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Counsel for Respondent

No. 19-1004

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

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

TUMBLING DICE, ET AL., PETITIONER
V.

UNDER MY THUMB, INC., RESPONDENT.

On Writ of Certiorari to the
United States Court of Appeals
for the Thirteenth Judicial Circuit

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. When the nondebtor licensor objects and applicable law excuses the nondebtor licensor from accepting performance from, or rendering performance to, an entity other than the debtor or debtor in possession, does 11 U.S.C. § 365(c) allow a debtor in possession to assume or assign a nonexclusive license over the nondebtor licensor's objection?
2. When multiple debtors file a joint plan of reorganization, does 11 U.S.C. § 1129(a)(10) require plan approval by just one impaired class of only a single debtor?

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OPINIONS BELOW

The decision of the Thirteenth Circuit Court of Appeals is reproduced in the record on appeal. The decision of the Bankruptcy Appellate Panel for the Thirteenth Circuit is unreported.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

The relevant statutory provisions are listed below and their pertinent text are reproduced in Appendix A.

1 U.S.C. § 1

11 U.S.C. § 102

11 U.S.C. § 362

11 U.S.C. § 365

11 U.S.C. § 1107

11 U.S.C. § 1124

11 U.S.C. § 1129

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STATEMENT OF THE CASE & FACTS

Under My Thumb is a leading software design company that specializes in hospitality rewards programs. R. at 4. After using the same software for 30 years, Tumbling Dice Development, LLC ("Development") contacted Under My Thumb in 2008 to revitalize its casino rewards program. *Id.* Development is the lone technology-focused subsidiary of Tumbling Dice, Incorporated ("TDI"). *Id.* TDI serves as the holding company for one of the country's largest luxury casino and resort chains. *Id.* As part of their complex corporate structure, TDI has eight other subsidiaries (each an "Operating Debtor" and collectively, the "Operating Debtors"), and each operates a casino and resort. *Id.*

Development and Under My Thumb agreed that Under My Thumb would spend $10 million to create new software (the "Software") for Development to use across a larger rewards program ("Club Satisfaction"). *Id.* Development agreed to reimburse Under My Thumb for a portion of the cost in building the Software. *Id.* The two parties signed an unsecured $7 million promissory note (the "R&D Note"). *Id.*

After the Software was completed, Development entered into a separate license agreement (the "Agreement") with Under My Thumb, granting Development a nonexclusive right to use the copyrighted and patented Software. R. at 5. The Agreement permitted Development to "extend the benefits of the Agreement to its affiliated entities only," and otherwise prohibited Development from assigning the Agreement or the Software to any other entities without Under My Thumb's express written consent. *Id.* The Agreement required Development to pay Under My Thumb a monthly fee based on spending activity by members of Club Satisfaction. *Id*. Development used the Software across business lines to drive TDI's growth. R. at 4-5. The Software immediately became a success, as membership in Club Satisfaction tripled and customer spending increased. R. at 5. Development successfully used the Software to identify customers' preferred games, eating and drinking preferences, and increase customer spending and satisfaction. *Id.*

In 2011, Start Me Up, Inc. acquired TDI through a leveraged buy-out. R. at 6. The leveraged buy-out saturated TDI and its affiliates with debt, and Development ceased its contractually required payments to Under My Thumb in June 2015. *Id.* Merely six months later, TDI, Development, and the Operating Debtors (each a "Debtor" and collectively, the "Debtors") each commenced chapter 11 cases. *Id.* At the time of filing, Development still owed more than $6 million to Under My Thumb for the original software development contract under the R&D Note. *Id.*

During their attempts to negotiate a plan of reorganization, the Debtors and other groups excluded Under My Thumb. *Id.* Instead, each of the Debtors, Start Me Up, other lenders, the unsecured creditors committee, and other stakeholders met in an attempt to negotiate a reorganization plan. *Id*. The Debtors proposed a plan of reorganization that would be partly funded by a new $35 million investment from a private equity group, Sympathy for the Devil ("SFD"). In return, SFD would receive 51% of the voting shares in a reorganized TDI and multiple seats on the board of directors. R. at 7-8. Despite its ownership of the bankrupt company, Start Me Up would contribute $31 million and retain 49% of the shares. *Id*.

Under My Thumb objected to the Plan because the Plan provides for a distribution to equity holders without fully compensating unsecured creditors. R. at 7. Under My Thumb also objected to the Plan after it discovered SFD's involvement because SFD owns Under My Thumb's direct competitor. R. at 8. That competitor had attempted to replicate Under My Thumb's software for several years. *Id*. After reviewing the ballots for plan approval, all Operating Debtors had at least one impaired class vote to approve the plan, except Development. *Id*. Development, however, had only one impaired class of creditors which was controlled by Under My Thumb. *Id*. Because of Under My Thumb's objection, Development lacks an accepting class of impaired creditors. *Id*.

Under My Thumb pursued two grounds for objection to the Plan. *Id.* First, the Plan impermissibly allowed Development to assume the Agreement, when 11 U.S.C. § 365(c)(1) excused Under My Thumb from performing. R. at 8. Second, the Plan was not confirmable because no impaired class of Development creditors voted to accept the Plan as required by 11 U.S.C. § 1129(a)(10). R. at 8. The Bankruptcy Court overruled both objections and confirmed the Plan, and the Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed that decision. R. at 8-9. The Court of Appeals for the Thirteenth Circuit subsequently reversed the decisions of the Bankruptcy Court. R. at 9.

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the Thirteenth Circuit because 11 U.S.C. § 365 prohibits a debtor in possession from assuming or assigning an executory contract over the objection of a nondebtor party when that party is excused from the contract under applicable nonbankruptcy law. A plain reading of the statute establishes a hypothetical test, which prevents a debtor in possession from assuming a contract if it is not allowed to assign it.

Here, the parties stipulate that intellectual property law excuses Under My Thumb from accepting performance from or rendering performance to a party other than the debtor in possession on a nonexclusive software license. Consequently, section 365 prohibits the Debtors from assuming or assigning the Agreement, unless the application of the statute produces an absurd result or is inconsistent with the general bankruptcy policies of fostering a successful reorganization. Neither is true in this case.

A plain reading of the statute gives meaning to the words explicitly provided by Congress in the statute. Specifically, the Bankruptcy Code states that a debtor in possession may not assume *or* assign. The disjunctive phrase does not include the conjunctive "and." Effectively, this establishes a two part analysis. A debtor in possession may not assume a contract when (1) applicable law excuses the nondebtor party from accepting performance from or rendering performance to a third party and (2) the nondebtor does not approve of the assumption. The debtor in possession must then go through the same process to have an assignment of the contract approved by the nondebtor party.

Furthermore, the hypothetical test interpretation gives meaning to the phrase applicable law described by section 365(c) that harmonizes with other provisions, specifically section 365(f). Regardless of applicable nonbankruptcy law, section 365(f) renders unenforceable any anti-assignment law or contractual provision and permits the debtor in possession to assign the contract. Section 365(c) then provides a narrow exception by which only applicable anti-assignment law that excuses a nondebtor party from assignment of its contract, resuscitates the anti-assignment in bankruptcy and prohibits the debtor in possession from assuming the contract. Only because the identity of the parties is material to the Agreement does applicable law under section 365(c) revive anti-assignment and prevent Development from assuming the contract. Both subsections, 365(c) and 365(f), work together coherently.

Additionally, section 365(c) fits with the goals of general bankruptcy policy. The Bankruptcy Code includes various nondebtor provisions, which balance the disadvantages for creditors in bankruptcy with certain rights and protections. The existence of those provisions makes it plausible that Congress intended to provide creditors an opportunity to accept or reject the assumption of contracts to protect their personal intellectual property. Such a result is not absurd and this Court should uphold the power of creditors to control their intellectual property, which Congress explicitly provided to creditors like Under My Thumb.

This Court should also affirm the decision of the Thirteenth Circuit because section 1129(a)(10) requires that an impaired class of creditors for each debtor accept the plan for confirmation. Both parties stipulate that the Debtors' plans were jointly administered and not substantively consolidated. Debtors' plans may be jointly administered for convenience, but each estate still remains separate and distinct. One of the nation's leading bankruptcy courts has consistently held that in jointly administered plans, the per debtor approach is appropriate.

Courts articulate clear differences between joint administration and substantive consolidation. Substantive consolidation is an equitable remedy that should be used sparingly in cases when the assets and liabilities of debtors are so commingled that it would be impossible to keep them separate. In substantively consolidated cases, courts use the per plan approach only because the debtors are treated as one. Not only do the parties stipulate that these cases were never substantively consolidated, but the equitable remedy is unnecessary in this case because each Debtor easily remains separate and distinct. Although the Debtors may act as though the plans were substantively consolidated, that does not overcome their burden in proving that substantive consolidation was necessary. Substantive consolidation is inappropriate in this case and this Court should treat the cases as jointly administered.

The plain language of the statute also supports the per debtor approach. 11 U.S.C. § 102(7) notes that in the Bankruptcy Code, use of "the singular includes the plural." Congress also codified this rule in 1. U.S.C. § 1, highlighting its significance. Applying "the singular includes the plural" shows that section 1129(a)(10) must mean each debtor needs an impaired class of creditors to accept the plan in order for the plan to be confirmed.

Statutory interpretation requires this Court to consider the statute in its entirety. Section 1129 lists the sixteen requirements necessary for plan confirmation. These requirements apply to each debtor filing for chapter 11 bankruptcy and should not change merely because a debtor is a more complex corporate entity than other debtors. Therefore, it logically follows that section 1129(a)(10) must apply to each individual debtor and that the per debtor approach is the correct interpretation.

Finally, the well-established principles of both corporate and bankruptcy law support the idea that entities must remain separate. Each debtor in this jointly administered case is a separate entity, and each has its own classes of creditors. Section 1129(a)(10) was created to give creditors protection from being forced into a plan that is detrimental to them. By applying the per plan approach, impaired classes of creditors for each debtor no longer have a say. The per plan approach allows a single class of impaired creditors to speak for all creditors, even if they are not creditors of the same debtor. Because entity separateness is important, the per debtor approach should be adopted. Therefore, the Thirteenth Circuit's decision should be affirmed.

STANDARD OF REVIEW

The parties do not dispute the facts set forth above. Rather, the issues before this Court are questions of law. Therefore, the standard of review is de novo. *Pierce v. Underwood*, 487 U.S. 522, 558 (1988). Under the de novo standard of review, this Court decides each issue of law as if it were the trial court in the matter. *Razavi v. Comm'r of Internal Revenue*, 74 F.3d 125, 127 (6th Cir. 1996).

ARGUMENT

I. SECTION 365 DOES NOT PERMIT A DEBTOR IN POSSESSION TO ASSUME A NONEXCLUSIVE LICENSE OVER THE OBJECTION OF THE NONDEBTOR LICENSOR, WHEN THE NONDEBTOR LICENSOR IS EXCUSED FROM THE CONTRACT UNDER APPLICABLE NONBANKRUPTCY LAW.

Section 365(a) authorizes a bankruptcy trustee to assume, assign, or reject any executory contract after the filing of a bankruptcy petition. 11 U.S.C. § 365(a). Section 365(f) renders unenforceable provisions prohibiting assignment and allows the trustee to subsequently assign an executory contract. 11 U.S.C. § 365(f). Both of these provisions are subject, by cross-reference, to an exception carved out in section 365(c), which provides:

> (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;

11 U.S.C. § 365(c)(1). Therefore, under the plain language of section 365(c), the trustee may not assume an executory contract if two conditions are met. First, applicable law must excuse the

nondebtor party from rendering performance to a party other than the debtor or debtor in possession. *Id.* Second, the nondebtor party must not consent to the assumption. *Id.*

Section 365 applies to the Agreement between Under My Thumb and Development because it is an executory contract. Executory contracts have generally been defined by courts according to the Countryman definition, which considers contracts executory when "obligations of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete the performance would constitute a material breach excusing the performance of the other." *Gloria Mfg. Corp. v. Int'l Ladies' Garment Workers' Union,* 734 F.2d 1020, 1022 (4th Cir. 1984) (quoting Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 460 (1973)). The Countryman analysis is applied on the state of the contract at the time of the bankruptcy filing. *In re Columbia Gas Sys. Inc.*, 50 F.3d 233, 240 (3d Cir. 1995) ("The time for testing whether there are material unperformed obligations on both sides is when the bankruptcy petition is filed."). At the time the Debtors filed their bankruptcy petitions, the Agreement between Development and Under My Thumb was ongoing since the parties intended that Development would continue using the Software for their loyalty program while paying a percentage of its generated income to Under My Thumb. R. at 4. In fact, nonexclusive licenses, such as the Agreement, are generally considered executory because of the ongoing, incomplete nature of performance under a license agreement. *See e.g. In re Superior Toy & Mfg. Co. Inc.,* 78 F.3d 1169, 1172 (7th Cir. 1996); *In re Kmart Corp.*, 290 B.R. 614, 618 (Bankr. N.D. Ill. 2003).

Section 365 further applies to Development as the debtor in possession because the Bankruptcy Code clearly establishes that when the word "trustee" is used in the Bankruptcy Code, it is "essentially interchangeable" with the phrase debtor in possession. *In re Cybergenics Corp.*, 226 F.3d 237, 243 (3d Cir. 2000) (citing 11 U.S.C. § 1107). "The term 'debtor in possession' refers to a debtor in a chapter 11 case for which no trustee has been appointed. When no trustee is appointed, the Bankruptcy Code gives a debtor in possession the powers and duties of a trustee." *Id.* (citations omitted). Therefore, when section 365(c) limits the ability of the trustee to assume or assign an executory contract, it limits the debtor in possession from doing so, as well. Development, as the debtor in possession here, is subject to the exception provided in section 356(c).

Applying section 365 to executory contracts, a majority of the federal circuits have held that a debtor in possession is precluded from assuming an executory contract, when applicable law would excuse a nondebtor third party from accepting performance from or rendering performance to an entity separate from the debtor or debtor in possession. *See e.g. In re Sunterra Corp.*, 361 F.3d 257, 267 (4th Cir. 2004); *In re Catapult Entm't, Inc.*, 165 F.3d 747, 750 (9th Cir. 1999); *In re James Cable Partners, L.P.*, 27 F.3d 534, 535 (11th Cir. 1994); *In re West Elec. Inc.,* 852 F.2d 79, (3d Cir. 1988). These courts apply the hypothetical test, which says that "a debtor in possession may not assume an executory contract over the nondebtor'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*, 165 F.3d at 750.

This Court should join the majority and adopt the hypothetical test, because (1) the plain language of section 365 prohibits the debtor in possession from assuming a nonexclusive license without producing an absurd result; (2) neither legislative history nor general bankruptcy policy preclude the plain reading of section 365 that prevents a debtor in possession from assuming a contract.

A. The Plain Meaning Of Section 365 Can Be Applied To Prohibit The Debtor In Possession From Assuming A Contract Without Producing An Absurd Result.

The United States Supreme Court has held "[i]t is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (explaining the plain meaning rule).

The Debtors argue that adoption of the hypothetical test will lead to an absurd result because it renders inoperative or superfluous words or provisions of section 365. R. at 13. However, exceptions to the plain meaning rule should be "exceptionally rare." *Hillman v. I.R.S.*, 263 F.3d 338, 342 (4th Cir. 2001). The Fourth Circuit explained the standard for determining when the absurdity exception to the plain meaning applies. "[I]f it is plausible that Congress intended the result compelled by the plain meaning rule, we must reject an assertion that such an application is absurd." *In re Sunterra*, 361 F.3d at 268. An absurd outcome requires more than a mere unreasonable outcome. *Id*.

The language in section 365(c) is plain and fits within the framework of section 365 and the entire Bankruptcy Code as a whole. The hypothetical test gives meaning to the disjunctive "or," the phrase "applicable law" found separate and distinctly in sections 365(c) and (f), and effectively reconciles the apparent contradiction of those two sections. This Court should follow the plain meaning rule, since the result of the hypothetical test as read in section 365(c) is plausibly a result intended by Congress.

i. The disjunctive "or" prohibits each assumption and assignment as separate and distinct events.

Section 365(c) first states that "[t]he trustee may not assume *or* assign any executory contract…." 11 U.S.C. § 365(c) (emphasis added). The hypothetical test acknowledges the use of the disjunctive "or" as opposed to the conjunctive "and," which a minority of courts read into the statute. The Fourth Circuit has noted that "[b]y its plain language, § 365(c)(1) addresses *both* assumption and assignment." *In re Sunterra*, 361 F.3d at 267 (4th Cir. 2004) (emphasis in original). Use of the word "or" means that the debtor in possession may not assume the contract regardless of an intention to assign it, and in another, entirely separate instance the debtor in possession may not assign the contract. Conversely, the use of the word "and" would render the inclusion of "assume" in section 365(c) superfluous because assignment first requires assumption. If the statute was intended to bar only assignment it could have said as much by stating simply "the trustee may not assign…" which would preclude "assumption and assignment" itself. Notably, section 365(f) refers to assignment without saying "assume and assign," presumably because assumption is inherently understood to be a prerequisite for assignment. *In re Catapult*, 165 F.3d at 752 (9th Cir. 1999).

Section 365(f) merely reads "the trustee may assign." 11 U.S.C. § 365(f). As the *Sunterra* decision notes,

> [a]n assumption and an assignment are "two conceptually distinct events," and the nondebtor must consent to each independently. Under the plain language of § 365(c)(1), therefore, *two independent events* must occur before a Chapter 11 debtor in possession is entitled to assign an executory contract. The debtor in possession must first obtain the nondebtor's consent to assume the contract, and it must thereafter obtain the nondebtor's consent to assign the contract.

In re Sunterra Corp., 361 F.3d at 267 (4th Cir. 2004) (emphasis in original) (citations omitted). Significantly, even the debtor in *Sunterra* admitted that section 365(c), by its plain language, is drawn in the disjunctive, which prohibited it, as the debtor in possession, from "assuming *or* assigning" the contract rather than "assuming *and* assigning." *Id.* at 269. Accordingly, the words of section 365(c), treating assumption and assignment as two separate events, can be applied to the facts and parties of this case. Doing so yields the following:

Development may not assume … the *Under My Thumb license*, … if
1(A) *intellectual property law* excuses *Under My Thumb* from accepting performance from or rendering performance to an entity other than *Development*…; and
(B) *Under My Thumb* does not consent to such assumption….
Or…

Development may not assign … the *Under My Thumb license*, … if
1(A) *intellectual property law* excuses *Under My Thumb* from accepting performance from or rendering performance to an entity other than *Development*…; and
(B) *Under My Thumb* does not consent to such assumption….

11 U.S.C. § 365(c) (substitutions in italics).

The debtors propose the actual test as an alternative to the hypothetical test, which requires a debtor in possession have actual intent to assign a contract, before 365(c) overrides section 365(f). *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489 (1st Cir. 1997) (abrogated on other grounds). Under the actual test, the disjunctive "or" in the phrase "assume or assign" is replaced by the word "and," so that a debtor in possession is only precluded from "assuming *and* assigning," but may still assume a contract without assigning it. *In re Sunterra*, 361 F.3d at 269. The statute would then read: "the trustee may not assume *and* assign any executory contract . . . ."

The Ninth Circuit disposed of this issue, noting that the actual test requires courts to effectively rewrite the statute, which would include "a narrow exception onto § 365(c)(1) for debtors in possession, providing that, as to them, the statute only prohibits assumption and assignment, as opposed to assumption or assignment." *In re Catapult*, 165 F.3d at 754. Such an exception, the Court noted, was not appropriate given the plain language reading that the debtor in possession may not "assume *or* assign." *Id.* (citing 11 U.S.C. § 365(c) (emphasis added).

The minority of courts that use the actual test further contend that the hypothetical test renders the phrase "or assign" superfluous because if the debtor in possession can't assume the contract, then it can't assign it. However, the inclusion of section 365(c)(2) seriously undermines that argument, since, as previously noted, assumption and assignment are distinct events. *In re Sunterra*, 361 F.3d at 267. It is possible that a nondebtor party could approve assumption, (though Under My Thumb does not) but reject an assignment. *Id.* As a matter of fact, Under My Thumb initially viewed the Plan and assumption of the Agreement favorably. R. at 7. It wasn't until a careful review revealed the involvement of its direct competitor that Under My Thumb objected to the Plan pursuant to section 365(c). R. at 7-8. This particular case emphasizes the importance of the word "or," giving the nondebtor party control over the assumption or assignment of its intellectual property.

The debtors and a minority of courts argue that the hypothetical test and the literal reading of the word "or" should be rejected because it produces an absurd result. However, the hypothetical test gives meaning to the word "or," without rendering other words void or superfluous. Further, the literal reading of "assume *or* assign" harmonizes with the phrasing of section 365(f), which refers only to assignment. 11 U.S.C. § 365(c). Conversely, the actual test adds words to the statute that Congress didn't include and ignores other words expressly included. It is certainly plausible Congress intended the result of the plain meaning as applied by the hypothetical test. This Court should enforce the statute as it is written.

ii. The applicable law described in section 365(c) provides a specific, narrow exception to the broader applicable law described by section 365(f).

The hypothetical test also gives meaning to the phrase "applicable law," in both sections 365(c) and (f). Section 365(c) continues, "[t]he trustee may not assume or assign any executory contract . . . if *applicable law* excuses a party . . . other than the debtor . . . from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession." 11 U.S.C. § 365(c) (emphasis added). At the same time, section 365(f) provides "notwithstanding . . . *applicable law*, that prohibits, restricts, or conditions the assignment of such contract . . . the trustee may assign such contract . . . ." 11 U.S.C. § 365(f) (emphasis added). On a surface reading, these provisions may seem contradictory; however, "a careful reading reveals that each subsection recognizes an 'applicable law' of markedly different scope." *In re Magness*, 972 F.2d 689, 695 (6th Cir. 1992).

The applicable law referenced in section 365(c) is conditioned by the immediately following phrase "excuses a party from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession." 11 U.S.C. § 365(c). So, the applicable law is limited to law that excuses a party in the described instances. On the other hand, the applicable law in section 365(f) is, more generally, any law that "prohibits, restricts, or conditions the assignment" of a contract, except as excused in section 365(c). *In re Catapult*, 165, F.3d at 752.

Several circuits resolve this problem, holding that section 365(c) is a narrowly tailored exception, whereby "only applicable anti-assignment law predicated on the rationale that the identity of the contracting party is material to the agreement is resuscitated . . . ." *In re Sunterra*, 361 F.3d at 266-67 (citing *In re Catapult*, 165 F.3d 747, 752 (9th Cir. 1999); *In re James Cable Partners, LP*, 27 F.3d 534, 538 (11th Cir. 1994); *In re Magness*, 972 F.2d 689, 695 (6th Cir. 1992)). Section 365(f), then, remains the broad rule, whereby a general law or anti-assignment provision is unenforceable, unless the section 365(c) exception resuscitates it. *In re Sunterra*, 361 F.3d at 267; *see also In re James Cable Partners, LP*, 27 F.3d at 537-38.

The described applicable law under section 365(c) establishes a balance of power in the Bankruptcy Code and protects significant public policy goals and principles of equity. The existence of provisions that protect nondebtors' rights throughout the Bankruptcy Code supports the plausibility that Congress intended to balance nondebtors' rights with the inclusion of section 365(c), as well. *In re Sunterra*, 361 F.3d at 268. The debtor in possession is given significant advantages under the Bankruptcy Code, including the ability to reject executory contracts that are unfavorable to the estate, assume contracts even when the debtor was in default, or assign most contracts regardless of anti-assignment provisions so that they are no longer obligated to such an agreement. John C. Weimauer, *First Government Contracts, Then Patents, and Now Software*, AM. BANKR. INST. J., Nov. 2004, at 20. The inclusion of section 365(c) balances those advantages with important nonbankruptcy policy and nondebtor rights. *Id.* Here, that includes protecting intellectual property like Under My Thumb's licenses.

In this case, section 365(f) would render an anti-assignment provision or law unenforceable and Development could assign the Under My Thumb licenses. But, the applicable law referenced by section 365(c) resuscitates the anti-assignment. "The parties stipulate that the Agreement was nonassignable because, under applicable nonbankruptcy law, Under My Thumb was excused from rendering performance to an entity other than Development and its affiliates." R. at 8. The Agreement is nonassignable under nonbankruptcy law because it is intellectual property, which is protected by laws valuing the identity of the contracting parties. The Ninth Circuit explains, "in determining whether an 'applicable law' stands or falls under § 365(f)(1), a court must ask *why* the 'applicable law' prohibits assignment. Only if the law prohibits assignment on the rationale that the identity of the contracting party is material to the agreement will subsection (c)(1) rescue it." *In re Catapult*, 165 F.3d at 752 (emphasis in original). The applicable law governing nonexclusive licenses, such as the Agreement, prevents assignment without the approval of the licensor, as the parties stipulate here. R. at 8; *see e.g. In re CFLC, Inc.*, 89 F.3d 673, 679 (9th Cir. 1996) (holding nonexclusive licenses to be personal and nonassignable).

In an intellectual property context, contracts must support "the interests in promoting creativity and innovation by protecting the [intellectual property] owner's right to control its [intellectual property] and ensuring that the owner is appropriately paid for use of the [intellectual property]." Peter M. Gilhuly et al., *Intellectually Bankrupt?: The Comprehensive Guide to Navigating IP Issues in Chapter 11*, 21 AM. BANKR. INST. L. REV. 1, 22–23 (2013). Nonexclusive licenses are personal to the licensor. The right of the licensor to control the identities of parties with whom they share their intellectual property should not be radically transformed because a licensee filed bankruptcy. *Id.* Allowing either assumption or assignment of nonexclusive licenses, in cases such as this, threatens to undermine research, development, and invention of future products, software, or other intellectual property. *In re CFLC*, 89 F.3d at 679. Effectively, "every licensee would become a potential competitor with the licensor . . . in the market for licenses" because any party could seek to use or attain intellectual property through an assignment, regardless of whether the licensor intends for that party to have such access. *Id.*

The facts of this case powerfully demonstrate the harm a licensor could suffer if this Court overrides intellectual property law under section 365(f) by allowing the debtor to even merely assume a contract without the licensor's consent. The party with whom Under My Thumb originally contracted, Development, is radically different than when the two parties entered the Agreement. Under the Plan, SFD will gain new majority ownership of the debtors, including Development. R. at 8. SFD owns a competitor with intellectual property interests adverse to Under My Thumb. *Id.* Rejecting the majority hypothetical test to section 365(c) and permitting Development to assume the Agreement would grant SFD, a competitor with adverse interests to Under My Thumb, access to Under My Thumb's intellectual property. Under My Thumb contends that an assumption of the Agreement would be a tacit assignment.

Several courts facing similar factual scenarios have weighed the substance of the transaction and the parties involved over the form of the transaction. Those courts held that assumption was prohibited by section 365(c), especially when the assumption would, in effect, result in an assignment. *See e.g. In re Beverages Int'l, Ltd.*, 61 B.R. 966, 973-74 (Bankr. D. Mass. 1986) (holding that a stock sale of the debtor could not be a vehicle to transfer debtor's rights to distribute liquor where outright assignment of liquor distribution agreement would be prohibited by applicable nonbankruptcy law); *In re Luce Indus., Inc.*, 14 B.R. 529 (S.D.N.Y. 1981) (holding that assumption of a license is prohibited where the debtor is being used as a conduit to transfer an unassignable license).

The facts of another bankruptcy case, *In re Alltech Plastics, Inc.*, demonstrate the importance of considering the motives and substance of an assignment over its mere form. *In re Alltech Plastics, Inc.*, No. 86-23673-B, 1987 WL123991, at *1 (Bankr. W.D. Tenn. Dec. 30, 1987). During Alltech's chapter 7 bankruptcy, the Court prohibited the trustee from assuming or assigning nonexclusive patent licenses. *Id.* Alltech subsequently converted to a chapter 11, restructured through a stock sale with a nondebtor party as part of its reorganization, and intended to assume the license itself. *Id.* at *10. The Court held that the reorganization was the nondebtor party's "innovative, creative and able effort to effect an assignment of the license" and that the debtor was "merely a conduit for [the nondebtor party]'s acquisition of the license." *Id.* at *12 (citing *In re Luce Indus*, 14 B.R. at 531). Thus, the Court rejected the nondebtor's attempt to use the debtor's bankruptcy to avoid important nonbankruptcy law, which would have prevented assignment.

Even outside of the bankruptcy context, courts have prohibited nonassignable licenses from being assumed after sale of stock. *See e.g. Westinghouse Elec. & Mfg. Co. v. Radio Craft Co.*, 291 F. 169, 173 (D.N.J. 1923). In *Westinghouse Electric,* the District Court of New Jersey noted that the nondebtor party had assumption of the license in mind when it acquired the stock of the debtor. *Id.* The Court looked beyond the form of the restructuring, finding that the purchaser "obviously acquired the stock . . . as a cloak under which [it] might operate . . . and so acquire the benefits of a nontransferable license." *Id.*

The facts of this case are strikingly similar. Plainly, Under My Thumb would not have entered the Agreement with SFD prepetition, nor would it have entered the Agreement with TDI had it known of SFD's later involvement, given its suspicion of SFD. R. at 8. The value and uniqueness of the intellectual property makes the identity of the parties material to the Agreement. It is more than plausible that section 365(c) was written to preclude assumption where nondebtor parties manage to disguise assignment as assumption, as is the case here. The requirement of a nondebtor party's approval supports this, because it helps maintain a licensor's control over its own intellectual property. 11 U.S.C. § 365(c)(2).

If this Court permits SFD to assume the Agreement, it revokes Under My Thumb's ability to control its own personal intellectual property, simply because one of its licensees filed a bankruptcy petition. When the identity of the parties is material to the contract, the licensor, as a nondebtor party, should have control over use and access to its intellectual property. This goal and its subsequent result are not absurd. In fact, the plain language of the statute indicates that Congress intended to implement such protection. Therefore, this Court should enforce the plain language.

B. Neither Legislative History Nor General Bankruptcy Policy Preclude The Plain Reading Of Section 365 That Prevents A Debtor In Possession From Assuming A Nonexclusive License.

The Debtors posit that legislative history disposes of the hypothetical test. In his dissenting opinion from the Thirteenth Circuit, Judge Jones cites a report published by the House Committee on the Judiciary commenting on a proposed amendment to the Bankruptcy Code. At the time, it read “applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee . . . .” R. at 25 (citing H.R. Rep. No. 96-1195, at 57 (1980)). The amendment would have replaced the “the trustee” with “an entity other than the debtor or the debtor in possession.” *Id.* The comment cited by Judge Jones asserts that the amendment was supposed to permit debtors in possession from assuming an executory contract even when a trustee would not be permitted to do so. *Id.* Aware of the report and alleged explanation for the proposed amendment, the Fourth, Ninth, and Thirteenth circuits have declined to override the plain meaning of the statute. *In re Sunterra*, 361 F.3d at 269-70; *In re Catapult,* 165 F.3d at 753-54; *see* R. at 13-15.

Courts in the majority acknowledge that because the plain language of section 365(c) is unambiguous, the court need not resort to legislative history. *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.”). The exception to applying a statute’s plain language occurs when doing so would result in an outcome that is “demonstrably at odds with the intentions of its drafters,” or so absurd “as to shock the general or moral common sense.” *United States v. Ron Pair Enterprs., Inc.*, 489 U.S. 235, 242 (1989); *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930).

Beyond holding that it was not bound to consider legislative history because section 365(c) is unambiguous, the *Sunterra* Court also objected to the persuasiveness of the cited legislative history, on which the Debtors rely.

> First, the 1980 Report relates to a 1980 proposal, which was never enacted, rather than to the 1984 Act; and we have held that courts are not free to replace a statute’s plain meaning with unenacted legislative intent. Second, the 1980 Report was prepared several years prior to enactment of the Statute. Finally, it reflects the views of only a single House committee.

In re Sunterra, 361 F.3d at 270 (citing *United States v. Morison*, 844 F.2d 1057, 1064 (4th Cir. 1988); and *In re Catapult*, 165 F.3d at 754) (quotations omitted)). The Ninth Circuit was particularly disturbed by the use of the Committee Report to override the plain language since it expressed the opinion of just one House committee, not the intent of Congress as a whole. *See In re Catapult*, 165 F.3d at 754. This Court has repeatedly held that the intent of Congress is more evident in the words it chooses to enact than statements from committees or individuals. To override the plain language, legislative history must overcome a "strong presumption that Congress expresses its intent through the language it chooses." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987). Congress did not adopt the amendment at the time the comment was included in the Committee Report. Congress' rejection of the amendment originally and its later silence on the subject when they did adopt the amendment demonstrates their rejection of that interpretation.

The Debtors fail to demonstrate that the plain meaning of the statute is at odds with congressional intent by citing just one comment from one report, which was written years prior to the enactment of the statute in its present condition. This Court should uphold the plain meaning of the statute, because doing so would not rise anywhere near the standard of shocking general or moral common sense.

The Debtors further contend "that applying the statute's plain language would produce an absurd result that is inconsistent with the general bankruptcy policies of fostering a successful reorganization and maximizing the value of the debtor's assets." R. at 14. However, even if this Court felt the actual test was preferable to achieving sound policy, it has already established that "[a]chieving a better policy outcome . . . is a task for Congress, not the courts." *Hartford Underwriters Ins. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13-14 (2000). *See also, In re Sunterra Corp.*, 361 F.3d 257, 269 (4th Cir. 2004) ("[n]o matter how appealing such an interpretation may be from a policy standpoint, 'we cannot adopt [such interpretation] as our own without trespassing on a function reserved for the legislative branch . . . .'") (alteration in original); *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 308 ("Because our job is to determine the meaning of the statute passed by Congress, not whether wisdom or logic suggests that Congress could have done better . . . ."). The actual test requires this Court affect a judicial rewrite of the statute. *In re Catapult Entm't, Inc.*, 165 F.3d at 754 (noting that the actual test requires the word "or" be replaced by the word "and" in section 365(c)).

Furthermore, in writing the statute Congress had a taller task than considering solely bankruptcy policy in the context of section 365. In writing the statute, Congress had to balance the goals of reorganization in bankruptcy with important applicable nonbankruptcy law, such as intellectual property law, as discussed previously. The Fourth Circuit recognized the difficulty and significance of striking this balance, pointing to various provisions of the Bankruptcy Code written to preserve nondebtors' rights. *In re Sunterra*, 361 F.3d at 268. For example, section 362(b) provides a list of exceptions to the automatic stay. *Id.* (citing 11 U.S.C. § 362(b)). Those exceptions certainly do not support the goal of successful reorganization, yet Congress evidently valued the rights of nondebtors, creditors in specific circumstances. Given that the Bankruptcy Code includes provisions to protect certain rights of nondebtors, it is not absurd for this Court to conclude it also meant to protect nondebtors with the plain language of section 365, especially considering it had to balance the policies of other applicable assignment laws, including intellectual property law. *Id.* ("[T]he existence of the Nondebtor Provisions makes it plausible that Congress meant what it said in the Statute.").

This Court should affirm the Thirteenth Circuit's decision that section 365(c) prohibits the assumption of a nonexclusive license because: (1) the plain language of section 365 prohibits the debtor in possession from assuming a nonexclusive license without producing an absurd result; and, (2) neither legislative history nor general bankruptcy policy preclude the plain reading of section 365 that prevents a debtor in possession from assuming a contract.

II. SECTION 1129(A)(10) REQUIRES A JOINTLY ADMINISTERED, MULTI-DEBTOR PLAN TO BE ACCEPTED BY AT LEAST ONE IMPAIRED CLASS OF CREDITORS OF EACH DEBTOR.

This Court should adopt the per debtor approach because it reflects the statute's plain meaning and goals of the Bankruptcy Code. Chapter 11 of the Code provides business entities in dire straits with a chance to take a deep breath and eventually to move forward with a relatively fresh start. *See* 7 COLLIER ON BANKRUPTCY ¶1100.01, at 1100-4 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2013) (describing chapter 11 as "strik[ing] a balance between the need of a corporate debtor in financial hardship to be made economically sound and the desire to preserve creditors' and stockholders' existing legal rights to the greatest extent possible").

At the same time, it reassures creditors that their debts will be paid, and while it is perhaps not at the rate they initially bargained for, creditors gladly take a chapter 11 haircut in lieu of a chapter 7 buzzcut. *See* Suzanne T. Brindise, *Choosing the "Per-Debtor" Approach to Plan Confirmation in Multi-Debtor Chapter 11 Proceedings*, 108 NW. U. L. REV. 1355, 1361 (2014) ("Chapter 11 is designed to benefit both debtors and creditors by providing relief to debtors and protection to creditors.") (footnotes omitted). Chapter 11 thus exists to provide the debtor temporary relief to put forward a negotiated plan that is agreeable and fair to all as an alternative to liquidation, while preserving a creditor's right to repayment. Indeed, the Code embodies exactly these principles through section 1129, which governs the confirmation of any plan under chapter 11. 11 U.S.C. § 1129.

Today's complex transactions and business structures in turn create complex problems in bankruptcy. For a single debtor with multiple impaired classes, section 1129(a)(10) requires at least one class of impaired claims to accept a plan. But, few courts have addressed what happens when multiple debtors are proffering their own plans, jointly administered as a single plan.

However, the operations of bankruptcy proceedings, the statute's text, and the tenets of American corporate law all dictate that at least one impaired class of each debtor must approve the plan before it may be confirmed. Said another way, the per debtor approach accurately reflects the Bankruptcy Code's text and operation without infringing upon other areas of the law.

A. Jointly Administered Cases Treat Debtors As Separate Distinct Entities With Their Own Assets And Liabilities.

Rule 1015 of the Federal Rules of Bankruptcy Procedure permits a chapter 11 case with multiple debtors to be jointly administered for convenience. FED. R. BANKR. P. 1015 advisory committee's note. ("Joint administration as distinguished from consolidation may include combining the estates by using a single docket for the matters occurring in the administration, including . . . other purely administrative matters that may aid in expediting the cases and rendering the process less costly."). In extreme cases, debtor parties may be substantively consolidated. *In re Owens Corning*, 419 F.3d 195, 208-09 (3d Cir. 2005), as amended (Nov. 1, 2007). However, the present case is plainly a joint administration of multiple debtors' separate bankruptcies. "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.

Accordingly, as a subsidiary of TDI, Development should still be treated as a separate and distinct entity throughout this bankruptcy proceeding. Under My Thumb contracted only with Development, not any of the other Operating Debtors. Because the Debtors' plans were jointly administered and not substantively consolidated, confirmation under 1129(a)(10) should be considered on a "per debtor" basis. Development did not have an impaired class of creditors accept the plan. Therefore, the Bankruptcy Court erred in confirming the plan.

i. Jointly administered cases must be treated differently from substantively consolidated cases.

In cases where the Debtors are jointly administered, each estate remains separate and distinct. *In re Tribune*, 464 B.R. 126, 182 (Bankr. D. Del. 2011). Because each debtor's plan remains separate, each debtor must have a class of impaired creditors agree to the plan in order for plan confirmation to occur.

Although the record is clear that Debtors' plans were jointly administered, the Debtors acted as if they were substantively consolidated. R. at 3, 18. The Third Circuit describes substantive consolidation as follows:

> [s]ubstantive consolidation, a construct of federal common law, emanates from equity. It treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities (save for inter-entity liabilities, which are erased). The result is that the claims of creditors against separate debtors morph to claims against the consolidated survivor.

In re Owens Corning, 419 F.3d 195, 205 (3d Cir. 2005).

Federal courts generally agree that substantive consolidation is an equitable remedy only to be used in certain circumstances. *Id.* ("[T]here appears nearly unanimous consensus that [substantive consolidation] is a remedy to be used 'sparingly."). Substantive consolidation should be used sparingly and should not be automatically inferred in cases where debtors file jointly. *In re Reider*, 31 F.3d 1102, 1109 (11th Cir. 1994).

The Debtors rely on the Ninth Circuit's decision in *In re Transwest*, arguing that § 1129(a)(10) should be considered on a per plan basis. *See generally, In re Transwest Resort Props., Inc.*, 881 F.3d 724 (9th Cir. 2018). That approach would require only *one* impaired class of creditors *from all ten debtors combined* to accept the plan. However, in her *Transwest* concurrence, Judge Friedland remained concerned "that entangling various estates in a complex, multi-debtor reorganization diminishes the protections afforded to creditors by the Bankruptcy Code." *Id.* at

733 (Friedland, J., concurring). Although the Court did not adopt the per debtor approach, Judge Friedland powerfully argues that in cases of de facto substantive consolidation, courts should critically evaluate facts on a case-by-case basis. *Id.* ("Only through a searching review of the record, on a case-by-case basis, can a court ensure that substantive consolidation effects its sole aim: fairness to all creditors.") (quoting *FDIC v. Colonial Realty*, 966 F.2d 57, 61 (2d Cir. 1992)).

ii. Regardless of the Debtors' behavior, substantive consolidation is inappropriate for this case.

The sole aim of substantive consolidation is fairness to all creditors. *Colonial Realty*, 966 F.2d at 61. *See also In re Transwest*, 881 F.3d 724, 733 (9th Cir. 2018); *In re Bonham*, 229 F.3d 750, 765 (9th Cir. 2000); *In re Auto-Train Corp.*, 810 F.2d 270, 276 (D.C. Cir. 1998). In this case, Under My Thumb specifically objected to the Debtors' plan because it unfairly eliminates some of its rights. A substantive consolidation of the Debtors would be unfair to Under My Thumb because substantive consolidation forces it into a plan for which it had no input and of Debtors with whom is unaffiliated.

Although Development is a subsidiary of TDI, it is still its own corporate entity and should be treated separate and distinct as has been established by multiple courts. *Skidmore, Owings & Merrill v. Canada Life Assur. Co.*, 907 F.2d 1026, 1027 (10th Cir. 1990); *see also Kreisler v. Goldberg*, 478 F.3d 209, 213 (4th Cir. 2007). Under My Thumb only contracted with Development. R. at 4-5. It did not contract with any of the other Debtors. *Id.* To treat the Debtors' cases as consolidated is inappropriate, unnecessary, and it would be detrimental to Under My Thumb.

Additionally, substantive consolidation is reserved for cases where the debtors' assets and liabilities have been "hopelessly commingled." *In re Gulfco Inv. Corp.*, 593 F.2d 921, 929 (10th Cir. 1979); *In re Vecco Constr. Indus.*, 4 B.R. 407, 410 (Bankr. E.D.Va. 1980). To determine whether substantive consolidation is appropriate, courts have generally applied two tests. The Second Circuit considers two factors when evaluating substantive consolidation: "(1) whether creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit; or (2) whether the affairs of the debtor are so entangled that consolidation will benefit all creditors." *In re Reider*, 31 F.3d at 1108 (citing *In re Augie/Restivo Baking Co.*, 860 F.2d 515, 518 (2nd Cir. 1988)). The Third Circuit in *Owens Corning* adopted a variation of this test by noting that parties seeking substantive consolidation must prove that:

> (i) prepetition, the entities disregarded separateness so significantly that their creditors relied on the breakdown of entity borders and treated them as one legal entity, or (ii) postpetition, the entities' assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors.

Owens Corning, 419 F.3d 195, 211 (3d Cir. 2005).

The D.C. Circuit spelled out a different test in *In re Auto-Train* to determine whether the pros of substantive consolidation outweigh the cons. 810 F.2d 270, 276 (D.C. Cir. 1998). Under the D.C. Circuit test, proponents of substantive consolidation must first show that "(1) there is a substantial identity between the entities to be consolidated; and (2) consolidation is necessary to avoid some harm or to realize some benefit." *In re Bonham*, 229 F.3d 750, 765-66 (9th Cir. 2000). If the proponents are able to prove the first two components, the burden shifts to objecting creditor to show "(1) it has relied on the separate credit of one of the entities to be consolidated; and (2) it will be prejudiced by substantive consolidation." *Id.* If an objecting creditor can prove each element, the court may only allow substantive consolidation "if it determines that the demonstrated benefits of consolidation 'heavily' outweigh the harm." *In re Bonham*, 229 F. 3d 750, 765-66 (quoting *In re Auto-Train*, 810 F.2d at 276).

The principle of entity separateness is well-established in corporate and bankruptcy law. *See e.g. In re Owens Corning*, 419 F.3d 195, 211 (3d Cir. 2007) ("The general expectation of state law and of the Bankruptcy Code . . . is that courts respect entity separateness absent compelling circumstances . . . .") The principle remains powerful in the context of parent and subsidiary relationships, as well. *Skidmore, Owings & Merrill v. Canada Life Assur. Co.*, 907 F.2d 1026, 1027 (10th Cir. 1990). The 10th Circuit noted that "[a]bsent circumstances justifying disregard of the corporate form, a parent company is treated as a legal entity separate from the subsidiary." *Id.*

Regardless of which substantive consolidation test is applied, substantive consolidation is inappropriate in this case. Consolidation would not benefit all creditors because Under My Thumb is clearly disadvantaged by the plan due to SFD's involvement. Prior to the filing, Under My Thumb did not treat all ten Debtors as one entity. On the contrary, it had no dealings with the other nine Debtors whatsoever. Further, the assets and liabilities are not so commingled that separating them would hurt creditors. Keeping the assets and liabilities together would actually harm Under My Thumb's interests and erode its rights in bankruptcy. While TDI argues that "there is a substantial identity" among the debtors because of the parent-subsidiary relationship, there is no argument that consolidation is necessary to avoid harm. Even if TDI were able to prove a prima facie case of substantive consolidation, the benefits of substantive consolidation are easily rebuttable.

Nonetheless, the Debtors attempt to disguise their jointly administered case as substantively consolidated for their own benefit. Consequently, they would leave Under My Thumb hung out to dry. On the contrary, this Court is bound by the contours of this case, which is jointly administered. R. at 3, 18. One of nation's leading bankruptcy courts in the District of Delaware has explicitly held that in jointly administered cases, section 1129(a)(10) must be read using a per debtor approach. *See In re Tribune*, 464 B.R. 126, 182 (Bankr. D. Del. 2011) ("In the absence of substantive consolidation, entity separateness is fundamental."); *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).

This Court should respect the corporate separateness of the individual debtors and adopt the per debtor approach. The case was filed as jointly administered, not substantively consolidated. The per plan approach falls short because the debtors benefit from de facto substantive consolidation which would be impermissible due to the harm it inflicts on creditors. Under the per debtor approach, however, the corporate form remains protected, as do the rights of the creditors.

B. The Plain Text Of The Bankruptcy Code Supports The Per Debtor Approach For Jointly Administered Cases.

When conducting statutory interpretation, courts examine not only the clause at issue, but the statute as a whole. *Life Techs. Corp. v. Promega Corp.*, 137 S. Ct. 734, 740 (2017) ("Whenever possible, . . . [the Court] should favor an interpretation that gives meaning to each statutory provision."). Courts endeavor to give an entire statute meaning instead of interpreting a statute in a way that nullifies or renders part of it absurd. *See United States v. Morton*, 467 U.S. 822, 828 (1984) ("We do not, however, construe statutory phrases in isolation; we read statutes as a whole."). When viewing subsection (a)(10) as a part of the broader section 1129 requirements and considering the Code as a whole, the plain text supports the per debtor reading.

The initial step of any statutory interpretation is to look to the text. *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) ("As in any statutory construction case, 'we start, of course, with the statutory text.'") (quotation omitted). Here, the text of the Bankruptcy Code informs this Court on two key points. First, it imports a critical rule of statutory construction – that the singular includes the plural. 11 U.S.C. § 102(7). Second, it illustrates that subsection (a)(10) must be read in conjunction with all sixteen requirements of section 1129. Upon satisfaction of chapter 11's requirements, "[t]he court shall confirm a plan" and the crucible of the bankruptcy process largely recedes. 11 U.S.C. § 1129(a).

i. In order to satisfy the Chapter 11 plan confirmation requirements, the per debtor approach is required.

Here, the plan proponents have not satisfied the section 1129 requirements because they have failed to gain plan support by at least one impaired creditor to each debtor. If there is no creditor support, the plan proponent must convince the court that they have dutifully satisfied each requirement of plan confirmation. "Courts universally agree that the burden of proof lies with the proponent of the plan . . . ." *In re Trenton Ridge Investors, LLC*, 461 B.R. 440, 459 (Bankr. S.D. Ohio 2011). TDI stipulates that Under My Thumb, as the only impaired class, did not vote to accept its plan. R. at 8. Therefore, TDI fails to prove plan acceptance under the plain language of section 1129.

To determine the meaning of section 1129(a)(10), this Court must first consider the statute's text. *Sebelius*, 569 U.S. at 376 ("As in any statutory construction case, 'we start, of course, with the statutory text.'") (quotation omitted). The statute's requirements are as follows: "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 . . . ." 11 U.S.C. § 1129(a)(10). With a single debtor, this requirement is more easily understood. For example, a plan that impairs at least one class of claims requires approval by at least one of those impaired classes. Complex transactions like the one at issue in this case muddle the application of the statute and more tools are needed for statutory analysis.

The statutory and canonical requirement that "the singular includes the plural" helps resolve lingering confusion. *See* 11 U.S.C. § 102(7). This rule of construction is so paramount to the statutory interpretation at issue in this case, it was codified twice. Not only does it appear in the Bankruptcy Code, it is included in the first statute amongst the entire U.S. Code. *See*

1 U.S.C. § 1 ("[W]ords importing the singular include and apply to several persons, parties, or things."). While section 102(7) governs this interpretation, Congress's repeated use of this canon suggests its gravity.

For a complex plan that includes multiple debtors and sub-plans, the court must remain within the confines of the statute. Logically, if (a)(10) provides clear rules for a single debtor entity, then the court should treat each affiliate debtor as its own separate debtor. By doing so, the court also imports the "singular includes the plural" rule. Reading subsection (a)(10) with the singular includes the plural rule treats one "plan" in the statute as the many "plans" which apply to the affiliate debtors. The Bankruptcy Court for the District of Delaware conducted precisely this analysis, noting: "the fact that § 1129(a)(10) refers to 'plan' in the singular is not a basis, alone, upon which to conclude that, in a multiple debtor case, only one debtor – or any number fewer than all debtors – must satisfy this standard." *In re Tribune Co.*, 464 B.R. 126, 182 (Bankr. D. Del. 2011). This interpretation allows the complex plan to be read as one larger plan with many separate sub-plans. Each sub-plan operates independently while also serving the greater goal of successful reorganization.

For jointly administered cases the interpretation is the same because "each joint plan actually consists of a separate plan for each Debtor." *In re Tribune*, 464 B.R. at 182. Bankruptcy courts use joint administration as a means of judicial efficiency. *See* FED. R. BANKR. P. 1015 advisory committee's note (noting that "[j]oint administration . . . may include the joint handling of other purely administrative matters that may aid in expediting the cases"). Considering its limited role as a procedural efficiency tool, joint administration provides the court with the ability to house one case with complex, multi-affiliate debtors under one roof. *Id*. Indeed, for jointly administered cases, the proper reading of the 1129(a)(10) requires each debtor with an impaired class to have at least one accepting impaired class. Only then is (a)(10) satisfied. Development should not be excused from requirements explicitly included in the Code solely because its case is jointly administered with other debtors.

As the plan proponent, TDI bears the burden of proving that the plan complies with all of section 1129(a)'s requirements. The Debtors argue that because at least one impaired class of any one of their nine affiliate debtors accepted the plan, no objection to another debtor's plan passes muster. R. at 17. TDI attempts to confirm this plan without the acceptance of any impaired class of Development's creditors. If this case was merely a resolution of Development's bankruptcy separate from the other operating debtors, then the plan could not be confirmed. The statute requires plan acceptance from at least one *impaired* class of debtors. 11 U.S.C. § 1129(a)(10). Creditors are considered impaired if the plan alters their pre-bankruptcy legal, equitable or contractual rights. 11. U.S.C. § 1124. Under My Thumb is impaired because TDI, by and through the involvement of Start Me Up and Sympathy for the Devil, has nullified Under My Thumb's contractual right to reject assumption or assignment of the Agreement. Development's plan cannot move forward with confirmation without Under My Thumb's acceptance of the plan.

The plain language of section 1129 requires this Court to interpret confirmation requirements under the per debtor approach. Reading the statute any differently alters the substantive rights of Under My Thumb through the bankruptcy process. Given that the statute's plain language requires the per debtor approach, this Court should affirm the Thirteenth Circuit.

ii. The framework for the Chapter 11 plan confirmation process requires this Court to adopt the per debtor approach.

When subsection (a)(10) is read as a part of the broader section 1129 framework, the text still requires the per debtor approach. Courts follow "the cardinal rule that a statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context." *King v.*

St. Vincent's Hosp., 502 U.S. 215, 221 (1991) (citations omitted). This rule, combined with the "reluctance" of the Supreme Court "to declare provisions of the Bankruptcy Code ambiguous," supports the notion that the Court looks toward finding the most common sense meaning that fits with the remainder of the text. *In re American Home Mortg. Holdings, Inc.*, 637 F.3d 246, 255 (3rd Cir. 2011).

Section 1129 is titled "Confirmation of a Plan" and subsection (a) states "[t]he court shall confirm a plan only if all of the following requirements are met" before spelling out each of the sixteen requirements. 11 U.S.C. § 1129. Congress, by listing the requirements and requiring *all* of them to be satisfied, directs parties seeking to confirm a chapter 11 plan to comply with each and every requirement. They all fit together in the same schema and should be read as such. If this Court reads subsection (a)(10) and all of section 1129 ultra-literally, then absurdity results.

Such absurd results are made clear by going through section 1129(a) line by line. *See In re Tribune Co.*, 464 B.R. 126, 182-83 (Bankr. D. Del. 2011) (discussing the impact of the per debtor approach as applied to other Code sections). Under TDI's proposed per plan approach, subsection (a)(1) would only require one affiliate plan to comply with the applicable provisions of the Bankruptcy Code. That would mean the Code endorses noncompliance with the rest of the plans. Additionally, subsection (a)(3) would only require one plan to be proposed in good faith. So, other plans could be proposed in bad faith. Subsection (a)(7)'s "best interest of the creditors" test would only apply to a single debtor's creditors in multi-affiliate cases. Then, other debtors don't need plans that are in the "best interest of the creditors." Subsection (a)(13) would only require payment of all retiree benefits for a single affiliate, allowing other affiliates to leave retirees high and dry.

Each of these consequences would provide debtors of larger, complex corporate structures with significant advantages, which are not offered to smaller, less complex debtors. Surely those advantages were not intended by Congress in drafting the Code. Because these effects essentially excuse some debtors from fulfilling requirements specifically established by Congress, the per plan approach runs counter to the ambit of the Court in providing meaning to the Code as a whole. *See King*, 502 U.S. at 221 (requiring "the statute to be read as a whole").

Additionally, reading section 1129(a)(10) under TDI's proposed per plan approach allows a single consenting impaired class to essentially enable cramdown. *See* Brindise, *supra*, *Choosing the "Per-Debtor" Approach* at 1359 (describing the per plan approach as "discredit[ing] the value of [a creditor's] vote."). Should a debtor find that its multi-affiliate plan has little support, the per plan reading allows a debtor to cramdown all impaired creditor classes of every affiliate. Applied to large, complex corporations, the per plan approach could allow a debtor to cramdown tens of thousands of impaired classes simply because a single class has voted to accept the plan.

The per plan approach strips Under My Thumb of its rights before, during, and after bankruptcy. Here, the results may be less quantitatively dramatic, to be sure. But the per plan approach nonetheless encroaches on the rights of objecting creditors. Where multiple creditors have adverse interests in plan approval, it consolidates power in a single, approving creditor of one distinct debtor, while it tacitly eliminates all objecting creditors' rights to vote on plan approval.

iii. Taking a per plan approach strips creditors of their rights provided for under § 1129(a)(10)

Section 1129(a)(10) provides creditors with a voice during plan confirmation. "The purpose of [§ 1129 (a)(10)] is 'to provide some indicia of support [for a plan or reorganization] by affected creditors and prevent confirmation where such support is lacking.' As such, § 1129(a)(10) requires that a plan of reorganization pass muster in the opinion of creditors whose rights to repayment from the debtor are implicated by the reorganization. By providing impaired creditors the right to vote on confirmation, the Bankruptcy Code ensures the terms of the reorganization are monitored by those who have a financial stake in its outcome." *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 243-44 (3d Cir. 2004) (quoting *In re Windsor on the River Assocs.*, 7 F.3d 127, 131 (8th Cir. 1993)) (citations omitted). It is yet another way the Code balances the significant postpetition disadvantages for creditors.

If § 1129(a)(10) is interpreted on a per plan approach, Under My Thumb's rights would be seriously undermined. The purpose of § 1129(a)(10) is to ensure creditors aren't forced into a reorganization plan that is unfairly detrimental in a Chapter 11 case. 7 COLLIER ON BANKRUPTCY ¶1100.01, at 1100-4 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2013). If each debtor isn't required to have an impaired class accept the plan, individual creditors lose their voice, while other creditors, with separate or even conflicting interests, are allowed to speak for them. Development did not have an impaired class of creditors accept the plan. The per plan approach would strip Under My Thumb of one of its few substantive rights, which Congress explicitly provided under § 1129(a)(10). The per debtor approach protects the entirety of the Code, including the right to vote on a plan provided to creditors like Under My Thumb. This Court should adopt the per debtor approach and affirm the Thirteenth Circuit's decision.

CONCLUSION

11 U.S.C. § 365(c)(1) prohibits a debtor in possession from assuming an executory contract over the objection of the nondebtor party to such contract when applicable law excuses the nondebtor party from accepting performance from or rendering performance to an entity other than the debtor or debtor in possession. Here, Under My Thumb is excused from rendering performance to another party under intellectual property law, and Development is, therefore, prohibited from assuming the agreement, pursuant to section 365(c)(1). Additionally, 11 U.S.C. § 1129(a)(10) requires a plan to be accepted by an impaired class of creditors of each debtor in a jointly

administered, multi-debtor plan. Development's plan should not have been confirmed without acceptance by its only impaired class, Under My Thumb. The decision of the Thirteenth Circuit should be *affirmed*.

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Counsel for Respondent

APPENDIX A

1 U.S.C. § 1: In determining the meaning of any Act of Congress, unless the context indicates otherwise— words importing the singular include and apply to several persons, parties, or things; words importing the plural include the singular;

11 U.S.C. § 102: In this title—
…
(7) the singular includes the plural;

11 U.S.C. § 362:
…
(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a)—

(A) of the commencement or continuation of a civil action or proceeding—

(i) for the establishment of paternity;

(ii) for the establishment or modification of an order for domestic support obligations;

(iii) concerning child custody or visitation;

(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or

(v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

(D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act;

(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;

(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or

(G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act;

11 U.S.C. § 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.

…

(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

…

(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.

11 U.S.C. § 1107:

(a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

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

11 U.S.C. § 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.

…

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

…

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

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

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

…

(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.

…

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

Fed. R. Bankr. P. 1015:

…

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

…

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(b) Joint administration as distinguished from consolidation may include combining the estates by using a single docket for the matters occurring in the administration, including the listing of filed claims, the combining of notices to creditors of the different estates, and the joint handling of other purely administrative matters that may aid in expediting the cases and rendering the process less costly.