Team 1R

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 Number 1R
*Counsel for Respondent*

# QUESTIONS PRESENTED

1. Does 11 U.S.C. § 365(c)(1) permit a debtor in possession to assume an executory contract over the objection of the non-debtor party to such contract when applicable non-bankruptcy law excuses the non-debtor party from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession?

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

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## OPINIONS BELOW

In unreported opinions, the United States Bankruptcy Court for the District of Moot found for Petitioner, Tumbling Dice, Inc., on both issues and the Bankruptcy Appellate Court for the Thirteenth Circuit affirmed. The United States Court of Appeals for the Thirteenth Circuit reversed on both issues; its opinion is reproduced as the record on this appeal.

## STATEMENT OF JURISDICTION

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

## STATUTORY PROVISIONS

**11 U.S.C. Section 365**

**(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)** [omitted]

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

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

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

**(2) – (3)** [omitted]

**(d)** [omitted]

**(f)**

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

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

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

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

**(3)** Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease,

such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

**(g) – (p)** [omitted]

**11 U.S.C. Section 1129**

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

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

**(2)** [omitted]

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

**(4) – (7)** [omitted]

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

**(A)** such class has accepted the plan; or

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

**(9)** [omitted]

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

**(11) – (16)** [omitted]

## STATEMENT OF FACTS

Tumbling Dice, Inc. ("TDI") and its nine subsidiaries (collectively, the "Debtors"), constitute one of the largest gaming operations in the United States. R. at 4. Eight of the subsidiaries each operate a luxury casino and resort, while the ninth, Tumbling Dice Development, LLC ("Development") acts as the licensee pursuant to a non-exclusive software license agreement (the "Agreement") with Under My Thumb, Inc. ("Under My Thumb"). R. at 4. In 2008, as part of an effort to modernize its casino loyalty program, TDI, through Development, contracted with Under My Thumb – a preeminent software designer specializing in "customer loyalty and reservations programs for the hospitality industry" – to leverage its industry expertise by developing "a comprehensive, integrated software system" (the "Software"). R. at 4.

Under My Thumb dedicated approximately one year and $10 million in costs to develop the Software pursuant to a research and development agreement between the parties. R. at 4. As part of the research and development agreement, Development agreed to reimburse Under My Thumb for the costs via an unsecured $7 million promissory note. R. at 4. Additionally, Under My Thumb entered into the Agreement with Development, which granted a non-exclusive license to use Under My Thumb's "copyrighted and patented Software" in exchange for a monthly fee based on loyalty program member spending activity. R. at 5. Although Development was permitted to "extend the benefits of the Agreement" only to its affiliated entities, the Agreement generally barred those entities "from assigning or sublicensing their rights to others" absent the express written consent of Under My Thumb. R. at 5. Despite the presence of the Agreement, Under My Thumb was permitted to license similar versions of the Software to third parties, which it did. R. at 5.

The utilization of Under My Thumb's Software proved to be extremely prosperous for TDI, resulting in a threefold increase in loyalty program membership rates, as well as increased

member spending. R. at 5. Under My Thumb was consequently rewarded for its Software's success, as the monthly payments it received pursuant to the Agreement were greater than expected. R. at 5-6. Additionally, payments to Under My Thumb on the promissory note in connection with the research and development agreement were made as scheduled. R. at 5. However, TDI soon plunged into self-imposed financial strain as a consequence of misguided management. Notably, following a leveraged buy-out, TDI was "[s]addled with a significant and unserviceable debt loan" and in June of 2015, ceased making payments to Under My Thumb pursuant to the research and development agreement. R. at 6.

On January 11, 2016, the Debtors filed voluntary cases under Chapter 11 of the Bankruptcy Code. R. at 3. The cases were jointly administered pursuant to Bankruptcy Rule 1015(b). R. at 5. The bankruptcy court authorized the Debtors' post-petition use of their prepetition business enterprise cash management system. R. at 3-4. At the commencement of the cases, Under My Thumb was owed an upwards of $6 million in connection with the research and development agreement, although payments due under the Agreement were current. R. at 6. Following negotiations that excluded Under My Thumb, a plan support agreement was proposed. R. at 7. Subsequently, a joint plan of reorganization (the "Plan") and a disclosure statement consistent with the plan support agreement were filed in August of 2016. R. at 7. The Plan was filed on behalf of all the Debtors and "expressly stated that 'the Debtors' estates are not being substantively consolidated and no Debtor is to become liable for the obligations of another.'" R. at 7. Under My Thumb initially viewed the Plan favorably, as it proposed to assume the Agreement pursuant to sections 365 and 1123(b)(2) of the Bankruptcy Code, thereby entitling Under My Thumb to the continued payments due under the Agreement. R. at 7. Additionally, the Plan "provided for a pro rata distribution of $66 million (i.e., 55%) to the Debtors' unsecured creditors," which included

the obligation of over $6 million owed to Under My Thumb in connection with the research and development agreement. R. at 7.

Under My Thumb's impression of the Plan shifted once it learned that the majority of the distribution to unsecured creditors would be funded by Sympathy for the Devil, LP ("SFD"), a private equity group whose portfolio contained one of Under My Thumb's direct competitors that, for years, sought to replicate the Software. R. at 8. Moreover, pursuant to the Plan, SFD would receive the majority of the reorganized Tumbling Dice's voting shares, and several seats on its reconstituted board of directors. R. at 8. Under My Thumb, concerned with the existential threat posed by SFD's access to its proprietary software and distressed at the prospect of being forced to uphold an agreement with an entity it did not contract with, timely voted to reject the Plan. R. at 8. Since Under My Thumb controlled Development's only class of creditors, its rejection rendered Development without an impaired accepting class of creditors because each of TDI and its other affiliated entities had at least one impaired accepting class of creditors. R. at 8.

In its objection to the Plan, Under My Thumb argued: (1) by "relying on the so-called 'hypothetical test'…the proposed assumption of the Agreement by the Debtors was impermissible under section 365(c)(1) because applicable non-bankruptcy law excused performance by Under My Thumb in the absence of its consent, which it was not giving"; and (2) "the Plan was not confirmable under section 1129(a)(10) because no impaired class of creditors of Development had voted to accept it." R. at 8. The bankruptcy court nevertheless overruled both of Under My Thumb's objections and confirmed the Plan. R. at 8. Its decision was affirmed by the Bankruptcy Appellate Panel for the Thirteenth Circuit on both issues. R. at 9.

Under My Thumb timely appealed the Bankruptcy Appellate Panel's ruling to the Court of Appeals for the Thirteenth Circuit. R. at 9. The Thirteenth Circuit reversed on both issues. R. at 3.

## SUMMARY OF THE ARGUMENT

Section 365(c)(1) of the Bankruptcy Code establishes a "hypothetical test" that bars a debtor in possession from assuming an executory contract over the non-debtor's objection if applicable law would bar assignment to a third party. This rule applies even where such a third party is purely hypothetical and the debtor in possession has no intention of assigning the contract to any such third party. The use of the "hypothetical test" is consistent with holdings of the majority of circuit courts that have addressed the issue. Thus, this Court should affirm the Thirteenth Circuit's holding and find that TDI is precluded from assuming the Agreement without the consent of Under My Thumb. However, even if this Court deviates from the majority and adopts the "actual test," assumption of the Agreement is precluded because SFD's acquisition of the majority of TDI's voting shares renders such an assumption a functional assignment.

The plain language of 365(c)(1) unambiguously demands the application of this "hypothetical test." Read literally, said test provides that the debtor in possession "may not assume *or* assign any executory contracts" without the consent of the non-debtor party. This plain language reading is consistent with the other provisions of the statute. In addition, none of the legislative history behind the subsection's establishment suggests that Congress had any intentions contrary to the plain meaning of the text.

In addition, adherence to the hypothetical test does not, as some courts have cautioned, run counter to bankruptcy policy in general. At least one court has noted that the existence of many Bankruptcy Code provisions preserving the rights of non-debtor parties from the generally pro-debtor process make it plausible that Congress *did intend* to bar debtors from assuming executory

contracts prior to bankruptcy. Such a result would thus constitute the continuation of a precedent, rather than an absurdity at odds with both the literal and intended meaning of the text. Furthermore, even if the Court adopts the actual test, assumption of the Agreement would not only deny Under My Thumb the benefit of its bargain, but would also establish an undesirable precedent in bankruptcy law by encouraging opportunistic parties to appropriate the bankruptcy process as a means of gaining a competitive advantage.

Section 1129 of the Bankruptcy Code governs confirmation of the Plan, with subsection 1129(a) providing sixteen requirements that must be satisfied in order for a plan to be confirmed. Section 1129(a)(10), in particular, provides that if a class of claims is impaired under a plan, at least one class of impaired claims under a given plan must accept said plan. In proceedings involving a jointly administered, multiple-debtor plan, disagreement can arise as to whether this subsection should be interpreted to require the proponent of such a plan to obtain acceptance from just *one* impaired class of creditors (the *per plan* approach), or from at least one impaired class of creditors of *each* debtor (the *per debtor* approach). This Court should affirm the Thirteenth Circuit's holding and apply a per debtor approach, thus rendering the Plan non-confirmable without the creditor support of any of the Development creditors controlled by Under My Thumb.

Although courts disagree on the correct approach, a line of cases decided in the Bankruptcy Court for the District of Delaware have held subsection 1129(a)(10) to require a *per debtor* application, reasoning that it aligns best with the statute's other subsections. Indeed, the plain language of section 1129(a)(10) is unambiguously consistent with a *per debtor* approach when considered alongside the subsection's other safeguards, each of which stipulate an individualized, *per debtor* application.

The alternative *per plan* approach is not only inconsistent with subsection 1129(a)(10)'s statutory scheme, but is also inappropriate to the extent that it constitutes *de facto* substantive consolidation; the effect of which is the conflation of the principles of administrative convenience and substantive business considerations for the abridgement of creditor rights. Entity separateness, informed by a *per debtor* approach to plan confirmation, is necessary in the absence of judicially administered substantive consolidation.

## ARGUMENT

When an appellate court reviews a decision of a bankruptcy court, it does so directly. *In re Charbono*, 790 F.3d 80, 84-85 (1st Cir. 2015). Therefore, questions of law are addressed under a *de novo* standard of review. *In re Soileau*, 488 F.3d 302, 305 (5th Cir. 2007).

### I. Assumption Of The Agreement Should be Prohibited Because (1) Under The Hypothetical Test, A Debtor In Possession Is By Its Terms Barred From Assuming An Executory Contract Over The Non-Debtor's Objection If Applicable Law Would Bar Assignment To A Hypothetical Third Party; And (2) Under The Actual Test, Assumption Would Constitute A Functional Assignment.

Section 365 of the Bankruptcy Code addresses the issue of executory contract treatment within a bankruptcy proceeding. Generally, section 365(a) provides that "the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor," while section 365(f) similarly authorizes a trustee the power to assign any executory contract "notwithstanding a provision…in applicable law." 11 U.S.C. §§ 365(a), (f). These provisions thus grant the trustee or debtor in possession, bestowed with the powers of a trustee under section 1107 of the Bankruptcy Code, with flexibility in deciding whether to assume or reject executory contracts. However, sections 365(a) and 365(f) are both made subject to other provisions of section 365, including 365(c). *See In re CFLC, Inc.,* 89 F.3d 673, 676 (9th Cir. 1996) ("[b]oth § 365(a), which authorizes assumption, and § 365(f), which authorizes assignment, are expressly subject to…§ 365(c)"). Section 365(c)(1) provides that:

> "[a] trustee may not assume or assign any executory contract…of the debtor…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 debtor in possession, whether or not such contract…prohibits or restricts assignment…; and such party does not consent to such assumption or assignment."

11 U.S.C. § 365(c)(1). This limitation imposed on the rest of section 365 thus impacts a trustee or debtor in possession's power with respect to executory contracts.

While this is a case of first impression for this Court, there is a split amongst circuit courts regarding whether section 365(c)(1) permits a debtor in possession to assume an executory contract over the objection of the non-debtor party to such contract when applicable non-bankruptcy law excuses the non-debtor party from accepting performance from or rendering performance to an entity other than the debtor or debtor in possession. *See N.C.P. Mktg. Grp., Inc. v. BG Star Prods., Inc.*, 556 U.S. 1145, 1147 (2009) (discussing "[t]he division in the courts over the meaning of § 365(c)(1)"). The Ninth Circuit held that adherence to section 365(c)(1)'s plain meaning establishes a "hypothetical test" that bars "a debtor in possession from assuming an executory contract over the non-debtor's objection if applicable law would bar assignment to a hypothetical third party, even where the debtor in possession has no intention of assigning the contract in question to any such third party." *In re Catapult Entm't, Inc.*, 165 F.3d 747, 750 (9th Cir. 1999). The majority of circuit courts addressing the issue have preferred to interpret section 365(c)(1) as establishing this hypothetical test. *See In re Sunterra Corp.*, 361 F.3d 257, 262 (4th Cir. 2004); *In re James Cable Partners*, L.P., 27 F.3d 534 (11th Cir. 1994); *In re Catron*, 158 B.R. 629, 636 (E.D. Va. 1993), *aff'd*, 25 F.3d 1038 (4th Cir. 1994); *In re West Electronics, Inc.*, 852 F.2d 79 (3d Cir. 1988). In contrast to the majority, one circuit court has rejected the hypothetical test and instead interpreted section 365(c)(1) as establishing an "actual test," which allows a debtor in possession to assume an executory contract when the debtor does not intend to assign it by inquiring whether the non-

debtor party is “being ‘forced to accept performance under its executory contract from someone other than the debtor party with whom it originally contracted.’” *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997) (quoting *Summit Inv. & Dev. Corp. v. Leroux*, 69 F.3d 608, 612 (1st Cir.1995)).

This Court should interpret section 365(c)(1) as establishing the “hypothetical test” contemplated by the majority, and find that a debtor in possession, TDI, is precluded from assuming an executory contract, the Agreement, without the non-debtor’s, Under My Thumb, consent where applicable law precludes assignment of the contract to a third party. It is an established maxim of statutory interpretation that where a statute's plain language is unambiguous and does not lead to absurd results, a court is obliged to enforce the statute according to its terms. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). Since the hypothetical test faithfully adheres to the plain meaning of section 365(c)(1), which is unambiguous, and does not produce an absurd result or an outcome that is demonstrably at odds with the intentions of its drafters, the hypothetical test should be the interpretation adopted by this Court. Under the hypothetical test, assumption of the Agreement is prohibited because Under My Thumb clearly does not consent to an assignment of the Agreement.

Even if the Court deviates from majority and adopts the actual test, assumption of the Agreement should be precluded because SFD’s acquisition of the majority of TDI’s voting shares renders such assumption a functional assignment. Assumption of the Agreement would therefore not only deny Under My Thumb the benefit of its bargain but would also establish the undesirable precedent in which opportunistic parties are encouraged to appropriate the bankruptcy process as a means of gaining a competitive advantage.

### A. The Court Should Adhere to the Plain Language of Section 365(c)(1) And Adopt the Hypothetical Test Because the Provision's Plain Language Is Unambiguous And Does Not Produce An Absurd Result.

The starting point of statutory interpretation is the examination of the ordinary meaning and structure of the statute's language. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). Where "the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters*, 530 U.S. at 6 (internal quotation marks omitted) (quoting *Ron Pair Enterprises*, 489 U.S. at 241).

The majority of circuit courts that have construed section 365(c)(1) adhered to its plain meaning and determined that the provision establishes a hypothetical test. *Catapult*, 165 F.3d. at 750; *see also Sunterra*, 361 F.3d at 262; *James Cable Partners*, 27 F.3d at 534; *Catron*, 158 B.R. at 636; *West Electronics*, 852 F.2d at 79 (3d Cir. 1988). This hypothetical test "is premised on a literal interpretation of" section 365(c). *See Sunterra*, 361 F.3d at 262. Notably, section 365(c) provides that the trustee or debtor in possession "may not assume *or* assign any executory contract" when the non-debtor party does not consent. 11 U.S.C. § 365(c) (emphasis added). Circuit courts adopting the hypothetical test have thus rightly opted for a literal reading of the disjunctive "assume or assign", linking "nonassignability under 'applicable law' together with a prohibition on assumption" by precluding assumption regardless of the debtor's intent to assign. *Catapult*, 165 F.3d at 750 (internal quotation marks omitted) (citing 1 DAVID G. EPSTEIN, STEVE H. NICKLES & JAMES J. WHITE, BANKRUPTCY § 5–15 at 474 (1992)).

In contrast to the majority approach, one circuit court has adopted the so-called "actual test," which permits a debtor in possession to assume an executory contract when the debtor does not intend to assign it. *Cambridge Biotech*, 104 F.3d at 489. This approach requires that the court depart from the literal, plain meaning of "assume or assign," and instead interpret the language to

mean "assume *and* assign." *Id.* By eschewing the plain meaning of the provision, the "actual test" violates this Court's settled principles of statutory interpretation and should therefore be rejected.

**1. The Plain Language of Section 365(c)(1) Is Consistent With the Surrounding Sections of the Bankruptcy Code, Including Section 365(f)(1).**

Statutory provisions should be interpreted in such a way as to be consistent with one another and "to minimize discord among related provisions." *Catapult*, 165 F.3d 747, 751 (9th Cir. 1999). Since a literal reading of section 365(c)(1) does not create any inconsistencies with the Code, this Court should not abandon a literal interpretation of section 365(c)(1)'s plain language. Courts adopting the hypothetical test have addressed the argument that a literal reading of 365(c)(1) results in a conflict between section 365(c)(1) and section 365(f)(1). *See Id.* at 751-53; *Catron*, 158 B.R. at 636. The purported conflict stems from each section's respective treatment of "applicable law": the plain language of section 365(c)(1) bars assumption whenever "applicable law" would bar assignment, while section 365(f)(1) states that executory contracts may be assigned, notwithstanding any contrary provisions in applicable law. 11 U.S.C. §§ 365(c)(1), (f)(1). Since assumption of a contract "is a necessary prerequisite to assignment under § 365…a literal reading of subsection (c)(1) appears to render subsection (f)(1) superfluous." *Catapult*, 165 F.3d at 751.

Courts have effectively reconciled the provisions by reasoning that "each subsection recognizes an 'applicable law' of markedly different scope." *In re Magness*, 972 F.2d 689, 695 (6th Cir. 1992); *accord James Cable*, 27 F.3d at 537–38; *In re Lil' Things, Inc.*, 220 B.R. 583, 590–91 (Bankr.N.D.Tex.1998); *In re Antonelli*, 148 B.R. 443, 448 (D.Md.1992), *aff'd without op.*, 4 F.3d 984 (4th Cir.1993). Notably, while section 365(f)(1) states the "broad rule" that "a law that, as a general matter, 'prohibits, restricts, or conditions the assignment' of executory contracts is trumped by the provisions of subsection (f)(1)," section 365(c)(1) creates a "carefully crafted

exception” to the rule. *Catapult*, 165 F.3d at 752. This exception is that “where applicable law does not merely recite a general ban on assignment, but instead more specifically excuses a party ... from accepting performance from or rendering performance to an entity different from the one with which the party originally contracted, the applicable law prevails over subsection (f)(1).” *Id.* Consequently, in construing “whether an ‘applicable law’ stands or falls under § 365(f)(1), a court must ask why the ‘applicable law’ prohibits assignment,” and “[o]nly 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.” *Id.* Moreover, given “the federal law principle against the assignability of nonexclusive patent licenses is rooted in the personal nature of a nonexclusive license,” the identity of the contracting party is indeed material with respect to the Agreement, which governs patented and copyrighted software. *Id.* at n.4; *see also CFLC,* 89 F.3d at 679.

**2. The Legislative History of Section 365(c)(1) Does Not Warrant Deviation From the Provision’s Plain Meaning Because the Plain Meaning Is Unambiguous And Adherence to the Plain Meaning Does Not Produce A Result At Odds With the Intentions of the Provision’s Drafters.**

This Court has established that a court need not resort to legislative history where it detects no ambiguity in the plain statutory language. *See Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808–09 n. 3 (1989) (“Legislative history is irrelevant to the interpretation of an unambiguous statute”). Since the plain language of section 365(c)(1) is unambiguous for the reasons detailed *supra*, the legislative history should be irrelevant to this Court’s interpretation of the provision. Further, a statute's “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.’” *Ron Pair Enterprises*, 489 U.S. at 242 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). Courts are thus compelled to adhere to a statute’s plain meaning unless it can be demonstrated that such a result would be contrary to that intended by Congress. *Id.* Such

a demonstration "is a more stringent mandate than requiring a showing that the statute's literal application is unreasonable in light of bankruptcy policy." *Sunterra*, 361 F.3d at 269.

The legislative history behind section 365(c)(1) does not clearly indicate Congressional intent contrary to the statute's plain meaning. Notably, the *Catapult* court found that section 365(c)'s "exhaustively analyzed" legislative history firmly established "that there exists no contemporaneous legislative history regarding the current formulation of subsection (c)(1)." *Catapult*, 165 F.3d at 754. The court also addressed the claim that the "language [of section 365(c)(1)] as ultimately enacted in 1984 had its genesis in a 1980 House amendment to an earlier Senate technical corrections bill," and a committee report accompanying the amendment. *Id.* The court held that the amendment and committee report did not constitute "the sort of clear indication of contrary intent that would overcome the unambiguous language of [section 365(c)(1)]," reasoning that the "report relates to a different proposed bill, predates enactment of § 365(c)(1) by several years, and expresses at most the thoughts of only one committee in the House." *Id.* at 754; *see also Sunterra*, 361 F.3d at 270 (declining to reject the plain meaning of 365(c)(1) on the same basis). Because the scarce legislative history behind section 365(c)(1) does not clearly indicate that Congress meant something contrary to the statute's plain meaning, this Court should adhere to the literal interpretation of section 365(c)(1)'s plain meaning and adopt the hypothetical test.

#### 3. Adherence to the Plain Meaning of 365(c)(1) Does Not Produce An Absurd Result.

Courts adopting the "hypothetical test" have also addressed the concern that adherence to the plain meaning of 365(c)(1) runs counter to the general bankruptcy policy, thereby producing an absurd result. The *Sunterra* court noted that "the Bankruptcy Code contains many provisions preserving the rights of non-debtor parties from its general debtor-favorable application." *Id.* at 268. These "Nondebtor Provisions" include sections 362(b), 555, 556, 557, 559, and 560 of the

Bankruptcy Code. *Id.* The court reasoned that the presence of these provisions "makes it plausible that Congress meant what it said in [365(c)]," namely, that debtors are barred from "assuming executory contracts existing from prior to bankruptcy." *Id.* The court held that because it is plausible that Congress could have intended such an outcome, interpreting the statute's plain meaning did "not produce a result so grossly inconsistent with bankruptcy policy as to be absurd" and therefore adherence to the plain meaning was required. *Id.* Because adherence to the plain meaning of 365(c)(1) does not produce an absurd result, this Court should adhere to its own precedent regarding statutory interpretation and adopt the hypothetical test.

This Court has also established that achieving "better policy outcomes" is the province of Congress, not the courts. *Hartford Underwriters*, 530 U.S. at 13 (citing *Kawaauhau v. Geiger*, 523 U.S. 57, 64 (1998); *United States v. Noland*, 517 U.S. 535, 541–42, n.3 (1996); *Union Bank v. Wolas*, 502 U.S. 151, 162 (1991)). Thus, "the modification of a statutory provision to achieve a preferable policy outcome is a task reserved to Congress." *Sunterra*, 361 F.3d at 269 (citing *Hartford*, 530 U.S. at 13). While a literal interpretation of the plain language of section 365(c)(1) may not result in optimal policy, that alone does not justify the court to engage in a "judicial rewrite" of the provision. *Catapult*, 165 F.3d at 754. Such a "judicial rewrite is precisely what the actual test requires," because it contemplates an unnecessary deviation from the unambiguous plain language of 365(c)(1). *Id.*

### B. Assumption of the Non-Exclusive License Agreement Is Precluded Under the Actual Test Because SFD's Acquisition of the Majority of TDI's Voting Shares Renders Such Assumption A Functional Assignment.

Even if the court deviates from the majority and adopts the actual test, it should prohibit assumption of the non-exclusive license Agreement because SFD's acquisition of the majority of TDI's voting shares renders such assumption a functional assignment of the Agreement. The actual test "contemplate[s] a case-by-case inquiry into whether the non-debtor party…actually was being

'forced to accept performance under its executory contract from someone other than the debtor party with whom it originally contracted.'" *Cambridge Biotech*, 104 F.3d at 493 (quoting *Leroux*, 69 F.3d at 612). For purposes of this inquiry, the debtor-in-possession is not, as a matter of law, "materially distinct from the prepetition debtor with whom the non-debtor party…contracted" by virtue of its bankrupt status. *Id.* However, "'sensitive to the rights of the non-debtor party,' the bankruptcy court must focus on the performance actually to be rendered by the debtor-in-possession with a view to ensuring that the non-debtor party…will receive 'the full benefit of [its] bargain.'" *Id.* (quoting *Leroux*, 69 F.3d at 612-13).

Here, given SFD's acquisition of a majority of reorganized TDI's voting shares, assumption of the Agreement by the debtor in possession amounts to a functional assignment, thereby depriving Under My Thumb of the full benefit of its bargain. Notably, Under My Thumb deliberately selected its counterparty when entering into the Agreement with TDI and explicitly prohibited assignment and sublicensing without Under My Thumb's express written consent. R. at 5. Under My Thumb thus clearly sought to contract with TDI, *and only* TDI. SFD has acquired a majority of TDI's voting shares, and now possesses multiple seats on TDI's reconstituted board of directors. R at 8. Assumption of the Agreement would therefore provide SFD with a direct pipeline to the Software that Under My Thumb invested substantial time and financial resources to develop.

Moreover, given that SFD's portfolio contains one of Under My Thumb's direct competitors, Under My Thumb would be deprived of the benefit of its bargain. R. at 8. When entering into the Agreement, Under My Thumb certainly did not anticipate that it would be forced to license its proprietary Software to a direct competitor, particularly one that had desired to replicate the Software for its own advantage. If assumption of the Agreement is permitted,

although Under My Thumb would be performing its end of the Agreement, it would not receive what it bargained for – namely, a counterparty lacking adverse business interests. Permitting the assumption of the Agreement would therefore not only deny Under My Thumb the benefit of its bargain but would establish the undesirable precedent in which opportunistic parties like SFD are encouraged to appropriate bankruptcy as a creative mechanism of gaining an otherwise unavailable competitive advantage. This Court should not allow the bankruptcy process to be seized upon in such a manner.

Under My Thumb's position is further strengthened by the fact that the non-exclusive license Agreement governs Under My Thumb's copyrighted and patented Software. Therefore the applicable non-bankruptcy law is predicated on the rationale that the identity of the licensee is material to the agreement. Notably, non-exclusive patent and copyright licenses are not assignable because they create only personal and not property rights in the licensed intellectual property. *See In re Golden Books Family Entm't, Inc.*, 269 B.R. 311, 314-16 (Bankr. D. Del. 2001); 4 McCarthy on Trademarks § 25:33 (4th ed. 2010) ("The rule as to nonexclusive licenses of patents and copyrights is the same: the license is a personal right and cannot be transferred by the licensee to another without the permission of the licensor"). Further, federal intellectual property law underscores that a fundamental component of a patentee's rights is the right to choose the identity of its licenses and to maintain the ability to exclude all others. *See CFLC, Inc.*, 89 F.3d at 679. The rationale precluding the assignment of nonexclusive patent licenses without the consent of the patent holder is consistent with the policy underlying the federal patent system, namely to "encourag[e] the creation and disclosure of new, useful, and non-obvious advances in technology and design." *Bonito Boats, Inc. v. Thunder Craft Boats. Inc.*, 489 U.S. 141, 150-51 (1989). Patent laws stimulate innovation by providing a right of exclusion during the patent term, during which

the patented innovation may not be used without the holder's consent. *See Kewanee Oil Co. v. Bicron Corporation*, 416 U.S. 470, 480 (1974); *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100, 135 (1969). Permitting assumption of the Agreement here would result in Under My Thumb losing the ability to control the identity of its licenses, which is indeed a fundamental right of a patentee. *See CFLC, Inc.*, 89 F.3d at 679. Thus, the Court should prohibit assumption of the Agreement.

## II. Section 1129(A)(10) Demands A *Per Debtor* Approach, Therefore Requiring Acceptance From An Impaired Class Of Claims Of *Each* Debtor In A Joint, Multi-Debtor Proceeding, Because Said Interpretation Is Most Consistent With The Section's Plain Language And Best Protects The Impaired Creditors' Rights In The Absence Of Substantive Consolidation.

Section 1129 of the Bankruptcy Code governs the confirmation of the Plan, with section 1129(a) providing sixteen requirements that must be satisfied in order for a plan to be confirmed. *See, e.g., Buffalo Sav. Bank v. Marston Enters., Inc.,* 13 B.R. 514, 516-18 (Bankr. E.D.N.Y. 1981). Although these terms provide that a bankruptcy court may generally confirm a plan only if it has the consent of each class of impaired creditors, in certain instances, a plan proponent can confirm a reorganization plan over the objections of one or more of the creditors. 11 U.S.C. § 1129(a)(8). One such circumstance may be a "cram down" scenario which, pursuant to section 1129(b), allows a Chapter 11 plan proponent to confirm a plan over the objections of one or more creditors under certain conditions. 11 U.S.C. § 1129(b). In 1984, Congress attempted to provide a safeguard against these "cram down" provisions, and enacted section 1129(a)(10) to protect lenders from their potential harmful effects. *Windsor on the River Assocs. v. Balcor Real Estate Fin.*, 7 F.3d 127, 131 (8th Cir. 1992). More broadly, Section 1129(a)(10) was intended to provide disadvantaged creditors with support by "promot[ing] consensual reorganization plans" in all Chapter 11 bankruptcy proceedings. *Id*. Section 1129(a)(10) provides such safeguard by stipulating that, "If a class of claims is impaired under the plan, *at least one class of claims that is*

*impaired under the plan has accepted the plan*, determined without including any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(10) (*emphasis added*). In cases such as this one, where a jointly administered plan consisting of multiple debtors is involved, disagreement can arise as to whether fair and equitable application of section 1129(a)(10) requires the proponent of such a plan to obtain acceptance from merely *one* impaired class of creditors (the *per plan* approach), or from at least one impaired class of creditors of *each* debtor (the *per debtor* approach).

Courts differ as to whether to apply the *per plan* or *per debtor* approach. The Bankruptcy Court for the District of Delaware has interpreted section 1129(a)(10) to require a *per debtor* application, reasoning that the statute's other sections clearly demand an analogous result. *See In re Tribune Co.,* 464 B.R. 126, 180-83 (Bankr. D. Del. 2011); *see also In re Woodbridge Grp. Of Cos., LLC,* 592 B.R. 761 (Bankr. D. Del. 2018); *In re JER/Jameson Mezz. Borrower II, LLC*, 461 B.R. 293 (Bankr. D. Del. 2011). In that line of cases, that court also suggests that to interpret section 1129(a)(10) to apply to jointly administered, multi-debtor plans on a *per plan* basis is to affect a *de facto* substantive consolidation absent the requisite assessment of whether substantive consolidation is appropriate. This significantly reduces the representation that the objecting lender would have otherwise had in confirming the plan under the *per plan* approach. *In re Tribune Co*., 464 B.R. at 182,184; *In re Woodbridge Grp. Of Cos*., LLC at 778; *In re JER/Jameson Mezz. Borrower II, LLC*, at 301-2. Alternatively, the Ninth Circuit has held that the plain language of section 1129(a)(10) prescribes a *per plan* application, declining to examine its legislative history and abrogating the responsibility of relevant policy concerns to Congress. *In re Transwest Resort Props., Inc.*, 881 F. 3d 724 (9th Cir. 2018).

When examined within the broader context of the section, the plain language of section 1129(a)(10) is most logically read to support a *per debtor* approach, as such a reading is most consistent with the other provisions outlined therein and produces a logical result. Furthermore, the alternative *per plan* approach constitutes *de facto* substantive consolidation, conflating the principles of substantive and administrative consolidation to deprive the objecting debtor of its voting power without requiring the court to consider the implications of such an action. A *per debtor* approach would correct this issue, promoting the entity separateness that is expected in bankruptcy and corporate law, and that is demanded in the absence of substantive consolidation. Here, this Court should follow the District of Delaware in holding that section 1129(a)(10) does indeed require that jointly administered, multi-debtor plans be analyzed on a per debtor basis and find that the Plan did not meet the requirements. Therefore, it should not have been confirmed without the approval of at least one of Development's impaired class of creditors

### A. The Plain Language Of Section 1129(a)(10) Is Unambiguously Consistent With A *Per Debtor* Approach When Considered In Conjunction With the Section's Other Provisions.

While the starting point of statutory interpretation requires an examination of the ordinary meaning and structure of the statute's language, it is vital that the statute be considered as a whole, as the "meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) (referring to the practice of reading a statute as a whole as a "cardinal rule" of statutory interpretation); *see also Food Mktg. Inst.,* 139 S. Ct. at 2364; *Massachusetts v. Morash*, 490 U.S. 107 (1989); *Shell Oil Co. v. Iowa Dept. of Revenue*, 488 U.S. 19 (1988). As "words . . . have only a communal existence" and gain their meaning from the setting in which they are employed, statutory interpretation requires us to interpret a statute's particular provision in conjunction with the other sections contained therein. *Shell Oil*, *supra*, 488 U.S. at 25; *King v. St. Vincent's Hospital,* 502 U.S. at 221; *see also* Kyu Y. Paek, *The Impaired Accepting*

*Class Rule and the Reorganization of the Business Enterprise*, 28 Norton J. of Bankruptcy L. & Practice 1, 7 (2019) ("…the analysis of whether section 1129(a)(10) applies per debtor or per plan should include how the other subsections of section 1129(a) are applied").

The plain language of section 1129(a)(10), when considered within the context of section 1129 as a whole, unambiguously provides that a reorganization plan must be satisfied by *each* debtor in a joint, multi-debtor plan. Our exercise in statutory interpretation must begin with a comprehensive examination of the plain language of section 1129(a)(10), inclusive of the provisions outlined in the Bankruptcy Code's Rules of Construction. *See Food Mktg. Inst.,* 139 S. Ct. at 2364. There, the rules provide that "the singular includes the plural." 11 U.S.C. § 102(7). Thus, "the fact that section 1129(a)(10) refers to 'plan' in the singular" is not alone a sufficient basis for reasoning that its standard can be satisfied by the approval of only one debtor in a multi-debtor case. *In re Tribune Co.*, 464 B.R. at 181. This contention is further strengthened where the proposed plan in question contains an explicit "non-substantive consolidation" provision, the practical effect of which is that "each joint plan actually consists of a separate plan for each debtor." *Id*. at 182. In *Tribune Co*., the United States Bankruptcy Court for the District of Delaware held that the existence of multiple separate and distinct plans makes the pluralization of the meaning of "plan" an "entirely logical" reading of the statute that is "consistent with such a scheme." *Id*. Here, as in *Tribune Co*., the Plan expressly stated that the Debtors' estates are not being substantively consolidated, and thus a pluralized reading of "plan" is similarly logical. R. at 7. *See Hartford Underwriters,* 530 U.S. at 6 ("[Where] the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is *not absurd*—is to enforce it according to its terms") (emphasis added; internal quotations omitted).

Examining this *per debtor* reading of section 1129(a)(10) in conjunction with the other sections of the statute provides further support for its legitimacy. Therefore, we must apply the approach that complies with the other sections contained within section 1129. *See also* 11 U.S.C. § 1129(a)(1) (providing that the Plan comply with the applicable provisions of the Bankruptcy Code). Section 1129(a)(3), for example, requires that a confirmable plan be "proposed in good faith" and in accordance with the law. However, a plan cannot be confirmed in good faith if its confirmation deprives certain debtors—or even one certain debtor—of their power to vote and, by extension, maintain control over their own obligations. *In re Tribune Co.*, 464 B.R. at 183. Section 1129(a)(7), which requires that a plan pass a "best interest of the creditors" test, and defines such treatment as a requirement for "*each* impaired class," similarly cannot be satisfied with a *per plan* approach, as its fair reading unambiguously requires that the statute be read "as an entitlement to the prescribed treatment for every impaired class of creditors for *each* debtor which is part of a joint plan." *Id*.

Indeed, when assets and liabilities vary across debtors, as they do here, their respective results of the best interests test will vary too. Kyu Y. Paek, *The Impaired Accepting Class Rule and the Reorganization of the Business Enterprise* at 9. Thus, the court must consider the results of *each* unique debtor individually in order to ensure that each debtor's rights under section 1129(a)(7) are preserved. *Id*. Furthermore, section 1129(a)(8) similarly requires a showing that *each* class of claims must either accept the plan or be unimpaired by it. *Id*. Taken together, these sections plainly show that the safeguards outlined in section 1129(a) are intended to apply to each debtor, thus making the *per debtor* interpretation of section 1129(a)(10) wholly consistent with the statute's scheme. *Id.* at 10.

While contrary case law heavily relies on the contention that changing the word "plan" to the plural "plans," as per section 102(7), has "no effect on the analysis," we need not rely on this argument alone; the surrounding terms within section 1129 further support the conclusion that a joint plan is not a single plan. *Id.* at 10-11. *See also In re Charter Communications,* 419 B.R. 221, 266 (Bankr. S.D.N.Y. 2009). While courts also argue that the other sections outlined in section 1129(a) are irrelevant, the Supreme Court is reluctant to declare provisions of the Bankruptcy Code ambiguous. *In re American Home Mortg. Holdings, Inc.*, 637 F.3d 246, 255 (3d Cir. 2011); *See In re Transwest Resort Props,* 881 F. 3d at 730. Instead, the Supreme Court instructs that courts "not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Id.* A contextual reading of section 1129(a)(10) is appropriate to understanding its clear language; considered within the context of the section's parallel requirements, section 1129(a)(10) does indeed provide unambiguous support for the *per debtor* approach.

**B. The *Per Plan* Approach Is Inappropriately Applied In The Instant Case Because It Produces a *De Facto* Substantive Consolidation In a Joint, Multi Debtor Proceeding, Erroneously Allowing Joint Administration To Be Used To Bypass the Rigorous Requirements Usually Necessary for Such Consolidation, and Thus Subjecting the Objecting Debtor To An Abridgement of Its Right to Be Heard Through Its Vote.**

While a debtor is generally permitted to reorganize only the assets and liabilities of its own bankruptcy estate, there exist two mechanisms—joint administration and substantive consolidation—that act as exceptions to this general rule and help facilitate complex, multi-debtor reorganizations more efficiently. *Id.* at 731. Joint administration is a "tool of convenience" intended for the benefit of both the parties and the court, usually employed on the basis of consensus or where "no objection is made by *any* creditor or party in interest." *Id.*; *In re Tribune Co.*, 464 B.R. at 183. Whereas the tool of joint administration does not mandate the merging of

any of the assets or liabilities of individual debtors, substantive consolidation effectively replaces "two or more debtors, each with its own estate and body of creditors," with a "single debtor" that shares a "common fund of assets and a single body of creditors." *In re Transwest Resort Props*, 881 F. 3d at 731; *see also In re Owens Corning,* 419 F. 3d 195, 205 (3d Cir. 2005) ("The result [of substantive consolidation] is that claims of creditors against separate debtors morph to claims against the consolidated survivor"). As substantive consolidation combines multiple debtors into one singular entity, a *per plan* approach is appropriate where it has been employed.

Substantive consolidation, however, is not automatic. On the contrary, the Third Circuit Court of Appeals held in *Owens Corning* that substantive consolidation is available as an equitable remedy, only upon a showing that the debtors were treated as one legal entity prepetition, and that the debtors' assets and liabilities are so entangled that separating them would actually hurt creditors. *In re Owens Corning*, 419 F.3d at 210-11. In *Augie/Restivo*, the Second Circuit set forth a slightly different, but equally stringent test, making clear that "the sole purpose of substantive consolidation is to ensure the equitable treatment of all creditors." *In re Augie/Restivo Baking Co., Ltd.*, 860 F.2d 515, 518 (2d Cir. 1988). In the instant case, despite that no motion for substantive consolidation was filed and no showing of its necessity was made, the lower court's decision to impose a *per plan* approach effectively subjected Under My Thumb to *de facto* consolidation. This decision ignored the principles of corporate law set forth in *Owens Corning* and *Augie/Restivo*, in turn allowing the impaired class of claims for the remaining debtors to speak for the lone dissenting debtor.

Here, where the Plan expressly stated that substantive consolidation was not being employed, the use of the *per plan* approach undermines that stipulation by ignoring corporate separateness and abridging the rights of Under My Thumb's class of creditors. In the case at bar,

a Thirteenth Circuit judge argued in a dissenting opinion that substantive consolidation, as a judicially-created doctrine, is irrelevant to the technical requirements of section 1129(a)(10) and thus should not affect its administration. R. at 30. While substantive consolidation is indeed an equitable remedy that should not affect the technical administration of plan confirmation, as governed by section 1129(a), the *per plan* approach causes just this muddling.

When the *per plan* approach is applied, the two otherwise distinct principles of substantive corporate separateness and joint administration become conflated, resulting in the effective use of joint administration to bypass the requirements for substantive consolidation and abridge the rights of the non-accepting debtor. Courts have held that joint administration cannot be used in such a manner. *See In re Reider,* 31 F.3d 1102, 1109 (11th Cir. 1994) (holding that substantive consolidation of spouses' jointly administered Chapter 7 cases was an abuse of discretion). On the contrary, the principles of corporate law require entity separateness in the absence of substantive consolidation. *In re Owens Corning*, 419 F.3d 195 at 211(Generally, courts respect "the general expectation of state law and of the Bankruptcy Code, and thus of commercial markets"). In the absence of judicially approved substantive consolidation, each debtor entity must be considered separately; this principle extends to the provisions governing plan confirmation. *See In re Tribune Co.,* 464 B.R. at 182 (holding that two distinct reorganization plans could not satisfy section 1129(a)(10) when applying the *per plan* approach without either the consent at least one class of claims of *each* debtor, or substantive consolidation).

As substantive consolidation is to be invoked sparingly, even "deemed," or *de facto,* consolidation can be subject to judicial scrutiny when the court questions whether the proposed *de facto* consolidation "exhibits sufficient characteristics" to be considered as such. *In re Owens Corning,* 419 F.3d 195, 205; Kyu Y. Paek, *The Impaired Accepting Class Rule and the*

*Reorganization of the Business Enterprise* at 12. In *New Century*, however, the District of Delaware showed that the threshold for being deemed a *de facto* consolidation is not necessarily a high one. *In re New Century TRS Holdings, Inc.,* 407 B.R. 576, 691 (D. Del. 2009). In that case, the proposed Chapter 11 joint plan had near universal support and lacked the support of just one class of creditors who argued that the plan constituted a *de facto* consolidation. *Id.* The court held that the plan's "many-into-three" framework still "presented the same potential inequities for creditors as would be presented in [a] many-into-one framework." *Id.* Any plan that aggregates multiple debtors into one or more groups could be considered *de facto* substantive consolidation, thus creating the "rough justice" that *Owens Corning* warned against. *Id.*

This principal reigns true even where some, "or even most," of the traditional elements of substantive consolidation are absent from a plan, meaning that once a plan is considered a *de facto* consolidation, it then must meet the stringent standards for equitable treatment set forth in *Owens Corning* and *Augie/Restivo*. Kyu Y. Paek, *The Impaired Accepting Class Rule and the Reorganization of the Business Enterprise* at 13 ("The *New Century* ruling illustrates that even a small group of dissenting creditors can put in jeopardy the confirmation of a joint plan containing consolidation elements… Once a court determines that a plan too closely resembles a de facto consolidation, such plan must satisfy the high bar established by the various courts of appeals"). Later, in *Transwest Resort Props*., the Court of Appeals for the Ninth Circuit rejected the argument that a jointly administered plan was, in effect, a substantive consolidation posed by a similarly situated lender. There, the court reasoned that this argument was easily defeated by two obstacles: (1) that the lender bringing suit had not previously objected to the plan on that basis, and (2) that the "parade of horribles" that the lender argued the *per plan* approach would impose was merely

a hypothetical policy consideration to be addressed by the legislature. *In re Transwest Resort Props*, 881 F. 3d at 730.

Regarding the former argument, it could simply be reasoned that the lender in that case, and Under My Thumb here, was robbed of the opportunity to raise an objection to substantive consolidation where the opposing party failed to properly request it. In a concurring opinion in that same case, Circuit Judge Friedland raises the question of why the lender did not make an earlier objection to substantive consolidation, perhaps by raising the question itself. *See Id.* at 732-733. However, it is logical that a lone dissenting lender in a jointly administered case would decline to raise such a question. Presenting such question opens a debtor to the risk that the court approve the requested substantive consolidation, subsequently potentially placing it in a worse off position that it otherwise would have been. Furthermore, the latter argument, relying on the legislature to protect lender rights, is incongruent with the purpose of section 1129(a)(10). This section was intended to protect disadvantaged lenders from abuse in the bankruptcy process, and therefore should be applied in a way that protects those rights without amendment by the legislature.

Although Judge Friedland notes that *de facto* substantive consolidation was inappropriate in *Transwest*, he also notes that a plan could proceed under *de facto* substantive consolidation where consensus exists amongst the all classes of creditors. *Id*. at 731; *see also In re Tribune Co.,* 464 B.R. at 183 (noting that where a single distribution scheme is proposed for the confirmation of a complex, multiple-debtor Chapter 11 plan, the constituents of the proceeding usually arrive at such result by consensus, or where no objection is made by any creditor or party in interest). Here, where consensus does not exist, administrative convenience is not alone sufficient to warrant abridging the rights of the impaired classes of creditors of an objecting debtor by applying a *per plan* approach. *Id*. Alternatively, any consideration of the policy favoring efficient and successful

reorganization of debtors must be balanced against the substantive rights given to creditors under the bankruptcy code. *In re Cordes*, 147 B.R. 498, 504 (Bankr. D. Minn. 1992) ("[The] equitable balance between the rights of debtors and the rights of creditors underlies the structure of the Bankruptcy Code"). Thus, judicial efficiency, convenience, and other broad policy considerations should not be allowed to abrogate specific statutory provisions. *See SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC,* 137 S. Ct. 954, 967 (2017) ("[We cannot overrule Congress's judgment based on [the court's] policy views"); *see also* Kyu Y. Paek, *The Impaired Accepting Class Rule and the Reorganization of the Business Enterprise* at 11 ("[Bankruptcy policy should not play a meaningful role in applying section 1129(a)(10)").

## CONCLUSION

For the aforementioned reasons this Court should affirm the ruling of lower court.

Respectfully submitted.

Team 1R

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