *interworking of plans* for debtors and each class of creditor claims attached to each debtor. *See Tribune*, 464 B.R. at 182 ("[E]ach joint plan actually consists of a separate plan for each Debtor."). Under My Thumb did not consent to substantive consolidation, and under the Plan, the overall structure of the Debtor's corporate structure remained the same. R. at 7. Therefore, the requirements of the impaired accepting class rule were not met because Under My Thumb did not vote in favor of the Plan—leaving Development without an impaired accepting class.

B. Applying § 1129(a)(10) on a per-debtor basis best aligns with the corporate separateness doctrine.

Adoption of the per-debtor approach best upholds the principle of corporate entity separateness. The doctrine of corporate entity separateness is fundamental in state corporate law. *See On-Line Servs. Ltd. v. Bradley & Riley PC (In re Internet Navigator Inc.)*, 301 B.R. 1, 6 (B.A.P. 8th Cir. 2003) ("[T]his Court is unwilling to . . . capsize the fundamental bulwark of corporate law that the corporate entity is separate and distinct from its individual members."). The corporate separateness doctrine is especially prevalent in cases where courts must decide matters involving multiple corporate entities because a corporate debtor is generally not liable for the debts of other corporate entities. *See United States v. Bestfoods*, 524 U.S. 51, 61 (1998) ("It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation . . . is not liable for the acts of its subsidiaries."). Under this corporate backdrop, § 1129(a)(10) cannot be read to ignore these fundamental and sound principles of corporate law.

In complex, multi-debtor reorganizations, the bankruptcy courts allow certain administrative rules of convenience to aid in management of the process. *See* Brindise, *supra* at 1357. Courts should consider whether the plans rely on joint administration or deemed substantive consolidation when applying the impaired accepting class rule to multi-debtor chapter 11 cases. Joint administration is a tool of convenience designed for the ease of administration and to permit the payment of only one filing fee. *See Reider v. FDIC (In re Reider)*, 31 F.3d 1102, 1109 (11th Cir. 1994) (citation omitted). Rules 1015 and 2009 of the

Code govern joint administration and further underscore the importance of entity separateness. Rule 1015(b) instructs courts to "give consideration to protecting creditors of different estates against potential conflicts of interest." Fed. R. Bankr. P. 1015(b). Rule 2009, governing appointment of trustees in jointly administered cases, requires the bankruptcy court to maintain separate bank accounts for the distribution of funds for "each estate." Fed. R. Bankr. P. 2009(d). Under these rules, and applicable nonbankruptcy rules governing corporate laws, the estates of each debtor in jointly administered cases remain separate, and the creditors of each debtor are deserving of repayment from their affiliated debtors.

The impaired accepting class rule under § 1129(a)(10) provides support only for plans that are "consensual to the greatest possible extent." Peter E. Meltzer, *Disenfranchising the Dissenting Creditor Through Artificial Classification or Artificial Impairment*, 66 Am. Bankr. L.J. 281, 312 (1992). A proposed plan that fosters no support from impaired classes has "failed in its purpose." *Id.* The impaired accepting class rule serves as a protective measure requiring support from creditors for a debtor's plan. This lack of change of the overall corporate structure requires adoption of the per-debtor approach because the corporate entities did not substantively consolidate. In this case, the Plan called for cancellation of the existing shares and membership interest of Debtors, but it did not require the changing of the overall corporate structure. R. at 7. Therefore, the impaired accepting class rule under § 1129(a)(10) must be read to apply to an impaired creditor class of each debtor in jointly administered chapter 11 cases.

C. The per-plan interpretation under § 1129(a)(10) is impermissible de facto substantive consolidation.

Applying the impaired accepting class rule on a per-plan basis is de facto substantive consolidation. Substantive consolidation serves as an extraordinary remedy and is to be used sparingly. *See Chem. Bank N.Y. Tr. Co. v. Kheel*, 369 F.2d 845, 847 (2d Cir. 1966) ("The power to consolidate should be used sparingly because of the possibility of unfair treatment of creditors of a corporate debtor who have dealt solely with that debtor without knowledge of its interrelationship with others."); *see also In re Owens Corning*, 419 F.3d 195, 199 (3d Cir. 2005); *In re Bonham*, 229 F.3d 750, 764 (9th Cir. 2000); *Augie/Restivo Baking Co.,* 860 F.2d at 518–19. Proponents of the per-plan approach ignore the consequences of substantive consolidation when the plan compels joint administration. Due to expectation under laws outside of bankruptcy, courts must respect corporate entity separateness. *See In re Augie/Restivo Baking Co.*, 860 F.2d 515, 518–19 (2d Cir. 1988) ("[E]fficiency will be undermined by imposing substantive consolidation in circumstances in which creditors believed they were dealing with separate entities.").

Substantive consolidation upsets the general expectation that entities will remain separate and negatively affects the creditor's right to receive its pro-rata distributions from the assets of its debtor. *See Bonham*, 229 F.3d at 762 ("Consolidation almost invariably redistributes wealth among the creditors of the various entities because the consolidated entities are likely to have different debt-to-asset ratios.") (citation and internal quotation marks omitted). Substantive consolidation should be permitted in limited circumstances, as such, the standards permitting consolidation are strict. In *In re Owens Corning*, the Third Circuit outlines two circumstances permitting substantive consolidation: (1) if, in preparation of the plan, debtors disregard separateness "so significantly their creditors relied on the breakdown of entity boarders and treated them as one legal entity," or (2) following petition, assets and liabilities "are so scrambled that separating them is prohibitive and hurts all creditors." *In re Owens Corning*, 419 F.3d 195, 211 (3d Cir. 2005). Thus, the correct interpretation of § 1129(a)(10) largely turns on whether parties seek joint administration or substantive consolidation because joint administration, unlike substantive consolidation, does not affect the substantive rights of impaired creditors.

Bankruptcy courts must take great care not to charter into the dangerous waters of substantive consolidation unless the creditors themselves set the course there. State corporate law and the Bankruptcy Code anticipate that bankruptcy courts will respect corporate entity separateness when rendering decisions. *See Augie/Restivo*, 860 F.2d at 518–19. The per-plan approach upsets this general expectation by forcibly converting jointly administered cases into de facto substantive consolidation. *See id*. If entities are consolidated in this way, those creditors who would otherwise stand to receive a higher pro rata share under a joint administration will be prejudiced. *See* 2 Collier on Bankruptcy P 105.09 (16th 2019) ("[T]he creditors of the one receiving the higher percentage recovery on their claims if the debtors were separate will be prejudiced by consolidation.").

There exists some level of consolidation under chapter 11 large multi-debtor cases and in smaller cases because the assets, liabilities, and distributions of the corporate entities often merge during reorganization. Absent substantive consolidation, however, this merger is temporary and maintains entity separateness before and after the reorganization process. *See Genesis Health Ventures, Inc. v. Stapleton (In re Genesis Health Ventures, Inc.)*, 402 F.3d 416, 423 (3d Cir. 2005) ("[F]or funding distributions under the Plan, deemed consolidation left no effect on the Debtors (including their legal and organizational structures) and the rights of claimholders."); *see also In re Enron*, 2004 Bankr. LEXIS 2549, at *236 ("It is quite common for debtors with a complex structure to file a joint chapter plan pursuant to which the corporate form is preserved."). Deemed consolidation hinges on the support of creditors and without creditor support, it faces the same scrutiny as substantive consolidation. *See Owens Corning*, 419 F.3d at

216 (“Even if there were, a ‘deemed’ consolidation—several zip (if not area) codes away from anything resembling substantive consolidation—fails to even qualify for consideration.”). Thus, the per-plan approach would impermissibly violate entity separateness no matter the size of the reorganization plan.

The per-plan approach results in plans that steer too closely to substantive consolidation, a result that must be avoided unless bargained for under the plan. The District of Delaware faced this issue in *New Century*, where the debtors filed for chapter 11 petitions under a joint plan which separated debtors into three groups. *In re New Century TRS Holdings, Inc.*, 407 B.R. 576 (D. Del. 2009). The joint plan classified creditors according to their affiliated debtors and enjoyed near universal support except for one group of its creditors, who argued that the plan constituted de facto substantive consolidation. *Id.* at 580. The bankruptcy court overruled the objections and confirmed the plan, but that decision was overturned by the Delaware District Court. *Id.* at 591. The court concluded that the plan improperly consolidated the estates to the detriment of creditors. *Id.* In this case, the Thirteenth Circuit took a similar stance against the substantive consolidation that the per-plan approach inevitably permits. The court ruled that “in the absence of substantive consolidation, each debtor must stand on its own.” R. at 20.

Likewise, Judge Friedland reasoned, in her concurring opinion in *Transwest,* that the real rub of the creditor’s objection was that confirmation of the plan constituted de facto substantive consolidation of the debtor’s estates. *Transwest*, 881 F.3d at 732–33 (Friedland, J., concurring). Unfortunately, the creditors in *Transwest* failed to raise this argument, and the court ruled in favor of the per-plan approach. *See id.* at 733. In this case, the substantive consolidation argument is fairly raised because the Plan expressly provided that the Debtors’ estates were to remain separate. R. at 20. Therefore, adoption of the per-plan approach in this case would constitute de facto substantive consolidation when the parties did not bargain for it in the Plan and violates the fundamental policy of corporate entity separateness.

CONCLUSION

For the foregoing reasons, we respectfully urge this Court to affirm the Thirteenth Circuit's decision on both issues.

APPENDIX A

11 U.S.C. § 102

Rules of construction.

In this title—

. . . .

(7) the singular includes the plural;

. . . .

APPENDIX B

11 U.S.C. § 365

Executory contracts and unexpired leases.

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

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

. . . .

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

> **(1)(A)** applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties . . . .

. . . .

(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

. . . .

(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 or lease that is conditioned on—

. . . .

(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—

(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

(ii) such party does not consent to such assumption or assignment . . . .

. . . .

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

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

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

APPENDIX C

11 U.S.C. § 1101

Definitions for this chapter.

(1) “debtor in possession” means debtor except when a person that has qualified under section 322 of this title is serving as trustee in the case;

. . . .

APPENDIX D

11 U.S.C. 1106

Duties of trustee and examiner.

(**a**) A trustee shall—

. . . .

(2) if the debtor has not done so, file the list, schedule, and statement required under section 521(a)(1) of this title;

(3) except to the extent that the court orders otherwise, investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;

(4) as soon as practicable—

(A) file a statement of any investigation conducted under paragraph (3) of this subsection, including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate; and

(B) transmit a copy or a summary of any such statement to any creditors' committee or equity security holders' committee, to any indenture trustee and to such other entity as the court designates;

. . . .

APPENDIX E

11 U.S.C. 1107

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.

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

APPENDIX F

11 U.S.C. 1124

Impairment of claims or interest.

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

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

. . . .

APPENDIX G

11 U.S.C. 1126

Acceptance of plan.

. . . .

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

. . . .

APPENDIX H

11 U.S.C. 1129

Confirmation of plan.

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

. . . .

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

. . . .

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

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

. . . .

(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;

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

(A) such class has accepted the plan; or

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

. . . .

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

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

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

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

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

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

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

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

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

. . . .

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

. . . .

APPENDIX I

Fed. R. Bankr. P. 1015

Consolidation or Joint Administration of Cases Pending in Same Court.

. . . .

(b) Cases Involving Two or More Related Debtors. If a joint petition or two or more petitions are pending in the same court by or against (1) spouses, or (2) a partnership and one or more of its general partners, or (3) two or more general partners, or (4) a debtor and an affiliate, the court may order a joint administration of the estates. Prior to entering an order the court shall give consideration to protecting creditors of different estates against potential conflicts of interest. An order directing joint administration of individual cases of spouses shall, if one spouse has elected the exemptions under §522(b)(2) of the Code and the other has elected the exemptions under §522(b)(3), fix a reasonable time within which either may amend the election so that both shall have elected the same exemptions. The order shall notify the debtors that unless they elect the same exemptions within the time fixed by the court, they will be deemed to have elected the exemptions provided by §522(b)(2).

. . . .

APPENDIX J

Fed. R. Bankr. P. 2009

Trustees for Estates When Joint Administration Ordered.

. . . .

(d) Potential conflicts of interest. On a showing that creditors or equity security holders of the different estates will be prejudiced by conflicts of interest of a common trustee who has been elected or appointed, the court shall order the selection of separate trustees for estates being jointly administered.

(e) Separate accounts. The trustee or trustees of estates being jointly administered shall keep separate accounts of the property and distribution of each estate.

APPENDIX K

Fed. R. Bankr. P. 9001(11)

General Definitions.

. . . .

(11) “Trustee” includes a debtor in possession in a chapter 11 case.

. . . .