No. 19-1004

IN THE
Supreme Court of the United States

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

TUMBLING DICE, INC. *ET AL.*, PETITIONER

v.

UNDER MY THUMB, INC., RESPONDENT

BRIEF FOR PETITIONER

TEAM NUMBER 18 P

Counsel for Petitioner

QUESTIONS PRESENTED

I. Under 11 U.S.C. § 365(c)(1) (2018), which allows trustees to assume or assign a debtor's executory contract unless applicable law excuses a party to the contract other than the debtor from rendering performance to an entity other than the debtor or the debtor in possession and that party withholds consent, may a debtor in possession assume an executory contract over the objection of the non-debtor where the debtor in possession does not intend to assign the executory contract to a third party?

II. Under 11 U.S.C. § 1129(a)(10) (2018), which requires that at least one class of impaired claims under a plan accept that plan, may a joint, multi-debtor plan be accepted where substantially all impaired classes of claims of any one debtor have agreed to the plan?

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OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Thirteenth Circuit is unreported and reproduced in the record. R. 2–32. The memorandum opinion and order of the Bankruptcy Appellate Panel for the Thirteenth Circuit is not reproduced in the record.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure are reproduced in the Appendix to this brief.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Tumbling Dice, Inc. and its affiliated debtors (collectively, the "Debtors"), owned and operated eight casinos and resorts in the United States. R. 2–3. The Debtors successfully ran these properties for over thirty years, becoming one of the "largest gaming operations in the country." R. 4. Tumbling Dice, Inc. ("TDI") owns the membership interests of nine wholly-owned debtor-subsidiaries. R. 4. Eight of these each operate a luxury casino and resort (individually an "Operating Debtor" and, collectively, the "Operating Debtors"), with the ninth, Tumbling Dice Development, LLC ("Development") acting in a more limited role as the licensee under a non-exclusive software license agreement with Respondent, software designer Under My Thumb, Inc. ("Under My Thumb"). R. 4.

Nearly thirty years ago, the Debtors introduced the innovative Club Satisfaction, a casino loyalty program that incentivizes and rewards active members who frequently engage in gaming and other activities on the Debtors' properties. R. 4. Club Satisfaction successfully created brand loyalty by offering free and discounted nights at hotels, complimentary meals and drinks at their in-house steakhouses, exclusive seating for concerts, and private chefs' table dinners. R. 4.

When Development decided to update the loyalty program in 2008, it contracted with Under My Thumb to create the Club Satisfaction software (the "Software"). R. 4. Development reimbursed Under My Thumb for a portion of the approximately $10 million costs of creating the Software with an unsecured $7 million promissory note (the "R&D Note"). R. 4. The Debtors remained current under the R&D Note until June 2015. R. 6.

After completion of the Software, the two parties entered into a license agreement (the "Agreement") with separate and independent obligations for Development than those it was responsible for under the R&D Note. R. 5. In addition to payments on the R&D Note,

Development paid Under My Thumb a monthly fee calculated based on the amount Club Satisfaction members spent. R. 5. The Agreement, which allowed Development to "extend the benefits of the Agreement to its affiliated entities only," consisted of a non-exclusive license for Development to use the copyrighted and patented Software. R. 5. The Agreement extensively precluded the Debtors from assigning or sublicensing their rights to others absent express written consent from Under My Thumb. R. 5. Notably, this relationship proved extremely beneficial for Under My Thumb. R. 5. The non-exclusivity empowered Under My Thumb to license similar versions of the Software to third parties, and generate benefits from those relationships. R. 5. Implementing the Software led to quick success, and became "essential" to the Club Satisfaction business model. R. 5. This directly translated to "higher than expected payments" made to Under My Thumb from the Debtors under the Agreement each month. R. 5.

In December of 2011, hedge fund Start Me Up, Inc. ("Start Me Up") acquired TDI's stock through a leveraged buy-out. R. 6. TDI and the Operating Debtors received a $3 billion loan in exchange for granting first priority liens on their assets to a syndicated group of lenders (the "Lenders").[1] R. 6. This transaction resulted in a massively burdensome, "significant and unserviceable" debt for the Debtors, forcing them to commence voluntary cases under chapter 11 of the Bankruptcy Code five years later in January 2016. R. 6.

At the time of the petition, TDI and each Operating Debtor jointly and severally owed the Lenders approximately $2.8 billion.[2] R. 6. Adding this weighty burden was an additional $120 million owed to their unsecured creditors, including over $6 million owed to Under My Thumb

[1] Development did not act as a borrower or guarantor under the credit facility due to its limited purpose, the non-exclusive nature of the Software license, and other restrictive covenants. R. 6.

[2] For the convenience of the parties and the court, all cases were jointly administered pursuant to Bankruptcy Rule 1015(b). R. 3.

under the R&D Note. R. 6. Despite this significant financial burden, the Debtors remained current on their obligated payments to Under My Thumb pursuant to the Agreement. R. 6.

From the first day of filing, the Debtors emphasized their "primary goal" of restructuring or refinancing the $2.8 billion debt through a negotiated arrangement with the Lenders. R. 6. The Debtors tirelessly worked with Start Me Up, the Lenders, the unsecured creditors' committee, and other stakeholders during non-binding mediation, and after "lengthy negotiations" reached a deal to best satisfy the wide-ranging creditor demands.[3] R. 6. The deal, memorialized in a plan support agreement, empowered the Debtors to consensually restructure almost all of the secured indebtedness owed to the Lenders through a lower interest rate and extended payment period. R. 7. Start Me Up infused new capital to fund a 55% pro rata distribution to unsecured creditors through both direct funding and an investment from a private equity group. R. 7–8.

The Plan's terms for Under My Thumb were viewed "favorably." R. 7. The distribution of $66 million (55%) to the unsecured creditors included the over $6 million obligation owed by Development to Under My Thumb under the R&D Note. R. 7. Moreover, the Agreement between Under My Thumb and Development would be assumed by the Plan under sections 365 and 1123(b)(2), enabling Under My Thumb to continue receiving monthly payments for the Software use. R. 7. Thus, Under My Thumb's Agreement was assumed and its distribution on account of its unsecured claim significantly *exceeded* the value of Development's assets. R. 7.

The Debtors filed the joint Plan and disclosure statement "on behalf of all of the Debtors" in August 2016, with "*overwhelming* creditor support." R. 7, 8 (emphasis added).[4] TDI and all Operating Debtors had at least one impaired accepting class of creditors, while only Under My

[3] Under My Thumb did not participate in the negotiations. R. 6.

[4] The Plan did not substantively consolidate the Debtors' estates; it expressed that no Debtor would be liable for another's obligations. R. 7.

Thumb, who controlled Development's creditors class, voted against the Plan. R. 8. The creditor vote made it apparent that the Plan enjoyed "*near universal support* from all creditor groups." R. 8 (emphasis added).

B. Procedural History

Under My Thumb timely objected to the Plan; only two grounds for objection are relevant on appeal. R. 8. First, Under My Thumb claims that under the "hypothetical test," section 365(c)(1) precludes the Debtors from assuming the Agreement because applicable non-bankruptcy law excuses performance by Under My Thumb without its consent. Second, Under My Thumb alleges that the Plan is not confirmable under section 1129(a)(10) because no impaired class of creditors of Development had voted to accept it. R. 8.

The bankruptcy court overruled both of Under My Thumb's objections, emphasizing the substantial creditor support for the Plan. R. 8. The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court on both issues. R. 9. Both courts properly applied the "actual test" to the issue on the first objection, and determined that Development could assume the Agreement under section 365(c)(1) because the statute envisions a case-by-case analysis of whether the creditor (here, Under My Thumb) was being forced to accept performance under its executory contract from someone other than the party with whom it originally contracted (here, Development), and the Plan merely asked Under My Thumb to honor its original contractual obligations to Development. R. 8–9.

Regarding the second objection, the lower courts rejected Under My Thumb's assertions that the Plan could not be confirmed "simply because no impaired class of debtors" voted for it after concluding that section 1129(a)(10) is satisfied where "at least one impaired class in a joint, multi-debtor plan accepts the plan," and "all but one" of the impaired classes voted in favor of the Plan. R. 9. Following Under My Thumb's appeal to the United States Court of Appeals for

the Thirteenth Circuit, the majority reversed the bankruptcy court's decision, while Circuit Judge Jones vigorously dissented on both issues. R. 21. The Debtors filed a petition for a writ of certiorari, which this Court granted. R. 1.

SUMMARY OF ARGUMENT

The judgment of the United States Court of Appeals for the Thirteenth Circuit should be reversed on both issues.

I. First, this Court should reverse the lower court's decision because section 365(c)(1) permits the assumption of a non-exclusive license of intellectual property, such as the license at issue here, over the objection of the licensor. In reaching this conclusion, the "actual test" rather than the "hypothetical test" should be used to allow assumption as long as the debtor in possession (here, the Debtors) does not intend to assign the executory contract to a third party. This interpretation, and the analysis under the "actual test," uphold the plain text of the statute because the "applicable law" exception of section 365(c)(1) does not cover a debtor in possession such as the Debtors who intend to assume an executory contract (here, the Agreement). Moreover, the "actual test" should be used because interpreting the statute to require use of the "hypothetical test" renders the statutory phrase "or assign" as mere surplusage, making it unnecessary to the meaning or consequences of the statute. Further, the "actual test" is more consistent with the legislative history of section 365(c) and the overarching goals of the Bankruptcy Code: enabling debtors to successfully reorganize and avoid liquidation. Alternatively, this Court should reverse the lower court's decision because section 365(c)'s prohibition against assumption applies only to a trustee, *not* a debtor in possession like the Debtors here.

II. Second, this Court should reverse the lower court's decision because acceptance of the Plan is valid under the plain language, context, and underlying purpose of section

1129(a)(10), which requires only one impaired class of claims to accept a joint, multi-debtor plan such as the one at issue here. Congress carefully crafted section 1129(a)(10) to require acceptance by only *one* impaired class (a per plan approach), rather than drafting the statute in a way that requires approval from an impaired class of each debtor (a per debtor approach). Additionally, reading section 1129(a)(10) in conjunction with other statutory provisions that must be met before a plan can be confirmed reveals that no subsection of 1129 suggests that section 1129(a)(10) applies on a per debtor basis. Finally, Congressional intent and several policy reasons demonstrate that the per plan approach should be used in analyzing reorganization plans' acceptance, because it streamlines the reorganization process and allows debtors to conserve their resources, save jobs, and avoid being held hostage by a single creditor.

ARGUMENT

I. SECTION 365(C)(1) PERMITS ASSUMPTION OF A NON-EXCLUSIVE LICENSE OF INTELLECTUAL PROPERTY OVER THE OBJECTION OF THE LICENSOR.

This Court should reverse the decision of the appellate court because section 365(c)(1) permits Development to assume the Agreement without the consent of Under My Thumb. Section 365 of the Bankruptcy Code permits a debtor in possession or trustee to assume, assign, or reject executory contracts. 11 U.S.C. § 365. While the Bankruptcy Code does not define "executory contract," this Court defines an executory contract as one where "performance remains due to some extent on both sides." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1658 (2019) (citations omitted). Bankruptcy courts generally interpret this as a contract where "the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other." *Olah v. Baird (In re Baird)*, 567 F.3d 1207, 1211 (10th Cir. 2009) (citations omitted).

The majority view is that non-exclusive intellectual property licenses, like the one at issue here, are executory contracts because the contract conveying the license will create continuing obligations for both the licensor and licensee. *See Everex Sys. Inc. v. Cadtrak Corp. (In re CFLC, Inc.)*, 89 F.3d 673, 677 (9th Cir. 1996) (concluding a non-exclusive patent license was executory where the licensor had a continuing obligation to refrain from filing suit and the licensee had an obligation to mark products with a patent notice). Here, the Agreement is an executory contract because Under My Thumb (the licensor) has a continuing obligation to permit the use of its copyrighted and patented software and Development (the licensee) has a continuing obligation to pay a monthly fee and restrict use of the software to "its affiliated entities only." R. 5. Therefore, the Agreement is an executory contract and Development's ability to assume, assign, or reject it is governed by section 365.

A debtor in possession may assume an executory contract. 11 U.S.C. § 365(a). When a debtor in possession assumes an executory contract, it continues to perform its obligations and accept performance of the non-debtor party under the agreement. *Id.* However, the ability to assume an executory contract is limited in a few specific provisions of section 365. For example, section 365(c)(1) precludes trustees from assuming or assigning a debtor's executory contract if applicable law excuses a party to the contract other than the debtor from accepting performance from or rendering performance to an entity other than the debtor or debtor in possession, and that party withholds consent to the assumption or assignment. *Id.*

A circuit split exists as to whether section 365(c)(1) prohibits both assumption and assignment, or only assignment of executory contracts, when the non-debtor party does not consent. Generally, courts have based their statutory interpretation of this issue on the "assume or assign" language in the section. § 365(c)(1). Two distinct tests for interpreting section

365(c)(1), the "actual test" and the "hypothetical test," have emerged. *Compare Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489 (1st Cir. 1997), *cert. denied*, 521 U.S. 1120 (1997) ("actual test"), *with RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257 (4th Cir. 2004) ("hypothetical test").

The "actual test" allows assumption as long as the debtor in possession does not intend to assign the executory contract to a third party. *See Institut Pasteur*, 104 F.3d at 493 (holding that because the reorganized debtor was the same entity that a patent holder had entered into a licensing agreement with, the laws restricting assignment of patents did not preclude assumption); *In re Kmart Corp.*, 290 B.R. 614, 618 (Bankr. N.D. Ill. 2003) (determining that section 365(c) requires the "actual test" to be used in an executory contract). The "hypothetical test" precludes assumption if applicable non-bankruptcy law would not allow the debtor in possession to assign the contract to a third party. *See In re Sunterra Corp.*, 361 F.3d at 267 (concluding that the debtor in possession was precluded from assuming a licensing agreement because copyright law excused the other party to the agreement from accepting performance from a hypothetical third party). Courts that follow this test hold that a debtor in possession may not assume an executory contract because of a fictional assignment. *Id.*

Some bankruptcy courts follow an alternative test known as the "*Footstar*" test. *See In re Footstar, Inc.*, 323 B.R. 566, 570-72 (Bankr. S.D.N.Y. 2005). The *Footstar* test adopts the "actual test" to determine that precluding assignment does not restrict assumption. *Id.* However, its analysis differs by determining that the term "trustee" in section 365(c)(1) does not include the debtor in possession. *Id.*; 11 U.S.C. 365(c)(1). This Court should adopt the "actual test" rather than the "hypothetical test" used by the lower court because the "actual test" is consistent

with the plain language of section 365(c)(1), is supported by legislative history, and prioritizes the underlying goals of the Bankruptcy Code.

A. The plain language of section 365(c)(1) requires the use of the "actual test" in determining whether the Debtors may assume the Agreement.

The "actual test" is consistent with the plain language of section 365(c)(1) because the debtor in possession is not a new entity and the language "or assign" is mere surplusage under the "hypothetical test." Resolving a dispute over a statute's meaning must begin with the text of the statute. *See United States v. Ron Pairs Enters., Inc.*, 489 U.S. 235, 241 (1989). Where, as here, that language is plain and unambiguous, "the sole function of the courts is to enforce it according to its terms." *Id*. (internal citations omitted). "When the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete.'" *Conn Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1989). Because the actual test reflects the plain language of section 365(c)(1), this Court should apply it and conclude that Development may assume the Agreement without the consent of Under My Thumb.

1. Under a plain meaning interpretation of section 365(c)(1), the words "applicable law" do not apply to a debtor in possession who, as here, intends to assume an executory contract.

Development may assume the Agreement because the "applicable law" language of section 365(c)(1) does not apply to a debtor in possession who intends to assume an executory contract. This Court has determined that the debtor in possession is the "same 'entity' which existed before the filing of the bankruptcy petition[.]" *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). Courts have concluded that because the prepetition debtor and debtor in possession are the same, the "applicable law" language referring to assignment to a third party is not triggered. *See Summit Inv. & Dev. Corp. v. Leroux,* 69 F.3d 608, 612-13 (1st Cir. 1995) (concluding that a debtor in possession may assume its obligations under a partnership

agreement where the prepetition and postpetition debtor are the same entity); *see also In re Lil' Things, Inc.*, 220 B.R. 583, 587 (Bankr. N.D. Tex. 1998) (determining that the *Bildisco* Court rejects the separate entity theory and holding that a debtor may assume its own contracts); *but see In re W. Elecs. Inc.*, 853 F.2d 79, 83 (3d Cir. 1988) (noting that the solvent prepetition entity and insolvent debtor are distinct which requires adopting the "hypothetical test"). Therefore, a debtor in possession who simply intends to assume an executory contract does not trigger "applicable law" that applies to the assignment of contracts because no assignment is occurring. 11 U.S.C. § 365(c)(1)(A); *see also Summit Inv. & Dev. Corp.*, 69 F.3d at 612-13.

Here, nothing in the record indicates that Development has any intention to assign the Agreement to a third party. Development merely wishes to continue fulfilling its obligations under the Agreement as it had prior to filing for chapter 11 reorganization. Because Development as a prepetition entity and as a debtor in possession are identical with each other, assuming the Agreement is in no way an assignment of the executory contract. The fact that the parties have stipulated that the Agreement cannot be assigned under non-bankruptcy law does not control assumption under a plain meaning interpretation of section 365(c)(1)(A). While Under My Thumb could not be forced to accept performance from any entity other than Development and its affiliates, under the facts of this case no such assignment will occur. A plain meaning interpretation of section 365(c)(1) dictates that Development may assume the agreement over Under My Thumb's objection.

2. The "hypothetical test" renders the phrase "or assign" in section 365(c)(1) as mere surplusage and runs contrary to a plain meaning interpretation of the statute.

A plain meaning interpretation of section 365(c)(1) favors the "actual test" over the "hypothetical test" because the words "or assign" are made superfluous under the "hypothetical test." One of the canons of statutory interpretation is the rule against surplusage; this Court has

noted that statutes should be interpreted in such a way that gives effect to "every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 167 (2001). A statute's language should not be interpreted in a way that renders other words of a statute to be "excess language" or unnecessary. *See Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 4 (2012). Here, the "hypothetical test" creates surplusage because section 365(f)(2), which governs assignment, requires assumption prior to assignment. 11 U.S.C. § 365(f)(2) ("[t]he trustee may assign an executory contract or unexpired lease of the debtor only if—(A) the trustee assumes such contract …"). Section 365(c) states in relevant part that "[t]he trustee may not assume *or* assign any executory contract…" 11 U.S.C. § 365(c) (emphasis added). Because the "hypothetical test" precludes assumption in all cases, the words "or assign" become irrelevant if that test is applied. *See* Michelle Morgan Harner, Carl E. Black & Eric R. Goodman, Debtors Beware: *The Expanding Universe of Non-Assumable/Non-Assignable Contracts in Bankruptcy*, 13 AM. BANKR. INST. L. REV. 187, 239 (2005). The "hypothetical test" renders "or assign" mere surplusage because the assumption, which the test does not allow, is a prerequisite to assignment under the statute.

In *In re Cardinal Industries*, the Bankruptcy Court for the Southern District of Ohio found the surplusage argument to be persuasive in holding that an executory contract could be assumed by a trustee. *In re Cardinal Indus., Inc.*, 116 B.R. 964, 982 (Bankr. S.D. Ohio 1990). There, the executory contract was a debtor's management interest in a limited partnership which other limited partners wanted to terminate. *Id.* at 972-73. The agreements contained ipso facto termination provisions which were enforceable under Ohio and Michigan partnership law. *Id.* at 973-74. The trustee argued that the inclusion of the words "or assign" were superfluous unless they "serve[] the function of clarifying that the debtor in such circumstances may be able to *assume* but not *assign* an executory contract." *Id.* at 977 (emphasis in original); 11 U.S.C. §

365(c). Based on this analysis, the court concluded that section 365(c) did not preclude assumption and that the trustee could assume the executory contract on behalf of the estate because performance would be rendered by the debtor. *See In re Cardinal Indus.*, Inc., 116 B.R. at 977; 11 U.S.C. § 365(c).

This Court should similarly hold that Development may assume the Agreement over the objection of Under My Thumb because holding to the contrary would render the phrase "or assign" mere surplusage. This is evidenced by the fact that Development only intends to assume the Agreement. Precluding mere assumption of the Agreement based on a hypothetical assignment would read "or assign" out of the statutory text. Because this Court has counseled against reading a statute in a way which creates surplusage, a plain meaning interpretation of section 365(c)(1) applying the "actual test" should be adopted.

B. The "actual test" is more consistent with the legislative history of section 365(c) and the overarching goals of the Bankruptcy Code.

The legislative history of section 365(c) supports adoption of the "actual test." When section 365(c)(1)(A) was originally passed, it read as follows:

> (1)(A) 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 an assignee of such contract or lease*, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties…

11 U.S.C. § 365(c)(1)(A) (1978) (emphasis added). Just two years after section 365(c)(1)(A) was added to the Code, the Bankruptcy Technical Correction Act of 1980 proposed a change. *See* The Bankruptcy Technical Correction Act of 1980, H.R. Rep. No. 1195, 96th Cong., 2d Sess. (1980). The proposed change would remove "the trustee" and replace it with "an entity other than the debtor or the debtor in possession" as the section is currently written today. *Id.*; *see also* 11 U.S.C. § 365(c)(1)(A) (2018). The report explained the purpose behind the amendment:

> This amendment makes it clear that the prohibition against a trustee's power to assume an executory contract does not apply where it is the debtor that is in possession and the performance to be given or received under a personal service contract will be the same as if no petition had been filed because of the personal nature of the contract.

The Bankruptcy Technical Correction Act of 1980, H.R. Rep. No. 1195, 96th Cong., 2d Sess. § 27(b) (1980). Because of concerns that the amendments were premature, an amendment was not published with the report in 1980. *Id.* The amendment, however, was made in 1984 exactly as written in the 1980 report. *Id.*; *see also* An Act to amend title 28 of the United States Code, Pub.L. No. 98-353 (1984).

The legislative history of section 365(c)(1) makes clear that Congress did not intend to preclude debtors in possession from assuming executory contracts during reorganization. Courts should not ignore the intent of Congress when they have explicitly addressed the issue at hand even if legislative history is not given the same level of deference as plain meaning. This Court should find the legislative history of section 365(c)(1) persuasive in holding that Development may assume the Agreement.

Furthermore, precluding Development from assuming the Agreement would be contrary to the ultimate goals of chapter 11 reorganization. This Court has explained that "[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. Executory contracts are often critical to a debtor's ability to continue to operate and survive a bankruptcy. *See In re Cardinal Indus.*, Inc., 116 B.R. at 981; *see also In re TechDyn Sys. Corp.*, 235 B.R. 857, 864 (Bankr. E.D. Va. 1999). A blanket prohibition on assumption based on a "hypothetical" assignment will have the effect of forcing many debtors into liquidation. *See* Michelle Morgan Harner, *et*

al., *Debtors Beware*: *The Expanding Universe of Non-Assumable/Non-Assignable Contracts in Bankruptcy*, 13 AM. BANKR. INST. L. REV. 187, 242 (2005). As the debtors have explained, "the Software is an essential part of the Debtors' ongoing business model." R. 5. Allowing the objection of one creditor to dismantle a potentially successful reorganization is not sound policy. This Court should not allow Under My Thumb's objection to derail Development's reorganization because doing so contravenes the purpose and primary objectives of the Bankruptcy Code.

C. Section 365(c)'s prohibitions against assumption and assignment apply only to a trustee and not a debtor in possession.

Alternatively, Development may assume the Agreement because on its face, section 365(c)'s prohibitions against assumption and assignment do not apply to a debtor in possession. Under a plain meaning interpretation of section 365(c)(1) ,"trustee" means trustee, not debtor in possession. 11 U.S.C. § 365(c)(1). Section 365(c)(1) unambiguously states that "[t]he *trustee* may not assume or assign…" *Id.* (emphasis added). Therefore, section 365(c)(1) does not prohibit a debtor in possession from assuming an executory contract. *Id.* While the trustee and debtor in possession perform similar functions in a chapter 11 case, the bankruptcy code defines them separately and never states they are synonymous. *See* § 1183 (defining the term "trustee" in a chapter 11 reorganization case); *see also* § 1184. Rights and powers of a debtor in possession. Courts that have incorrectly construed the trustee and debtor in possession as the same entity have done so without citing the Bankruptcy Code. *See In re Catapult Entm't, Inc.*, 165 F.3d 747, 750 (9th Cir. 1999).

The above interpretation of section 365(c) is known as the "*Footstar* Test" and has been adopted by multiple bankruptcy courts. *See In re Footstar, Inc.*, 323 B.R. 566, 570-72 (Bankr. S.D.N.Y. 2005); *In re Adelphia Communications Corp.*, 359 B.R. 65, 72 (Bankr. S.D.N.Y.

2007); *In re Aerobox Composite Structures*, LLC, 373 B.R. 135, 141-42 (Bankr. N.M. 2007) (agreeing with the reasoning in *Footstar* and holding that a debtor in possession may assume an executory contract). In *Footstar*, the court explained that reading "trustee" to mean "debtor in possession" renders the provision "a virtual oxymoron since mere assumption [by the debtor in possession] (without assignment) would *not* compel the counterparty to accept performance from or render it to 'an entity other than' the debtor." *Footstar*, 323 B.R. at 573 (emphasis in original). If this Court does not find the reasoning behind the "actual test" to be persuasive, it should follow *Footstar*'s plain meaning interpretation. *Id.*

A trustee has not been appointed in this case. Development is acting as a debtor in possession and is tasked with managing its bankruptcy estate. Therefore, the analysis is simple. Section 365(c) does not apply to Development under the facts of this case. This is because Development is not a trustee. This Court should find the holding and analysis in *Footstar* to be persuasive and hold that Development may assume the Agreement.

II. UNDER THE PLAIN LANGUAGE, CONTEXT, AND UNDERLYING PURPOSE OF SECTION 1129(A)(10), ONLY ONE IMPAIRED CLASS OF CLAIMS MUST ACCEPT A JOINT, MULTI-DEBTOR PLAN.

The majority of courts, including the only other circuit court to analyze this issue, have recognized that the per plan approach is the correct basis for determining acceptance of a joint, multi-debtor plan under section 1129(a)(10). Under the per plan approach, only one impaired class of claims in a joint, multi-vendor plan must accept the plan. *See JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props. (In re Transwest Resort Props.)*, 881 F.3d 724, 729 (9th Cir. 2018). There is no dispute that Under My Thumb is an impaired creditor, since "legal, equitable, and contractual" rights are altered by the Plan. *See* 11. U.S.C. § 1124(1). However, a proposed plan need not have universal acceptance from all impaired creditors. The majority below erred when it followed the per debtor approach, under which section 1129(a)(10)

would require acceptance from an impaired class of claims of each debtor in the plan. Section 1129(a)(10)'s text, context, and underlying purpose abundantly support the adoption of the per plan approach.

A. The plain language of section 1129(a)(10) unambiguously requires acceptance of only one impaired class of claims.

The plain language of section 1129(a)(10) is clear and unambiguous, and supports the adoption of the per plan approach. When interpreting a statute, this Court's analysis begins with the statutory text. *See Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004). When the statute's language is plain, this is also where the Court's analysis ends. *Id.*

Section 1129(a)(10) reads: "[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). The Ninth Circuit Court of Appeals carefully interpreted this language, and unanimously concluded that it supported the per plan approach. *See In re Transwest Resort Props.*, 881 F.3d at 729; *see also In re Station Casinos, Inc.*, 2010 Bankr. LEXIS 5380, at *82 (Bankr. D. Nev. Aug. 27, 2010) (holding that under plain language, "the affirmative vote of one impaired class under the joint plan of multiple debtors is sufficient to satisfy Section 1129(a)(10)"); *JPMorgan Chase Bank, N.A. v. Charter Communs. Operating, LLC (In re Charter Communs.),* 419 B.R. 221, 266 (Bankr. S.D.N.Y. 2009) (concluding that it was appropriate to test compliance with section 1129(a)(10) on a per-plan basis rather than a per-debtor basis); *In re Enron Corp.*, 2004 Bankr. LEXIS 2549, at *235 (Bankr. S.D.N.Y. July 15, 2004) (same); *In re SGPA, Inc.*, 2001 Bankr. LEXIS 2291, at *22 (Bankr. M.D. Pa. Sep. 28, 2001) (concluding that a plan "complie[d] with §1129(a)(10) because at least one class of impaired creditors . . . accepted the [p]lan").

As the Ninth Circuit emphasized, section 1129(a)(10) makes no distinction between different creditors or debtors, nor does the statute make any reference between single- or multi-debtor plans. *See In re Transwest Resort Props.*, 881 F.3d at 729. The statute merely requires that "*at least one* impaired class of claims under the plan has accepted the plan . . . " 11 U.S.C. § 1129(a)(10) (emphasis added). Thus, when one impaired class of creditors, regardless of who its debtor is, accepts a plan (be it a single- or multi-debtor plan), the requirements of section 1129(a)(10) are met.

Congress could easily have drafted the statute in such a way that would unambiguously require plan approval from an impaired class of each debtor, had it intended to do so. *See In re Transwest Resort Props.*, 881 F.3d at 729. However, it did not, and instead explicitly worded section 1129(a)(10) so as to require the acceptance of only one impaired class under the plan.

The Bankruptcy Code's rules of statutory construction do not alter section 1129(a)(10)'s plain meaning. Section 102(7) instructs that when interpreting provisions of the Bankruptcy Code, "the singular incudes the plural." 11 U.S.C. § 102(7). In *In re Tribune Co.*, on which the majority below heavily relies, the Bankruptcy Court for the District of Delaware reasoned that absent substantive consolidation, each joint plan actually consisted of a separate plan for each debtor, and thus "ascribing the plural meaning of plans' in § 1129(a)(10) is entirely logical and consistent with such a scheme." 464 B.R. 126, 182 (Bankr. D. Del. 2011). *In re Tribune* represented the first time a court adopted the per debtor approach. *Id.* at 182.

However, even after applying section 102(7), the per plan approach is still consistent with the text of the statute. Under section 102(7), section 1129(a)(10) is "effectively amend[ed] to read: 'at least one class of claims that is impaired under the plans has accepted the plans.'" *In re Transwest Resort Props.*, 881 F.3d at 729. Under this reading, when one or more impaired

classes of claims accepts the plans, as occurred here, section 1129(a)(10) is satisfied. The majority below adopted the per debtor approach in order to protect the voting rights of creditors. R. 19. Such an interpretation was improper because the text of section 1129(a)(10) unambiguously calls for the acceptance of only one class of claims. Policy concerns cannot override Congress's clear and unambiguous text; where, as here, a statute's language is clear, the court's "sole function . . . is to enforce it according to its terms." *Lamie*, 540 U.S. at 534 (quotation omitted). Therefore, this Court, in accordance with section 1129(a)(10)'s text and plain meaning, should adopt the per plan approach and determine that because the Plan has been accepted by every impaired class of claims besides Under My Thumb, its acceptance is valid.

B. The per plan approach is consistent with the statutory context of section 1129(a)(10).

The per plan approach required under the plain language of section 1129(a)(10) conforms with the other requisites for plan confirmation imposed by section of 1129. Since a statute's meaning depends on its context, its different provisions should be read together. *See King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991).

Section 1129, in addition to subsection (a)(10), has various other elements that must be met prior to plan confirmation. First, under subsection (a)(1), the plan must comply with the other applicable provisions of the Bankruptcy Code. 11 U.S.C. § 1129(a)(1). Subsection (a)(3) mandates that "[t]he plan has been proposed in good faith and not by any means forbidden by law." § 1129(a)(3). Subsection (a)(8) requires each impaired class of claims to accept the plan. § 1129(a)(8). Importantly however, section 1129(b) allows confirmation of a plan that meets all of provisions of subsection (a) other than paragraph (8), so long as it is fair and equitable. § 1129(b).

The Ninth Circuit in *In re Transwest Resort Properties* noted that none of the subsections in section 1129 suggest that (a)(10) applies on a per debtor basis. 881 F.3d at 730. First, by their plain language, subsections (a)(1) and (3) do not call for the per debtor approach. *Id.* Even assuming that these subsections require the per debtor approach, as the bankruptcy court did in *In re Tribune*, 46 B.R. at 183, they are reconcilable with application of the per plan approach in section 1129(a)(10). A joint, multi-debtor plan may comply with the provisions of the Bankruptcy Code, be proposed in good faith, and be accepted by at least one impaired class of claims, in accordance with subsections (a)(1), (3), and (10). Thus, even if the subsections employ different approaches, the per debtor approach mandated by the plain text of section 1129(a)(10) is consistent with the rest of the statute.

Moreover, nowhere does the text of the statute indicate that if some subsections apply on a per debtor basis, then all other subsections must do so as well. The majority below and *In re Tribune*'s unsupported conclusion that all of section 1129's elements apply on a per debtor basis is further weakened because each subsection is worded differently. As Congress "says in a statute what it means," *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000), if it had intended for each subsection to apply per debtor approach, it would have worded them accordingly.

Sections 1129(a)(8) and (b) further demonstrate Congress's intention that the entire statute does not apply on a per debtor basis. Section 1129(b), "which permits confirmation by 'cram down,' relieves a plan proponent from the §1129(a)(8) requirement if all other §1129(a) requirements are met when the proposed plan 'does not discriminate unfairly, and is fair and equitable . . .'" *In re Tribune Co.*, 464 B.R. at 183. As Judge Jones recognized in the dissent below, Congress thereby "establish[ed] a mutually exclusive requirement for

confirmation." R. 29. Thus, applying section 1129(a)(10) on a per debtor basis would render sections 1129(a)(8) and (b) superfluous. Section 1129(a)(10)'s context does not suggest that each provision should be interpreted identically, and different constructions of each subsection are reconcilable with each other. Therefore, this Court need not deviate from plain meaning of section 1129(a)(10)'s per plan approach.

C. Policy reasons and the underlying purpose of section 1129(a)(10) and the Bankruptcy Code support adoption of the per plan approach.

The per plan approach, required by section 1129(a)(10)'s plain language and context, also aligns with the underlying purposes of statute and the Bankruptcy Code as a whole. The goal of chapter 11 of the Bankruptcy Code is to "maximiz[e] the value of the bankruptcy estate." *Toibb v. Radloff*, 501 U.S. 157, 163 (1991). In cases where a debtor's estate is of more value restructured than liquidated under chapter 7, chapter 11 "serves the congressional purpose of deriving as much value as possible from the debtor's estate." *Id.* at 164. This case is just the type Congress contemplated when it allowed business debtors to reorganize; under the Debtors' Plan, "it is undisputed that the proposed 55% distribution greatly exceeds liquidation value." R. 31. The Plan is beneficial to Under my Thumb and the rest of the Debtors' stakeholders. R. 31.

Section 1129(a)(10) is meant to "require some indicia of creditor support" for a debtor's reorganization plan. *In re Bataa/Kierland, LLC*, 476 B.R. 558, 578 (Bankr. D. Ariz. 2012). Here, the Plan has gathered substantial support from its creditors. Indeed, "the Plan enjoyed near universal support from all creditor groups." R. 8. Under My Thumb is the sole impaired class not to approve of the Plan. R. 9. However, "[t]here is no evidence of any legislative intent to confer on under-secured creditors a veto power [with section 1129(a)(10)]." *In re Loop 76, Ltd. Liab. Co.*, 442 B.R. 713, 722 (Bankr. D. Ariz. 2010). The acceptance of the Plan by every other

impaired class of claims demonstrate that it is agreeable to the majority of the Debtor's creditors. Therefore, under the Plan, section 1129(a)(10) has served its purpose.

The majority below expressed concern that per plan approach impedes on creditors' rights. R. 19–21. However, the majority's concerns are misplaced. Section 1129(a)(10) does not confer any substantive rights to creditors. *See In re Bataa/Kierland, LLC*, 476 B.R. at 578; *In re Rhead*, 179 B.R. 169, 177 (Bankr. D. Ariz. 1994). Rather, section 1129(a)(10) is a "purely technical requirement for confirmation." *In re Bataa/Kierland, LLC*, 476 B.R. at 578. Because section 1129(a)(10) does not bestow any rights to begin with, the per plan approach does not deprive creditors. Moreover, section 1129 has other provisions that safeguard creditors. For example, subsections (a)(1) and (3) provide that a plan conforms to the requirements of the Bankruptcy Code and be proposed in good faith. 11 U.S.C. § 1129(a).

By adopting the per plan approach, this Court will effectuate Congress's intent and simplify the reorganization process for debtors. When a plan only needs approval from one impaired class of claims, debtors may reorganize faster, thereby conserving their resources, maximizing their value, and preserving jobs. Indeed, the majority below recognized that the per plan approach "paves a clearer path forward for confirmation." R. 20.

On the other hand, under the per debtor approach, a single creditor may "hold the Debtors and their stakeholders hostage." R. 31. By requiring acceptance from an impaired class of claims of each debtor, the per debtor approach greatly complicates the reorganization process. Meanwhile, the debtor's and its stakeholders' resources are wasted and jobs are lost while the debtor struggles to reach a plan all creditors, who are often in competition with one another, would accept.

Under the text of the statute, section 1129(a)(10) requires acceptance from only one impaired class of claims in a joint, multi-debtor plan. This interpretation is strengthened by the context of section 1129(a)(10) and Congress's intent in enacting the statute. Finally, the per plan approach is sound policy because it helps debtors, creditors, and their employees.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Thirteenth Circuit should be reversed.

Respectfully submitted,

TEAM NUMBER 18 P
Counsel for Petitioner

JANUARY 2020

APPENDIX: STATUTORY PROVISIONS

11 U.S.C. § 365 (2018): Executive 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.

…

(c) The trustee may not assume or assign any executory contract … of the debtor … if—

(1)

(A) applicable law excuses a party, other than the debtor, to such contract … from accepting performance from or rendering performance to an entity other than the debtor or debtor in possession …, and

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

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

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

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

11 U.S.C. § 102 (2018): Rules of Construction

(7) the singular includes the plural; …

11 U.S.C. § 1124 (2018): Impairment of claims or interest

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

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

11 U.S.C. § 1129 (2018): Confirmation of plan

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

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

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

(3) The plan has been proposed in good faith and not by any means forbidden by law.
(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.
(5)

(A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and
(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and
(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.
(7) With respect to each impaired class of claims or interests--
(A) each holder of a claim or interest of such class--
(i) has accepted the plan; or
(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or
(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.
(8) With respect to each class of claims or interests--
(A) such class has accepted the plan; or
(B) such class is not impaired under the plan.
(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that--
(A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;
(B) with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive--
(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;

(C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim regular installment payments in cash--

(i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;

(ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and

(iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)); and

(D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

(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.

(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.

(12) All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

(14) If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.

(15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan--

(A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

(16) All transfers of property under the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

(b)

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

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

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

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

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

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

(C) With respect to a class of interests--

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

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

11 U.S.C. § 1183 (2018): Trustee

(a) In general.--If the United States trustee has appointed an individual under section 586(b) of title 28 to serve as standing trustee in cases under this subchapter, and if such individual qualifies as a trustee under section 322 of this title, then that individual shall serve as trustee in any case under this subchapter. Otherwise, the United States trustee shall appoint one disinterested person to serve as trustee in the case or the United States trustee may serve as trustee in the case, as necessary.

11 U.S.C. § 1184 (2018): Rights and powers of a debtor in possession

Subject to such limitations or conditions as the court may prescribe, 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 functions and duties, except the duties specified in paragraphs (2), (3), and (4) of section 1106(a) of this title, of a trustee serving in a case under this chapter, including operating the business of the debtor.