In the Supreme Court of the United States

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

V.

UNDER MY THUMB, INC., RESPONDENT

24 P – Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether 11 U.S.C. § 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 the debtor in possession.

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

Congressional Reports

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V.

UNDER MY THUMB, INC., RESPONDENT

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE THIRTEENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals for the Thirteenth Circuit is not published in the Federal Reporter but is available in the record below.

STATEMENT OF THE BASIS FOR JURISDICTION

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

STATUTORY PROVISIONS INVOLVED

1. Section 365(c)(1) of the United States Bankruptcy Code:

   § 365(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

2. Section 1129(a)(10) of the United States Bankruptcy Code:

§ 1129(a) The court shall confirm a plan only if all of the following requirements are met:

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

STATEMENT OF THE CASE

Petitioner is a corporate-group debtor — consisting of a parent company and nine debtor-subsidiaries — who owns and operates eight casino and resort properties throughout the United States. R. at 3. The Chapter 11 cases at the center of this dispute were filed separately, on January 11, 2016, but jointly administered to reflect the fact that, though each debtor-subsidiary has different liabilities (and each creditor in this case has different rights stemming from those respective liabilities), the corporate group is a unitary business that benefits from streamlined management and, to some degree, shared profits. R. at 3. The lead bankruptcy case was filed by Tumbling Dice, Inc., the holding company; and the debtor-subsidiary at the center of this dispute is Tumbling Dice Development, LLC. R. at 4.

Tumbling Dice Development, LLC ("Development") is the licensee in a non-exclusive software license agreement with the Respondent in this case, Under My Thumb. R. at 4. The software agreement is one of the corporate group's most valuable assets, as it is crucial to the group's longstanding casino royalty program, "Club Satisfaction." R. at 4. Through Club Satisfaction, Petitioner offers loyalty members free and discounted nights at its hotels, complimentary meals and drinks at its chain of steakhouses, VIP seating at concerts, and other perks. R. at 4.

Development contracted with Respondent, a leading software designer, in 2008 to create a comprehensive, integrated software system that would modernize Club Satisfaction, and that would benefit all branches of this corporate group. R. at 4. The modernization of the loyalty program was a tremendous success for the entire corporate group and is an essential part of the group's business model. R. at 5.

Respondent incurred roughly $10 million in costs to create the Club Satisfaction Software, and Development agreed to reimburse Respondent for a portion of these costs pursuant to an unsecured $7 million promissory note. After the Software was completed, and pursuant to a licensing agreement, Respondent granted Development a non-exclusive license to use the copyrighted patented software; as part of the agreement, Development was permitted to "extend the benefits of the Agreement to its affiliated entities only." R. at 5. Development was not, however, allowed to assign or sublicense these rights to other parties without obtaining Respondent's written consent. R. at 5.

Membership in Club Satisfaction tripled as a result of the revamped loyalty program. R. at 5. Respondent also benefitted richly from provisions in the agreement allowing it to license similar versions of the Software to third parties, as well as from the higher-than-average payments it received as a result of the program's success. R. at 5-6.

Petitioner filed for bankruptcy after a leveraged buy-out transaction under which Development — which serves a limited purpose in the corporate group structure — assumed no additional liabilities. R. at 6. Though debtor had ceased making payments on the promissory note in June 2015, their primary goal in filing for Chapter 11 protection was to restructure the debt load assumed as part of the leveraged buyout-transaction. R. at 6. Petitioner's total secured debt at the time of filing was $2.8 billion; petitioner's unsecured debt (including that of the parent company and the associated debtor-subsidiaries) was roughly $120 million. R. at 6. Respondent was owed $6 million — accounting for just 5 percent of the total unsecured debt. R. at 6.

After negotiations and mediation, debtors reached a deal to reorganize and restructure the secured debt. R. at 7. One joint plan was filed in August 2016, on behalf of all the debtors. R. at 7. In keeping with the separate corporate management structure from which the group has long benefitted, the Plan expressly stated that "the Debtors' estates are not being substantively consolidated and no Debtor is to become liable for the obligations of another." R. at 7. The plan called for the injection of new capital (to fund a 55 percent distribution to unsecured creditors) from the hedge fund that financed the LBO, in exchange for equity. R. at 7.

Under the plan, Petitioner proposed to assume the agreement under 11 U.S.C. § 365 and § 1123(b)(2), meaning that Respondent would continue to receive monthly payments. Respondent also would receive a 55 percent distribution on the promissory note — an amount that greatly exceeds the value of Development's assets. R. at 7. Respondent thus viewed the plan favorably, at least initially, as did Petitioner's other creditors. R. at 7.

Respondent's favorable view of the plan changed, however, upon learning that the unsecured distribution was being partially funded by one of its competitors, Sympathy for the Devil, who was to receive 51 percent of the voting shares in the reorganized holding company as a result of the plan. R. at 8. Upon learning of Sympathy for the Devil's involvement, Respondent objected to the Plan. R. at 8. Respondent was the only impaired creditor who objected; all other impaired classes voted to accept the plan. R. at 9.

Respondent launched two objections, both of which were overruled by the bankruptcy court. R. at 8. First, Respondent argued that § 365(c) poses a "hypothetical" test, under which a debtor may not assume an agreement if applicable law would prohibit assignment of the agreement. R. at 8. The bankruptcy court held instead that § 365(c) poses an "actual test," under which assumption is only prohibited if the non-debtor party would be forced to accept performance from someone other than the party to the agreement. R. at 8-9. Second, respondent argued that § 1129(a)(10) requires that an impaired class of creditors of each debtor — rather than an impaired class of creditors under the joint Plan — support the plan. R. at 8. Respondent is Development's only creditor. The Bankruptcy Appellate Panel of the Thirteenth Circuit affirmed the bankruptcy court's rulings on both questions, but the Thirteenth Circuit reversed, holding that § 365(c) poses an actual test and that § 1129(a)(10) is tested per-debtor, rather than per-plan.

SUMMARY OF ARGUMENT

The corporate-group debtor in this case is a prime candidate for an effective Chapter 11 Reorganization: the group has proposed a Joint Plan that includes the investment of new capital, the preservation of thousands of jobs, and generous distributions even to unsecured creditors. Accordingly, the Plan has won near-unanimous support from impaired creditors. But confirmation of the Plan is tied up in lengthy and expensive litigation — and the Reorganization is at risk of derailment — due to the objections of one unsecured creditor who holds just 5 percent of the unsecured debt. Such is hardly the outcome that Congress intended when it enacted the Bankruptcy Code, with an eye toward encouraging successful reorganizations in cases like this one.

This case involves two sections of the Bankruptcy Code. One of those sections, 11 U.S.C. § 365(c)(1), is ambiguous, has frustrated courts and Congress for decades, and has ample legislative history that sheds light on its purpose and function in the statutory scheme. The majority of bankruptcy courts, as well as the First Circuit and the Fifth Circuit, have interpreted this section in a manner consistent with that purpose and function, reading it to allow assumption of executory contracts in cases where, as here, the non-debtor party is not being forced to render performance to anyone other than the party with whom it contracted. *See Summit Inv. and Dev. Corp. v. Leroux*, 69 F.3d 608, 612 (1st Cir. 1995); *see also In re Mirant Corp.*, 440 F.3d 238, 248-49 (5th Cir. 2006). This is consistent with fundamental bankruptcy principles: it maximizes the value of the debtor's estate and it ensures that debtors do not forfeit bargained-for contractual rights when they file for Chapter 11 protection.

The Thirteenth Circuit, joining the view of a handful of other Article III courts, instead adopted a hyper-literal reading of the text. This reading yields an absurd result under which assumption of contracts — here, the Software Agreement — is barred whenever applicable law would prohibit assignment to a third party. The Thirteenth Circuit reached this conclusion despite the fact that applicable law (the terms of the Software Agreement prohibiting assignment to third parties) is decidedly inapplicable to these facts, where debtor-subsidiary Development, the original party to the agreement, seeks to assume the contract. And the court reached this conclusion despite the fact that Congress has repeatedly attempted to amend this statute to prevent precisely this result. The decision below should be reversed, and debtor-subsidiary Development should be allowed to assume the Software Agreement. The courts do not exist to play a "gotcha" game with Congress whenever the legislature has made a slight wording error.

The other section, 11 U.S.C. § 1129(a)(10), contains merely a technical requirement for plan confirmation, the purpose of which is largely unclear from the legislative history but is generally thought to be a compromise, resulting from a split in the case law at the time the modern Bankruptcy Code was enacted. *See, e.g., In re Marston Enterprises, Inc.*, 13 B.R. 514, 520 (Bankr. E.D. N.Y. 1981) (noting this split). The provision requires "at least one class of claims that is impaired under the plan" to have "accepted the plan." 11 U.S.C. § 1129(a)(10). Until recently, the meaning of this language was undisputed in the case law; it was widely understood to be tested on a per-plan, rather than a per-debtor basis. The per-plan approach especially makes sense in cases like this one, where the debtor-subsidiaries are part of one integrated corporate group that benefits from centralized management but that includes several debtor-subsidiaries with separate liabilities.

The Thirteenth Circuit, however, held that in jointly administered cases of a corporate group of debtors, § 1129(a)(10) requires approval from an impaired class of each debtor-subsidiary. The only way to avoid this outcome, according to the decision below, is through substantive consolidation — an extreme, judicially-created remedy that pools assets and fundamentally alters the rights and liabilities of the parties involved in the case. That approach is neither supported by the text of the Code nor by the legislative history. And it will severely undermine debtors' ability to reorganize in cases like this one, where the corporate structure — and thus the division of assets in bankruptcy — depends on a degree of separateness among the separate corporate branches.

The Thirteenth Circuit's decision should be reversed, and this Court should instead adopt the view of the Ninth Circuit, which has held that § 1129(a)(10) is tested on a per-plan, rather than a per-debtor basis. *See Matter of Transwest Resort Properties, Inc.*, 881 F.3d 724, 729 (9th Cir. 2018). The per-plan approach furthers the important Code policy of reorganization while still ensuring that there is an "indicia of support," R. at 16, from creditors. This approach is "more consistent with certain acknowledged policies of Chapter 11," R. at 20, and it is also consistent with the text of the statute.

The holding below, on the other hand, directly contradicts the legislative goal of encouraging reorganizations. Respondent, an unsecured creditor holding a fraction of the debt, is favorably treated under the Plan but in this case has been given confirmation veto power. And Respondent seeks to exercise that veto power for competitive reasons entirely unrelated to its rights as a creditor and its relationship with the debtor. This was certainly not the purpose envisioned by Congress in enacting § 1129(a)(10).

Under sensible readings of both the statutory provisions at issue in this case, the Plan — which has the overwhelming support from a majority of creditors it impairs — is confirmable over Respondent's objections.

ARGUMENT

I. A Debtor-in-Possession is Not Precluded from Assuming a Non-Exclusive IP License Under a Meaningful Construction of § 365(c)(1) Consistent with the Section's Text, Legislative Purpose, and Underlying Congressional Policies

11 U.S.C. § 365(c)(1)(A) says that, "[t]he trustee may not assume . . . any executory contract . . . if applicable law excuses a party . . . from . . . rendering performance to an entity other than the debtor." 11 U.S.C § 365(c)(1)(A). Yet "the meaning or plainness of discrete statutory language is to be gleaned from the statute as a whole, including its overall policy and purpose." *Summit Inv. and Dev. Corp.*, 69 F.3d at 610. In keeping with this principle, "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with legislative purpose are available." *Griffin v. Oceanic Contractors,* 458 U.S. 564, 575 (1982). And § 365(c)(1), if read literally and if considered in isolation from the rest of the Bankruptcy Code, produces an "absurd result."

A sensible construction of § 365(c)(1) should only prohibit assumption or assignment upon "an actual showing — prior to any termination of the debtor's postpetition contract rights — that the non-debtor party . . . would be forced to accept performance under its executory contract from someone other than the debtor party with whom it originally contract[ed]." *Summit Inv. and Dev. Corp. v. Leroux*, 69 F.3d 608, 612 (1st Cir. 1995). This approach is referred to as the "actual test," and it has been endorsed by the First Circuit, the Fifth Circuit, and the majority of bankruptcy courts. *See id.*; *see also In re Mirant Corp.*, 440 F.3d 238, 248-49 (5th Cir. 2006) (holding 365(e)(2)(a) requires an actual test and suggesting that the 365(c) analysis is the same), *In re Edison Mission Energy*, 2013 Bankr. LEXIS 3872, at *27 (Bankr. N.D. Ill. Sep. 16, 2013) ("assumption is prohibited only where the debtor expresses an actual intent to assign the contract to a party to whom the nondebtor could refuse performance").

The Software Agreement is among Petitioner's most valuable assets, and it is crucial to the business success of the entire corporate group. There is no reason that Petitioner should be forced to forfeit this asset in bankruptcy simply because of a slight wording error in the statute. "[E]ven though section 365(c) speaks in the disjunctive and provides that a debtor may not assume or assign an unexpired executory contract without consent, a sensible construction of this section permits but one conclusion — that this section was designed solely to govern the debtor-in-possession's ability to assign a contract which it had already assumed." *In re Fastrax, Inc.*, 129 B.R. 274, 277 (Bankr. M.D. Fla. 1991) (so holding in another case involving assumption of a software contract).

"Allowing applicable law to drive the assumption determination, when said law may be entirely inapplicable, would allow creditors a potential windfall through a fast exit from their duties and obligations." *Ohio Skill Games Inc. v. Pace-O-Matic, Inc.* No. 08-06049, 2010 Bankr. Lexis 2220, 2010 WL 2710522, at *6 (Bankr. N.D. Ohio July 8, 2010) (internal quotation marks omitted); *see also In re Cumberland Corral*, 2014 Bankr. Lexis 936, at *25 (Bankr. M.D. Tenn. Mar. 11, 2014) ("[t]o allow [Respondent] to block assumption of the [Software Agreements] because such agreements could not be assigned would allow [Respondent] a windfall while destroying the Debtor's chances at reorganization"). The literal construction of the statute adopted by the Thirteenth Circuit gives Respondent a windfall by allowing it to back out of its contract without consequence and also denies Petitioner the benefit of its bargain.

Indeed, because Petitioner simply seeks to assume the contract, the hypothetical approach is particularly improper here. When "[n]o assignment is contemplated . . . there is no need to pose or answer the hypothetical question of whether [the debtor-in-possession] may assume and assign the Contracts." *Matter of GP Exp. Airlines, Inc.*, 200 B.R. 222, 231-32 (Bankr. D. Neb. 1996). That is why "virtually all" of the other cases that applied the hypothetical test "involve[d] a situation where the debtor propose[d] to assume a contract *and assign* it to a third party." *Id.* (collecting cases). But those are not the facts in this case.

Here, Petitioner has continued to operate its business and manage its property as a debtor-in-possession. Respondent will be no worse off if Petitioner assumes the contract and continues paying for the services, while Petitioner will lose access to the bargained-for-product essential to its going concern value and continued viability as a business. Because the actual test does not enshrine such an absurd forfeiture it is more consistent with the congressional intent underlying this specific provision and the code as whole, and thus should be adopted by this court.

A. The Legislative History Clearly Indicates the Actual Test Is Appropriate

"The rules of statutory construction require foremost that the intention of the legislature be given effect," *In re Cardinal Industries*, 116 B.R. 964, 978 (Bankr. S.D. Ohio 1990). And the actual test is the only reading of the statute that gives effect to the intention of Congress in enacting — and repeatedly amending — § 365(c)(1). The legislative history makes clear that § 365(c)(1) was never meant to impose such a sweeping prohibition on assumption of executory contracts by a debtor in possession. Rather, "Congress intended § 365(c) to be a narrow exception to the general rule allowing assumption of executory contracts and unexpired leases." *Texaco Inc. v. Louisiana Land & Expl. Co.*, 136 B.R. 658, 663 (Bankr. M.D. La. 1992).

"Congress did not intend to bar assumption of any contract as long as it will be performed by the debtor or debtor in possession." *In re Ontario Locomotive & Indus. Ry. Supplies (U.S.) Inc.*, 126 B.R. 146, 148 (Bankr. W.D. N.Y. 1991). Section 365(c) was merely intended to "require the courts to be sensitive to the rights of the nondebtor party to executory contracts and unexpired leases." S. Rep. No. 95-989, at 59 (1978). Legislators who enacted the provision were concerned that a non-debtor party could be "forced to accept performance — under a nonassignable executory contract — from the chapter 11 *trustee* of an individual (i.e. non-corporate) chapter 11 debtor, rather than from the debtor himself." *Summit Inv. and Dev. Corp.*, 69 F.3d at 612. That is not a concern on these facts, where Respondent will only need to render performance to the party with whom it contracted.

The 1978 Senate Report indicates that legislators intended to permit assumption in cases like this one: "If the trustee is to assume a contract or lease, the court will ensure that the trustee's performance under the contract or lease gives the other contracting party the benefit of his bargain." S. Rep. No. 95-989, at 59 (1978)*; see also* 3 *Collier on Bankruptcy*, ¶ 365.07[1][d] (Richard Levin & Henry J. Sommer eds., 16th ed.) ("[t]he non-assumption rule of section 365(c) was intended to relieve the non-debtor party to the contract from having to deal with a party other than the debtor in situations in which, under nonbankruptcy law, the non-debtor party would be relieved of any obligation to continue such dealings"). Thus, because Congress clearly intended for § 365(c) to operate in the manner allowed by the actual test, this court should adopt the actual test and reverse the Thirteenth Circuit's decision.

Repeated Congressional efforts to fix the botched language of the statute further reveal that the actual test is the only reading of the statute consistent with legislative intent. Legislators quickly realized problems with the initial drafting of the statute, and in 1980 began working on an amendment to "make[] clear that the prohibition against the 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 the petition had not been filed because of the personal nature of the contract." H.R. Rep. No. 96-1195, Section 27(b) (1980). "This comment clearly indicates that Congress did not intend § 365(c)(1) to preclude assumption of an otherwise nonassignable personal service contract if the performance to be given or received will be the same as if no petition had been filed." *In re Fastrax, Inc.* 129 BR at 277 (internal quotation marks omitted).

An amendment to the statute was enacted in 1984; the language, "an entity other than the debtor in possession" was added to § 365(c)(1)(A), replacing prior language that referenced the "trustee." But the attempted fix proved insufficient to solve the problem; § 365(c)(1) could still be read literally as saying "that if the nondebtor could refuse to accept performance from an assignee under otherwise applicable law, the contract cannot be assumed in bankruptcy." Daniel Bussel, *Textualism's Failures: A Study of Overruled Bankruptcy Decisions*, 53 Vand. Law Rev. 887, 914 (2000). Another technical amendment enacted in 1986 again tried to fix that problem, again to no avail. *Id*.

It is true — as proponents of the hypothetical test are quick to point out — that some wording glitches remain. But "[a] fair reading of the statute as amended suggests that, so long as the debtor or debtor in possession were to continue performance under the contract, the prohibition on assumption or assignment would not apply." *In re Ontario Locomotive & Indus. Ry. Supplies (U.S.) Inc.*, 126 B.R. 156 (Bankr. W.D. New York 1991).

B. The Actual Test Is Consistent with the Structure of § 365 as a Whole and the Rest of the Bankruptcy Code

The actual test is also the only way to read § 365(c) such that the provision is consistent with the rest of § 365. "Section 365(a), for example, gives a debtor the option, subject to court approval, to "assume or reject any executory contract." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1661 (2019). Under the actual test, § 365(c)(1) is consistent with that provision; under the hypothetical test, it is not. And therefore, this court should adopt the actual test.

The reading of the statute under the hypothetical test also makes § 365(c) inconsistent with § 365(b). "[A] sensible reading of § 365 as a whole leaves no doubt that § 365(b)(1)(A),(B) & (C)" — and not § 365(c) — "sets forth the requirements for an assumption by a debtor-in-possession with an unexpired executory contract." *In re Fastrax, Inc.*, 129 B.R. at 277. Because Development never defaulted on the Software Agreement, the cure provisions of § 365(b)(1) do not apply, and thus Development is "authorized to assume the contract in question." *Id.*

And, "section 365(c) should not be interpreted to provide a means around" § 365(e), which "prevents a party to a contract from terminating the contract merely because the debtor has commenced a bankruptcy case." 3 *Collier on Bankruptcy*, ¶ 365.07[1][d] (Richard Levin & Henry J. Sommer eds., 16th ed.). But that is precisely the effect of the Thirteenth Circuit's decision: it gives Respondent a means around the provision preventing termination triggered by the filing of a bankruptcy case. *Cf.* 11 U.S.C. § 365(e).

The actual test, on the other hand, is a sensible interpretation of the statute that gives meaning to what Congress intended by ensuring that there will never be a scenario in which "the non-debtor party to a contract need do business with a stranger." *In re Ontario Locomotive & Indus. Ry. Supplies (U.S.) Inc*., 126 B.R. at 148. And by protecting the debtor's right to assume a contract, "the actual test is more congruous with fundamental bankruptcy policy: the maximization of the value of the debtor's estate." *In re Edison Mission Energy,* 2013 Bankr. LEXIS 3872, at *30.

The result reached by the Thirteenth Circuit is plainly at variance with the pro-rehabilitation policy embedded in the Bankruptcy Code. By refusing to allow Petitioner to assume the software agreement, the Thirteenth Circuit's decision also sharply undermines other Code policies favoring equal treatment of creditors, and it directly contradicts the principle that bankruptcy entitlements should mirror non-bankruptcy entitlements. Two Justices of this Court have acknowledged these criticisms of the hypothetical test, noting that it "purchases fidelity to the Bankruptcy Code's text by sacrificing sound bankruptcy policy." *N.C.P. Mktg. Grp., Inc. v. BG Star Prods., Inc.,* 556 U.S. 1145 (2009) (Statement of Justice Kennedy and Justice Breyer Respecting the Denial of Certiorari). Meanwhile, the leading bankruptcy treatise has described the Thirteenth Circuit's approach as "troubling" because "it may prevent a debtor in possession from being able to reorganize under circumstances that do not adversely affect the other party to the contract"). 3 *Collier on Bankruptcy,* ¶ 365.07[1][d] (Richard Levin & Henry J. Sommer eds., 16th ed.).

"To bar [Petitioner] from assuming its executory contract with [Respondent] would be inconsistent with other provisions of the Bankruptcy Code, and impair a successful reorganization." *Matter of GP Exp. Airlines, Inc.,* 200 B.R. at 232 (citing § 541, under which property of the estate includes the debtor's contractual rights; § 363, which allows the debtor in possession to use property of the estate; and *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528

(1984), for the proposition that the debtor in possession is not entirely distinct from the debtor). The decision below fixates on a single word in the statute to reach a result that "extends § 365(c) beyond its fair meaning and intended purpose, contrary to the ultimate goal of rehabilitation of the debtor's enterprise." *Texaco Inc. v. Louisiana Land & Expl. Co.*, 136 B.R. at 663; *see also In re Cajun Elec. Power Co-op., Inc.*, 230 B.R. 693, 705 (Bankr. M.D. La. 1999) (noting the same). As a result, the Thirteenth Circuit's decision "does not fulfill the purposes of the non-assignment statutes it seeks to enforce, creates inherent inconsistencies in the language of . . . the Code, and fails to adequately account for" amendments to the Code. *In re Hartec Enters. Inc.*, 117 B.R. 865, 871 (Bankr. W.D. Tex. 1990) (vacated by settlement, 130 B.R. 929 (W.D. Tex. 1991).

C. Even if § 365(1) Is Read Hyper-Literally, a Debtor-in-Possession is Not Precluded from Assumption Because § 365(c)(1) Only Restricts the Actions of a Trustee

Even as written and even read in isolation from the rest of the Bankruptcy Code, "[t]he statute can . . . be construed in accordance with its plain meaning to reach a conclusion which is entirely harmonious with both the objective sought to be obtained in section 365(c)(1) and the overall objectives of the Bankruptcy Code, without construing 'or' to mean 'and'." *In re Footstar, Inc.*, 323 B.R. 566, 570 (Bankr. S.D.N.Y. 2005). This is because "[s]ection 365(c)(1) states that '[t]he *trustee* may not assume or assign . . .'" *Id*. "The statute *does not* say that the debtor or debtor in possession may not assume or assign," *id*. And "[n]owhere does the Bankruptcy Code define 'trustee' as synonymous with 'debtor' or 'debtor in possession," *id.* at 571; as discussed in Part I.B, *supra*, the 1984 amendment to § 365(c)(1) changed statutory language that previously referenced the "trustee" to instead refer to the "debtor in possession," in an effort to make clear that the statute did not bar assumption by the debtor in possession.

Section 365(c)(1) only can be read to prohibit assumption by the trustee, and "[i]n this case, there is no trustee." *In re Footstar*, 323 B.R. at 570. Petitioner does not seek to "force[] [Respondent] to accept performance — under a nonassignable executory contract — from the chapter 11 *trustee* of an individual (i.e. non-corporate) chapter 11 debtor, rather than from the debtor himself." *Summit Inv. and Dev. Corp.*, 69 F.3d at 612. If, for example, a professional athlete files for bankruptcy, it is easy to see why the non-debtor party who has contracted with the athlete for personal services might object — and rightfully so — to the bankruptcy trustee assuming the contract and rendering the services that were supposed to be performed by the athlete. But those are not the facts in this case. "Nothing in the Bankruptcy Code prohibits the debtors from assuming the [Software] Agreement[]." *In re Footstar*, 323 B.R. at 570. Therefore, even if this court were to adopt a hyper-literal reading of § 365(c)(1), the provision still does not prohibit Development from assuming the Software Agreement.

II. The Per-Plan Approach Is A Sensible Construction of § 1129(a)(10) per the Section's Text, Legislative History, and Policy Considerations

The Plan in this case has drawn near-universal support, winning approval from all but one class of impaired creditors. The Plan should be confirmed over the objections of Respondent, because the text of § 1129(a)(10) only requires approval of a single impaired class under a joint plan. "When 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." *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (citation and internal quotations omitted).

Unlike in § 365(c)(1) — where ambiguities in the language have created absurd results — the statutory language in § 1129(a)(10) is plain and yields a sensible result. "Section 1129(a)(10) requires that one impaired class under the plan approve the plan. It makes no distinction concerning or reference to the creditors of different debtors under the plan, nor does it distinguish between single-debtor and multi-debtor plans." *Matter of Transwest Resort Properties, Inc.*, 881 F.3d 724, 729 (9th Cir. 2018). "Obviously, Congress could have required plan approval from an impaired class for each debtor involved in a plan, but it did not do so." *Id*. Accordingly, "[c]ourts should be hard-pressed to read the words 'at least one class of claims' as requiring anything more than one impaired assenting class to satisfy § 1129(a)(10) for all debtors involved. Alexander J. Gacos, *Reconciling the "Per-Plan" Approach to 11 U.S.C. § 1129(a)(10) with Substantive Consolidation Principles Under in Re Owens Corning*, 14 Seton Hall Circuit Rev. 295, 312 (2018). The debtors in this case — all related corporate entities — administratively consolidated this case and proposed a joint plan. All of the creditors except for Respondent have approved that plan. TDI thus meets the requirements of § 1129(a)(10).

The per-plan approach is supported even under §102(7)'s rule of statutory construction providing that "the singular includes the plural." 11 U.S.C. § 102(7). "Section 102(7) effectively amends section 1129(a)(10) to read "at least one class of claims that is impaired under the plans has accepted the plans." *Matter of Transwest Resort Properties*, 881 F.3d at 729. That is the case here: at least one class of claims that is impaired under the plans — which have been consolidated into a single joint plan — has accepted the plans.

Indeed, the facts of this case strongly support the per-plan approach, because the business of the subsidiaries is managed by Petitioner "on an integrated basis making it reasonable and administratively convenient to propose a joint plan." *In re Charter Communications*, 419 B.R. 221, 266 (Bankr. S.D.N.Y. 2009). Here, as in *Charter Communications*, "[t]hat joint Plan has been accepted by numerous other impaired accepting classes, thereby satisfying the requirement of section 1129(a)(10)." *Id*. The corporate-group debtor is, for all intents and purposes, a unitary business. It has proposed a single plan that far exceeds the baseline requirements of §

1129(a)(10) because it has won approval from all but one class of creditors. "There is one plan of reorganization. While it is true that various corporations are affected by the Plan, the business of the Debtors remains the same." *In re SPGA, Inc*., 2001 WL 34750646, No. 1-01-02609, at 17 (Bkrtcy.M.D.Pa. Sep. 28, 2001).

The Thirteenth Circuit's decision is at odds with the view taken by the majority of bankruptcy courts that have considered this issue and "have uniformly held that compliance with [s]ection 1129(a)(10) is tested on a per-plan basis, not on a per-debtor basis, and that section 1129(a)(10) therefore does not require an accepting impaired class for each debtor under a joint plan." *In re Station Casinos, Inc.*, 2010 Bankr. LEXIS 5380, *81-82 (Bankr. D. Nev. Aug. 27, 2010); *see also* Alexander J. Gacos, *Reconciling the "Per-Plan" Approach to 11 U.S.C. S 1129(a)(10) with Substantive Consolidation Principles Under in Re Owens Corning*, 14 Seton Hall Circuit Rev. 295, 304 (2018) (prior to the Delaware Bankruptcy Court's adoption of the per-debtor approach in 2011, "courts uniformly interpreted § 1129(a)(10) to require a per-plan application")

A. The Per-Plan Approach Does Not Contradict Any Identifiable Legislative Purpose

The Thirteenth Circuit's majority, in its discussion of § 1129(a)(1), disregards the plain meaning of the statute to reach a result that, again, sharply undermines the pro-rehabilitation policy that Congress built into the Code. And the Thirteenth Circuit's majority cites no legislative history to justify its departure from the plain meaning of the text. It ignores the overwhelming majority of case law on this issue and bases its holding instead on only on a "handful of opinions out of the District of Delaware" — the only jurisdiction outside of the Thirteenth Circuit that has adopted this approach. R. at 17.

Section 1129(a)(10) does not, as the Thirteenth Circuit suggests, "represent[] a powerful and important safeguard for impaired, objecting creditors." R. at 16. The section was not included in the Code to forward a specific policy goal; rather, its inclusion in the Code "represents a compromise between cases . . . which require[d] affirmative voting acceptance of a class of creditors and the position taken in a number of . . . bankruptcy court decisions that a . . . plan of arrangement may be confirmed without the consent of any class of creditors." *In re Marston Enterprises, Inc*., 13 B.R. 514, 520 (Bankr. E.D. N.Y. 1981). Indeed, "[n]o case law or commentator has identified any important social or reorganization policy that section 1129(a)(10) serves. The historical genesis for the requirement reveals it to be a vestigial mutation that serves no evolutionary purpose." Clark Boardman Callaghan & Randolph J. Hines, *Bankruptcy Review Commission Fails to Achieve Significant Chapter 11 Reform,* 8 Norton Bankr. L. Adviser 1 (1997). Instead, "section 1129(a)(10) is a technical requirement for confirmation. It is an obligation for the proponent of a Plan to fulfill; *it is not a substantive right of objecting creditors*." *In re 7th Street and Beardsley Partnership*, 181 B.R. 426, 431 (Bankr. D. Ariz. 1994) (emphasis added). And according to the text of the statute, Petitioner has fulfilled that obligation.

To the extent that § 1129(a)(10) exists "to provide some indicia of support by affected creditors and prevent confirmation where such support is lacking," *In re Windsor on the River Associates*, 7 F.3d 127, 131 (8th Cir. 1993) (citations omitted), that requirement is satisfied in this case. There is plenty of support from other creditors who unanimously support the Plan — and even Respondent "initially viewed the Plan favorably," R. at 7, before learning the identity of one of the proposed new equity holders.

B. The Per-Plan Approach is Consistent with the Bankruptcy Codes' Pro-Reorganization Policies and Avoids the Distortive Hold-Out Problem Created by the Per-Debtor Approach

Chapter 11 reflects a "congressional goal of encouraging reorganizations," *see, e.g., United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204 (1983). The adoption of the per-debtor approach runs afoul of this goal by empowering hold-outs that seek to delay or sabotage the reorganization process for their own ends at the expense of other creditors. In a situation like the present case, where the dissenting creditor is the sole creditor of one of the debtor-entities, the § 1129(a)(10) objection under the per-debtor approach is tantamount to confirmation veto power. Accordingly, even a minority unsecured creditor like Under My Thumb, would be empowered to stymie the reorganization process of a multi-billion dollar business despite near unanimous support by all other creditors. The per-plan approach avoids this scenario so clearly antithetical to the congressional policies that form the bankruptcy process.

Indeed, the Thirteenth Circuit's reading of the statute unnecessarily inflates § 1129(a)(10) at a time when bankruptcy scholars are questioning whether the provision even belongs in the Code. "[S]ome commentators have questioned [§ 1129(a)(10)'s] continued utility in light of the barriers to confirmation and the creditor holdup value it creates in many chapter 11 cases." D.J. Baker et al., American Bankruptcy Institute, *Commission to Study the Reform of Chapter 11*, at 258 (2014), https://abiworld.app.box.com/s/vvircv5xv83aavl4dp4h; *see also In re 7th Street & Beardsley Partnership*, 181 B.R. at 431 ("the purpose and usefulness of section 1129(a)(10) have often been questioned").

The American Bankruptcy Institute has recommended that Congress delete § 1129(a)(10) from the Code entirely, amid concerns that it "simply allow[s] creditors to hold up the confirmation process," as Respondent is trying to do in this case. Of course, the decision of whether to delete the provision lies with Congress, and not this Court. Yet given the wave of support for removing barriers to reorganization imposed by § 1129(a)(10) as written, it makes even less sense for courts to impose new barriers to reorganization that are not written into the statutory text. The Thirteenth Circuit decision should be reversed, because it unnecessarily broadens an already-problematic provision to reach a result that threatens to prevent reorganization in cases like this one.

The solutions that proponents of the per-debtor approach have proposed to remedy the hold-out distortion of their own creation are equally untenable. The Delaware bankruptcy court that first devised the per-debtor approach proposed that an impaired class that fails to vote could be considered "deemed acceptance," or in the alternative, the joint plan could simply drop the dissenting classes from the joint plan. *See In re Tribune Co.*, 464 B.R. 126, 183-84 (Bankr. D. Del. 2011). The former solution is simply a non-starter as a creditor seeking to hold-out for its own advantage isn't going to simply forget to vote. The latter solution is likewise practically useless for a reorganizing business when the affected debtor-entity is essential for the business and thus the success of the joint plan, as Development is in this case, because it holds valuable Agreements. Dropping dissenting classes will further incentivize hold-out behavior if creditors know they can renegotiate from a position where they need not consider the implications on other creditors by inducing the reorganizing business to "drop them" from the joint plan.

Thus, by adopting the per-debtor approach of *Tribune*, the Thirteenth Circuit effectively closes the door on confirmation for jointly administered plans absent some form of substantive consolidation. The court suggests substantive consolidation "is an equitable remedy" to be "applied sparingly," R. at 18, yet at the same time has reached a result that requires substantive consolidation to overcome the hold-out problem it created. R. at 20. The court claims the per-plan approach devalues individual creditors substantive rights. Yet its holding requires an even greater destruction of substantive rights, via substantive consolidation, to work around the hold-out powers given to a single, unsecured creditor under the per-debtor approach. "A substantive consolidation is a general pooling of assets and liabilities that thoroughly reorders the substantive rights of all the parties of all the consolidated entities in derogation of what is likely to have been a carefully constructed corporate structure premised upon principles of separateness and limited liability." Daniel Bussel, *Multiple Claims, Ivanhoe and Consolidation*, 17 ABI L. Rev. 1, 15 (2009).

Requiring substantive consolidation, an equitable remedy not contemplated anywhere in the bankruptcy code, to resolve a hold-out issue of a minority unsecured creditor is a ridiculous solution to a non-problem. The parties in this case have reached precisely the result that Chapter 11 is designed to effectuate: a fair and equitable Plan of Reorganization that has won approval from all but one class of creditors. That Plan should be confirmed.

An alternative and equally undesirable outcome of effectively requiring substantive consolidation in joint plans could be the watering down of substantive consolidation standards or the evolution of limited de-facto substantive consolidation for the purposes of bankruptcy voting and distribution.[1] Therefore, to avoid bankruptcy policy contradictions and substantive consolidation litigation and distortion, the per-plan approach should be adopted by this court.

CONCLUSION

For the aforementioned reasons we ask this court to reverse the Thirteenth Circuit's opinion and reinstate the bankruptcy court's decision: 1) adopting the actual test construction of §

[1] For example, in *In re ADPT DFW Holdings, LLC,* the bankruptcy court authorized a deemed consolidation of all 140 debtor entities for voting and distribution purposes while noting there should be a more liberal standard for substantive consolidation in "mega-bankruptcy" case. 574, B.R. 87, 94 (Bankr. N.D. Texas 2017). This is direct contradiction to the widely cited *In re Owens Corning* Third Circuit decision that stated "[f]or obvious reasons, we are loathe to entertain the argument that complex corporate families should have an expanded substantive consolidation option in bankruptcy. 419 F.3d 195, 215 (3rd Cir. 2005).

365(c)(1) that permits Development to assume the non-exclusive license agreement and 2) adopting the per-plan construction of § 1129(a)(10) that allows Tumbling Dice's join plan to proceed with confirmation.