Team 27R

No. 19-1004

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IN THE

# Supreme Court of the United States

October Term, 2019

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

*Debtors,*

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

*Petitioner,*

v.

**UNDER MY THUMB, INC.,**

*Respondent*.

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

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**BRIEF FOR RESPONDENT**

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## QUESTIONS PRESENTED

I. Whether a debtor in possession may assume a non-assignable executory contract under 11 U.S.C. § 365(c)(1) when the counterparty to that contract does not consent to its assumption?

II. Whether 11 U.S.C. § 1129(a)(10) permits a bankruptcy court to confirm a joint plan when one of the debtors under that joint plan fails to obtain acceptance from at least one impaired class of claims?

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## United States Supreme Court Cases

**United States Courts of Appeal Cases**

**United States Bankruptcy Appellate Panel Cases**



**United States District Court Cases**



**United States Bankruptcy Court Cases**

**State Court Case**



**United States Statutes**

**Legislative Materials**



**Secondary Sources**

## OPINIONS BELOW

The United States Bankruptcy Court in this case held for Tumbling Dice, Inc. and its subsidiaries on both issues, and the Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed those rulings. (R. at 3). Specifically, that court held, first, that § 365(c)(1) of the Bankruptcy Code does not preclude a debtor in possession from merely assuming a non-exclusive software license over the objection of the licensor, and second, that the acceptance of a single impaired class of creditors is sufficient creditor support under § 1129(a)(10) to confirm even joint plans concerning multiple distinct debtors. *Id.* The Thirteenth Circuit Court of Appeals reversed on both issues. *Id.* This Court granted the Debtors' petition for writ of certiorari. *Id.* at 1.

## STATEMENT OF JURISIDCTION

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

## STATUTES INVOLVED

The relevant federal laws controlling this case are 11 U.S.C. §§ 365, 1107(a), 1129(a) (2012) of the United States Bankruptcy Code. These provisions are attached in full in Appendix A.

## STATEMENT OF THE CASE

### I. Facts

In 2008, Under My Thumb (UMT) created a specialized software platform to modernize the loyalty program used at Tumbling Dice, Inc.'s (TDI) casino and resort properties. R. at 4. The "corporate structure" of TDI's business was composed of ten corporate entities. *Id*. TDI, the "holding company," owned the membership interests of the other nine entities (altogether, Debtors). *Id*. Eight of the subsidiaries operated casino and resort properties (Operating Debtors). *Id*. The final debtor–subsidiary, Tumbling Dice Development, LLC (Development), served the sole purpose of licensing software from UMT. *Id*.

The licensing agreement with UMT (Agreement) granted Development a non-exclusive license to use UMT's "copyrighted and patented Software." *Id*. at 5. Development, as the only party to the Agreement, was permitted to extend the benefits of the Software to its affiliates, but was prohibited from "assigning or sublicensing their rights to others without Under My Thumb's express written consent." *Id*. In exchange, Development agreed to pay a monthly fees based on member activity. *Id*. Development also agreed to pay $7 million dollars under an unsecured promissory note (the R&D Note) to partially reimburse UMT's investment in developing the Software—nearly $10 million in costs and nearly one year's worth of time. *Id*. at 4. The revamped loyalty program was a huge success, and the Software became "an essential part of the Debtors' ongoing business model." *Id*. at 5.

In December of 2011, the hedge fund Start Me Up, Inc., acquired TDI through a "leveraged buy-out." *Id*. at 6. The transaction required that TDI and the Operating Debtors grant first priority liens on their assets in exchange for a $3 billion loan from a group of lenders (the "Lenders"). *Id*. Development was not a borrower or guarantor under the credit facility. *Id*. Because of the

"unserviceable debt load from the leveraged buy-out," *id*., each of the ten Debtors filed chapter 11 petitions in January 11, 2016, *id*. at 3. While the Debtors had remained current on their monthly payments under the Agreement, the Debtors "abruptly ceased making payments" under the R&D Note in June 2015." *Id*. at 6.

After lengthy negotiation with Start Me Up, Lenders, and other stakeholders, "but, notably, not Under My Thumb," Debtors announced a deal. *Id*. at 6. The deal proposed that the Debtors restructure their secured debt and that Start Me Up inject new capital "to fund a 55% distribution" for unsecured claims, including UMT's claim on the R&D Note. *Id*. at 6–7. Also, Start Me Up would retain its equity interest in the Debtors. *Id*. at 7. To that end, all existing shares and membership interests would be cancelled and reissued in the reorganized Debtors, "without changing the overall corporate structure." *Id*. Finally, the deal proposed to assume the Agreement under §§ 365 and 1123(b)(2). *Id*.

The Debtors filed a Plan consistent with the deal in August 2016. *Id*. "The Plan expressly stated that 'the Debtors' estates are not being substantively consolidated.'" *Id*. Rather, the Plan was a "joint plan," *id*., and the Debtors' cases were merely being "jointly administered for the convenience of the parties and the court," *id.* at 3.

The Debtors' creditors gave the Plan almost "universal support." *Id.* at 8. When they voted on the Plan, at least one impaired creditor of TDI and of each of the eight Operating Debtors voted to accept it. *Id.* Development, however, did not receive a vote of acceptance from UMT, who controlled Development's one and only class of creditors. *Id.*

UMT withheld its vote of acceptance despite having initially viewed the deal favorably. *Id.* at 7. But UMT soured on the Plan after learning from the disclosure statement that a private equity group called Sympathy for the Devil, LP (SFD), was set to take over the reorganized TDI. *Id*. at

7–8. In exchange for funding more than half of the unsecured distribution pot, SFD would receive "51% of the voting shares of reorganized TDI . . . and several seats" on its new board of directors. *Id*. at 8. UMT was "immediately suspicious of SFD's involvement" because "SFD's portfolio of companies includes a direct competitor of UMT who had, for several years, tried to replicate the Software." *Id*. Therefore, UMT did not consent to Debtors' assuming the Agreement as debtors in possession. *Id.*

**II. Procedural History**

The Debtors voluntarily filed petitions for chapter 11 bankruptcy on January 11, 2016. R. at 3. Out of "lengthy negotiations" and court ordered mediation with a group of stakeholders that did not include UMT, the preliminary agreement emerged. *Id.* at 6–7. In August 2016, the Debtors filed their joint Plan and a disclosure statement. *Id.* Upon learning from the disclosure statement that the Plan would give SFD control over TDI, UMT filed multiple objections to the Plan. *Id.* at 8. Over these objections, the Bankruptcy Court confirmed the Plan. *Id.* After the Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the Plan's confirmation, UMT appealed to the Thirteenth Circuit on the two issues presented here. *Id.* at 9. The Circuit Court reversed the Bankruptcy Court and held for UMT on both issues. *Id.* at 9. This Court granted the Debtors' petition for writ of certiorari. *Id* at 1.

## STANDARD OF REVIEW

The parties do not dispute the facts in this case. *Id.* at 3 n.3. The questions whether a debtor in possession may under § 365(c)(1) assume a non-assignable executory contract over the objection of the counterparty and whether § 1129(a)(10) permits a bankruptcy court to confirm a joint plan when one of the debtors under that joint plan fails to obtain acceptance from at least one

impaired class of claims are both questions of law. Therefore, a de novo standard of review governs both questions. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014).

## SUMMARY OF THE ARGUMENT

The Thirteenth Circuit properly held that the Debtors may not assume the patent license over the objection of UMT. The text of § 365(c)(1) prohibits trustees from assuming non-assignable executory contracts if the counterparty does not consent to the assumption. Because this provision uses the disjunctive "or," even mere assumption under § 365(c)(1) requires the counterparty's consent. This limitation on trustees' assumption power applies to debtors in possession (DIP). The plain language of § 1107(a) subjects DIPs to "any limitations" on trustees. Therefore, the Code does not allow DIPs to take an action that a trustee does not have the power to take, including nonconsensual assumption of non-assignable executory contracts. To enforce the plain meaning of § 1107(a), § 365(c)(1) must apply to DIPs without qualification.

Only under the "hypothetical test" for applying § 365(c)(1) can courts enforce the plain meaning of the Code. Under this framework, trustees and DIPs may not assume non-assignable executory contracts without counterparty consent, and courts need not inquire into whether the trustee or DIP possesses an actual intent to assign. The other approaches, namely, the "actual test" or the *Footstar* approach, do not apply the limitation on assumption to DIPs. But those theories are based not on the text of the Code but on the policy objectives that those courts consider preferable.

But even the policy concerns of chapter 11 favor the hypothetical test. To be sure, the hypothetical test frustrates some reorganizations that the actual test would allow, but the Code does not require that every reorganization plan be confirmed. Rather, the Code builds in certain checks on the trustee's or DIP's powers, especially when necessary to protect the legitimate

interests of nondebtor stakeholders in a chapter 11 reorganization. The limitation on assumption power created by § 365(c)(1) ensures that for parties who enter non-assignable contracts with future debtors, a bankruptcy filing does not explode their nonbankruptcy rights. The hypothetical test gives meaning to the full breadth of those rights and encourages debtors and counterparties to negotiate before a plan is filed to reach an acceptable compromise.

Furthermore, the Thirteenth Circuit properly held that the Debtors' joint plan could not be confirmed pursuant to § 1129(a)(10) without each debtor obtaining acceptance from at least one impaired class of creditors. Specifically, Development failed to obtain acceptance from UMT, which controlled its only impaired class of creditors. The Debtors comprised of ten distinct corporate entities that were not substantively consolidated. The fundamental rule of corporate separateness dictates that each debtor could only reorganize the assets and liabilities of its own estate. Therefore, a "joint plan" is really a number of separate "plans" for each distinct chapter 11 debtor. The Advisory Committee Notes to Rule 1015(b), which allow joint administration of affiliated debtor entities, emphasizes that joint administration is not substantive consolidation—the former is a matter of convenience, whereas the latter alters the substantive rights of parties. Accordingly, absent substantive consolidation, the plain language of "plan" in § 1129(a)(10) refers to the individual plan of each debtor, so that § 1129(a)(10) applies on a per-debtor basis.

Moreover, the purpose of § 1129(a)(10) is to protect creditors, such as UMT, from having a plan "crammed down" their throats despite lacking minimum level of support. Thus, by creating a voting-rights bargaining chip, § 1129(a)(10) promotes negotiation and creditor consent, which are overall policies of chapter 11. Interpreting § 1129(a)(10) as a per-plan requirement would water down the threshold for obtaining a minimum level of impaired creditor support to the point of depriving it of usefulness. Only a per-debtor interpretation properly preserves the carefully

legislated balance of chapter 11 policies that seek to not only promote reorganization but also protect creditors and promote negotiation. Since the Code requires that § 1129(a)(10) be fulfilled on a per debtor basis, and Development failed to obtain acceptance from at least one impaired class of creditors, the Thirteenth Circuit properly held that the Debtors' plan could not confirmed over UMT's objection.

## ARGUMENT

### I. THE THIRTEENTH CIRCUIT CORRECTLY HELD THAT 11 U.S.C. § 365(c)(1) DOES NOT PERMIT A DEBTOR IN POSSESSION TO ASSUME A NON-ASSIGNABLE EXECUTORY CONTRACT WITHOUT THE COUNTERPARTY'S CONSENT.

Section 365 of the Bankruptcy Code empowers a "trustee" in bankruptcy generally to assume and assign executory contracts of the prepetition debtor. *See* 11 U.S.C. § 365(a) & (f) (2012); *Perlman v. Catapult Entm't, Inc. (In re Catapult Entm't, Inc.)*, 165 F.3d 747, 749 (9th Cir. 1999). But an exception to those powers appears in § 365(c):

> (c) The trustee may not assume or assign any executory contract . . . of the debtor, whether or not such contract . . . prohibits or restricts assignment of rights . . . , if—
>
> (1)(A) applicable law excuses [the counterparty] to such contract . . . from . . . rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract . . . prohibits or restricts assignment of rights . . . ; and
>
> (B) such party does not consent to such assumption or assignment . . . .

11 U.S.C. § 365(c)(1). The patent-license agreement between UMT and Development is an executory contract, *cf. Insitut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 490 n.2 (1st Cir. 1997), and the parties stipulate that applicable law excuses UMT "from rendering performance to entities other than Development and its affiliates," r. at 8 n.7.

The disjunctive prohibition of § 365(c)(1) ("trustee may not assume *or* assign") limits the trustee's power to assume executory contracts regardless of whether assignment is intended to or does occur. That limitation is imputed to a debtor in possession (DIP) via § 1107(a): "Subject to

any limitations on a trustee serving in" a chapter 11 bankruptcy, "a debtor in possession shall have all the rights . . . and powers . . . of a trustee serving in" a chapter 11 bankruptcy. 11 U.S.C. § 1107(a) (2012). Read together, § 365(c)(1) and § 1107(a) preclude debtors in possession from assuming patent licenses without the consent of the licensor.

A contrary result is incompatible with chapter 11's policy framework. Though reorganization is the ultimate goal of chapter 11 proceedings, "Congress also weighed . . . the legitimate interests and expectations of the debtor's counterparties." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1666 (2019). By empowering counterparties to block assumptions that would infringe their legitimate interests—such as an assumption that would, for instance, expose a counterparty's patented software to a competitor—§ 365(c)(1) creates leverage for otherwise vulnerable counterparties during preconfirmation negotiations and vindicates the concerns of intellectual property law.

To enforce the Code's plain meaning and carefully balanced policy objectives, a majority of circuits have adopted the "hypothetical test." *E.g.*, *RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257, 262 (4th Cir. 2004) (collecting cases). Under this test, § 365(c)(1) revokes a trustee's—and therefore, a DIP's—power to assume an executory contract when applicable law excuses the counterparty from rendering performance to a hypothetical entity other than the debtor or DIP. A minority of circuits adopt the "actual test," which bars a DIP's assumption only when the DIP actually intends also to assign the contract after assuming it. *E.g.*, *Institut Pasteur*, 104 F.3d 489. This Court should reject the minority approach and instead affirm the Thirteenth Circuit's use of the hypothetical test.

### A. <u>The ordinary meaning of § 365(c)(1)'s text bars debtors in possession from assuming non-assignable executory contracts without the counterparty's consent.</u>

To interpret § 365(c)(1), the "starting point lies in a careful examination of the ordinary

meaning and structure of the law itself." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (citing *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407 (2011)). "[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1888 (2019) (quoting *Roberts v. Sea-Land Servs., Inc.*, 566 U. S. 93, 101 (2012)). Ultimately, if "the statute's language is plain," then "the inquiry should end." *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016).

*i. A trustee may not assume a non-assignable executory contract over the objection of the counterparty.*

The language of § 365(c)(1) is plain, and it prohibits a bankruptcy trustee from assuming non-assignable executory contracts over the objection of the counterparty. Most important, by using the disjunctive word "or," the prohibition applies individually to both assumption and assignment. Antonin Scalia & Bryan A. Garner, *Reading Law* 119 (2012) ("With the disjunctive [prohibition], none of the listed things is allowed."). The statutory scheme of § 365 confirms the disjunctive reading by treating assumption and assignment as "two conceptually distinct events." *Sunterra*, 361 F. 3d at 267 (citing *Catapult*, 165 F.3d at 752); *see also* 11 U.S.C. § 365(a) (authorizing only assumption); § 365(f)(2) (authorizing assignment "only if" assumption has occurred). Applying § 365(c)(1) only to cases of assumption *and* assignment—as the actual test requires, *Sunterra*, 361 F.3d at 262 n.9—would contradict the plain meaning of "or."

Moreover, because assumption is a necessary precondition to assignment, a non-disjunctive reading would render two thirds of the phrase "assume or assign" superfluous. Had Congress intended that only the joint act of "assumption *and* assignment" depend on the counterparty's consent, § 365(c)(1) could have stated, simply, "The trustee may not assign . . . ." But because Congress included "assume or" in the text, and because the Court should prefer a

meaning that gives effect "to every word Congress used," *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 632 (2018) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)), the one permissible interpretation of § 365(c)(1) prohibits a trustee's assumption of non-assignable executory contracts over the counterparty's objection.

Construing § 365(c)(1)'s limitation on the assumption power in this fashion does not render § 365(f)(1) meaningless, as asserted in *In re Cardinal Industries, Inc.* 116 B.R. 964, 976–77 (Bankr. S.D. Ohio 1990). Many courts have addressed this issue, and multiple theories exist for reconciling the two sections. Michael J. Kelly, *Recognizing the Breadth of Non-Assignable Contracts in Bankruptcy: Enforcement of Nonbankruptcy Law as Bankruptcy Policy*, 16 Am. Bankr. Inst. L. Rev. 321, 323–32 (2008) (setting out three distinct theories courts have used to reconcile § 365(c)(1) and (f)(1) and proposing a theory of its own). All of these theories read § 365(f)(1) as a general rule that permits "the trustee" to assign executory contracts "notwithstanding" any contractual language or applicable law that would prohibit such assignment. In the face of that general rule, § 365(c)(1) creates an exception by reinstating certain restrictions on assignment vitiated by § 365(f)(1). Exactly which restrictions are reinstated is the point of disagreement between the three theories of reconciliation,[1] but all agree that § 365(f)(1) refers to a broader scope of laws than does § 365(c)(1), coherently reconciling the two provisions. *Id.* at 323. Thus, "[c]ourts that have found [a conflict between these sections] have been looking for one." *Murray v. Franke–Misal Technologies Group, LLC (In re Supernatural Foods, LLC)*, 268 B.R. 759, 775 (Bankr. M.D. La. 2001).

[1] The Court need not determine the exact scope of § 365(c)(1) for present purposes, because the narrow question whether the limitation on trustees' assumption power applies to DIPs does not turn on the scope of "applicable law" as used in § 365(c)(1). *See Supernatural Foods*, 268 B.R. at 773 n.39. Additionally, the parties do not dispute that the rule against assigning patent licenses is within the meaning of the term "applicable law." R. at 8 n.7.

*ii. The limitation on trustees' assumption power also limits the assumption power of debtors in possession.*

The limitation on trustees' assumption power created by § 365(c)(1) applies with equal force to DIPs through the plain language of § 1107(a): "Subject to any limitations on a trustee serving" in a chapter 11 case, "a debtor in possession shall have all the rights . . . and powers . . . of a trustee." 11 U.S.C. § 1107(a). The effect of this section is to make the scope of powers for DIPs coterminous with the scope of powers of trustees. *In re Hartec Enters., Inc.*, 117 B.R. 865, 869 (Bankr. W.D. Tex. 1990) ("[T]he duties and powers of a debtor in possession are coextensive with those of a Chapter 11 trustee . . . ."). Yet the actual test would broaden the scope of the DIP's powers to permit assumption over the counterparty's objection. That empowerment of the DIP finds no support in the unqualified phrase "subject to any limitations on a trustee." Accordingly, this Court should not interpret § 365(c)(1) and § 1107(a) so as to except the DIP from this limitation.

But policy-minded courts have resisted § 1107(a)'s directive to apply this limitation to DIPs because, they reason, the "basic objective of [§] 365(c)(1) . . . is not implicated when a [DIP] seeks [only] to assume" an executory contract. *In re Footstar, Inc.*, 323 B.R. 566, 573 (Bankr. S.D.N.Y. 2005). Two faulty premises foreclose that argument. First, that position presumes that § 1107(a) applies to DIPs only those limitations whose "basic objective" is implicated when a DIP transgresses them. But nothing in the text of § 1107(a) permits a court to second-guess the "basic objective" of a limitation before applying it to a DIP. Rather, the basic objective of § 1107(a) itself, gleaned from the text, is to apply to DIPs "any limitations" that apply to trustees. *See U.S. Brass & Copper Co. v. Caplan (In re Century Brass Prods., Inc.)*, 22 F.3d 37, 40 (2d Cir. 1994) (describing § 1107(a) as "all-encompassing"). And though the *Footstar* court considered the assumption limitation not to apply equally to DIPs "as a matter of logic and common sense,"

*Footstar*, 323 B.R. at 573, courts should not displace the text merely because "wisdom or logic suggests that Congress could have done better," *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 308 (4th Cir. 2000).

Second, if the objective of the statute must be reached, *Footstar*'s conception of the objective of § 365(c)(1) is unduly narrow. That court reasoned that § 365(c)(1) does not seek to prohibit assumption by a DIP because, it asserted, the DIP is the same entity as the prepetition debtor. *Footstar*, 323 B.R. at 574 n.4 ("The Supreme Court has laid to rest the notion that a debtor in possession should be deemed a different entity than the prepetition debtor." (citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984))). Even accepting momentarily that this characterization of *Bildisco* is correct, such a holding would not negate statutory language prohibiting assumption by a DIP without counterparty consent. *See Catapult*, 165 F.3d at 754 n.9 (emphasizing that adoption of the hypothetical test "does not rely on the 'separate entity' theory").

But that characterization of *Bildisco* is not correct. Though the *Bildisco* Court did reason that a DIP is not a "wholly 'new entity,'" it couched that view as merely "sensible" "[f]or [the] purposes" of that case. *Bildisco*, 465 U.S. at 528. Courts writing after *Footstar* have recognized that *Bildisco* did not "conclusively resolv[e]" the question and "does not support in all cases the proposition that" the DIP is indistinct from the prepetition debtor. *E.g.*, *Bonneville Power Admin. v. Mirant Corp. (In re Mirant Corp.)*, 440 F.3d 238, 254 n.21 (5th Cir. 2006). In this case, Congress itself distinguished between the two entities when it referred to them separately in § 365(c)(1)(A) ("debtor or debtor in possession"); *see also In re West Elecs. Inc.*, 852 F.2d 79, 83 (3d Cir. 1988) (finding § 365(c)(1) to express Congress's "judgment that in the context of assumption and assignment of executory contracts, a solvent contractor and an insolvent debtor in possession . . . are materially distinct entities"). *Footstar* would nonetheless collapse those two entities into one.

*Footstar*, 323 B.R. at 574 n.4. But aside from violating the rule against surplusage, *Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 632, ignoring this distinction substitutes the court's policy judgment for Congress's and thereby trespasses on the legislative domain, *Sigmon Coal*, 226 F.3d at 308.

*iii. Only the hypothetical test comports with the text of § 365(c)(1) and § 1107(a).*

Because a trustee may not assume a non-assignable executory contract over the counterparty's objection, § 365(c)(1), and because DIPs have only those powers that trustees have, § 1107(a), these sections should combine to prohibit DIPs from assuming non-assignable executory contracts over counterparty objections. Only the hypothetical test achieves this result. *See Sunterra*, 361 F.3d at 269 (noting that as to DIPs, actual test has effect of prohibiting only "assumption *and* assignment" (quoting *Catapult*, 165 F.3d at 754)); *see also Footstar*, 323 B.R. at 573 (adopting modified version of actual test and concluding that "the constraint on assumption without assignment imposed on a trustee under Section 365(c)(1) . . . cannot apply to a debtor in possession").

Moreover, the hypothetical test squares with the hypothetical language of § 365(c)(1)(A). The "dispositive terms" in § 365(c)(1)(A), r. at 23 (Jones, J., dissenting) (referring to "applicable law" and "an entity other than the debtor or debtor in possession"), are cast generally and not specifically. Focusing first on "applicable," the exact breadth of that term is not at issue in this case. *Supra* note 1. But because "applicable" means only "capable of . . . being applied," *Applicable*, Merriam-Webster, https://www.merriam-webster.com/dictionary/applicable (last visited Jan. 21, 2020), the term does not require an "actual" application of the law before § 365(c)(1) is triggered. Rather, the only analysis necessary is one that asks whether some law could be applied to bar assignment to an entity other than the debtor or DIP.

The other dispositive term, "an entity other than the debtor or debtor in possession," lends

further support for the hypothetical test. This phrase is much broader than that which originally occupied this position in the Code: "the trustee or . . . an assignee of such contract." *Hartec*, 117 B.R. at 869–70 (noting that Congress amended § 365(c)(1) in 1984 and 1986 resulting in its current form). That original wording supported the actual test, because both "the trustee" and "an assignee" refer to specific entities created by a real, factual circumstance (i.e., appointment of the trustee or assignment to a third party). To determine if applicable law barred assignment to those entities, then, courts would necessarily have to determine whether those entities actually existed. This logic has supported the use of an actual test to apply § 365(e)(2)(A), which still contains the "trustee or . . . an assignee" language. *Cf. Mirant*, 440 F.3d at 249–50; *In re Footstar, Inc.*, 337 B.R. 785, 789 (Bankr. S.D.N.Y. 2005).

In contrast, the current wording of § 365(c)(1)(A) supports the hypothetical test. The phrase "an entity other than the debtor or the debtor in possession" does not contemplate any actual assignment of the executory contract at issue. Instead, the phrase refers to a broad set of entities that includes not just a trustee or an assignee but also other indeterminate entities. Indeed, those indeterminate entities, unlike "the trustee" or "an assignee," exist in every bankruptcy proceeding and come into being the moment the debtor files a petition. Therefore, to apply § 365(c)(1), courts need only consider whether some law would be capable of applying to bar assignment to an entity other than the debtor or DIP—whether a trustee, an assignee, or an indeterminate entity. *See West Elecs.*, 852 F.2d at 83 (framing the test under § 365(c)(1) as: "under applicable law, could the [counterparty] refuse performance from 'an entity other than the debtor or the debtor in possession'"). Though this test varies significantly from the test applied under § 365(e)(2)(A), the different tests reflect that the two provisions "are by no means parallel overall or identical in effect," *Mirant*, 440 F.3d at 247 n.16, and that "the use of different words or terms within a statute

demonstrates that Congress intended to convey a different meaning," *Tin Cup, LLC v. U.S. Army Corps of Eng'rs*, 904 F.3d 1068, 1074 (9th Cir. 2018). The meaning conveyed here is that § 365(c)(1) calls for a hypothetical test.

Against the plain meaning of the text, legislative history purported to support the actual test is not persuasive. In general, legislative history can be an unreliable indicator of the meaning of a statute. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("First, legislative history is itself often murky, ambiguous, and contradictory."); Scalia & Garner, *supra*, at 369–90. Accordingly, courts resort to legislative history "only to the extent [it] shed[s] a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil Corp.*, 545 U.S. at 568. Even then, if the legislative history would "'muddy' the meaning of 'clear statutory language,'" the Court should disregard it. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (quoting *Milner v. Dep't of Navy*, 562 U.S. 562, 569 (2011)).

Here, legislative history supporting the actual test is unreliable. Proponents of the actual test commonly cite a committee report published in 1980 to support their position. *E.g.*, *Summit Inv. & Dev. Corp. v. Leroux*, 69 F.3d 608, 613 (1st Cir. 1995) (citing H.R. Rep. No. 96-1195, at 12 (1980)). But that report misunderstands § 365(c)(1) by referring only to contracts of a "personal service nature." H.R. Rep. No. 96-1195, at 12. Such a limited conception of § 365(c)(1), however, contradicts the unquestioned holding that § 365(c)(1) relates to a broader range of contracts than just personal services contracts. *E.g.*, *Catapult*, 165 F.3d at 750 (applying hypothetical test); *Mirant*, 440 F.3d at 249 (citing *Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.)*, 700 F.2d 935, 943 (5th Cir. 1983)) (applying actual test to § 365(e)(2)(A)). Because of this contradiction, much of the scope of § 365(c)(1) falls outside the sphere of influence of this committee report.

And even if it correctly understood the law, the report sheds no light on "the enacting Legislature's understanding" of § 365(c)(1). This report was drafted in relation to an amendment proposed four years before the adoption of the language at issue here and six years before § 365(c)(1)(A) was amended for the last time. *Hartec*, 117 B.R. at 870. Moreover, the 1980 amendment was not enacted into law, and the committee report announces the views of only one House committee, *Sunterra*, 361 F.3d at 270, diminishing any interpretive guidance to be gleaned from the committee report, *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77 n.6 (1994) ("[T]he views of the committee of one House of another Congress are of [little] weight." (citing *Pierce v. Underwood*, 487 U.S. 552, 566 (1988))). These indicia of unreliability make this report the type of unhelpful legislative history that the Court should not allow to "muddy" the otherwise "clear statutory language" of § 365(c)(1).

B. Allowing a debtor in possession to assume a non-assignable executory contract without the counterparty's consent is inconsistent with chapter 11's policy framework.

Although it is a goal of chapter 11 to facilitate successful reorganizations, *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1665 (2019), the "Court has rejected the notion that 'Congress had a single purpose in enacting Chapter 11,'" *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 51 (2008) (quoting *Toibb v. Radloff*, 501 U.S. 157, 163 (1991)). Against the goal of reorganization, the Code "weigh[s] . . . the legitimate interests and expectations of the debtor's counterparties." *Tempnology*, 139 S. Ct. at 1665. Therefore, the law "does not permit anything and everything that might" increase a debtor's chance of confirming a plan, *id.*, but simply "establish[es a] preference for reorganizations, where they are legally feasible and economically practical," *Baker & Drake, Inc. V. Pub. Serv. Comm'n (In re Baker & Drake, Inc.)*, 35 F.3d 1348, 1354 (9th Cir. 1994).

To balance these interests, chapter 11 presents not a "prescription for rehabilitation" but "a framework for negotiation" between debtors and creditors. Richard I. Aaron, 1 *Bankruptcy Law Fundamentals* § 12:1 (2019). Those negotiations are debtors' chance to obtain their creditors' consent to a reorganization plan, which is a virtual necessity for plan confirmation. *In re Arnold*, 471 B.R. 578, 592 (Bankr. C.D. Cal. 2012) (citing Elizabeth Warren, *Chapter 11: Reorganizing American Businesses* 133–34 (2008)). Besides increasing the chance of confirmation, facilitating negotiations reduces the need for "costly and lengthy" litigation, another important goal of chapter 11. *In re Quad-C Funding LLC*, 496 B.R. 135, 142 (Bankr. S.D.N.Y. 2013).

*i. Requiring counterparty consent for assumption of non-assignable executory contracts protects creditors' rights set out by nonbankruptcy law.*

Section 365 creates "powerful tool[s]" for trustees and DIPs to use to craft an estate of maximized value. *Tempnology*, 139 S. Ct. at 1658–59; Aaron, *supra*, § 9:10. Trustees and DIPs generally may assume, assign, or reject executory contracts in the manner they consider best. 11 U.S.C. § 365(a), (f). Indeed, in granting the assignment power, § 365(f) takes the extraordinary step of nullifying any restrictions on assignment that the parties initially agreed to or that exist in applicable law. § 365(f)(1) ("[N]otwithstanding a provision in an executory contract . . . or in applicable law, that prohibits, restricts, or conditions the assignment of such contract . . . , the trustee may assign such contract . . . ."). Were chapter 11 concerned only with confirming plans quickly, § 365's application to chapter 11 bankruptcies might have ended there.

But chapter 11 is not so single-minded. Rather, some of its provisions account for the "legitimate interests and expectations of" counterparties and therefore restrict the assumption and assignment powers. Namely, § 365(c)(1) vindicates counterparties who, having entered contracts that are non-assignable under applicable law, have a legitimate expectation that the law applicable to their contracts will be enforced. To fully vindicate the rights of counterparties, the Court should

adopt the interpretation of § 365(c)(1) that prohibits assumption of non-assignable executory contracts without counterparty consent.

A holding to the contrary would infringe counterparties' rights originating in nonbankruptcy law. In patent law, to use a relevant example, the rule restricting assignment of licenses permits licensors to defend their patents not only when threatened by a formal assignment but also when the substance of a transaction would effect a de facto assignment. *E.g.*, *PPG Indus., Inc. v. Guardian Indus. Corp.*, 597 F.2d 1090, 1096 (6th Cir. 1979) (upholding provision in license agreement terminating patent license upon sale of a majority of licensee's stock); *Md. Jockey Club v. ODS Techs., L.P.*, No. Civ. WMN–03–2124, 2005 WL 1200181, at *6–7 (D. Md. May 20, 2005) (citing *Branmar Theatre Co. v. Branmar, Inc.*, 264 A.2d 526, 528 (Del. Ch. 1970)) (enforcing license provision deeming sale of majority stake in licensee to be an assignment). Though § 365(f)(1) would vitiate those contractual provisions, § 365(c)(1)'s requirement of consent before assumption ensures that the rule restricting assignment of patents is not violated by a transaction that, though compliant in form, amounts in substance to a de facto assignment. *Cf. In re Alltech Plastics, Inc.*, No. 86-23673-B, 1987 WL 123991, at *10 (W.D. Tenn. Dec. 30, 1987) (concluding that, because patent licensor's competitor would purchase chapter 11 debtor–licensee's stock under proposed plan, mere assumption would "infring[e]" licensor's "patent rights"). A reorganization under such circumstances would not be legally feasible.

Under the actual test, however, debtor–licensees could structure their reorganizations to effect de facto assignments through mere assumption, leaving licensors unable to enforce their patent rights to their "fullest extent." Jennifer Ying, *The Plain Meaning of Section 365(c): The Tension Between Bankruptcy and Patent Law in Patent Licensing*, 158 U. Pa. L. Rev. 1225, 1240–41 (2010). Because nothing in the Code justifies rendering the "applicable law" of patent non-

assignability subservient to debtors' efforts to reorganize, *id.* at 1243, the Court should adopt the hypothetical test, which enforces the full extent of patent rights and ensures that debtors do not receive "a fresh start at the expense and risk of" their licensors, *Alltech Plastics*, 1987 WL 123991, at *11.

*ii. Requiring counterparty consent for assumption of non-assignable executory contracts encourages negotiation between debtors and creditors.*

To efficiently achieve the balance of debtor and creditor interests, the Code prefers that parties negotiate out of court to resolve their differences. *See In re Polytherm Indus., Inc.*, 33 B.R. 823, 835 (W.D. Wis. 1983). The assumption, assignment, and rejection rights granted by § 365, if unchecked, would allow debtors to determine unilaterally which contractual obligations they (or their handpicked assignees) will continue to perform and which obligations will fall by the wayside, in which case the counterparty's recoupment rights are relegated to those of a general unsecured creditor. *Tempnology*, 139 S. Ct. at 1658 (citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531–32 (1984)). In that world, the counterparty, with no negotiating power, can do nothing but watch the debtor take its money and run.

But § 365(c)(1) provides a mechanism that encourages negotiation between debtors and counterparties before confirmation of a plan. Under this law, the § 365(c)(1) consent power becomes a bargaining chip, creating leverage by which the counterparty can demand acceptable terms for the trustee's or DIP's continued enjoyment of the executory contract. Such an interaction fits neatly within chapter 11's "framework for negotiation" and increases chances that the parties themselves work out an acceptable agreement with minimal litigation.

Prioritizing negotiation also provides an additional reason not to limit the consent power only to instances in which the trustee or DIP intends to assume *and* assign the contract. Counterparties' special knowledge about their general industry and their particular business places

them in the best position to know when assumption of a contract harms their interests. Especially when no assignment is actually intended, courts may struggle to discern the true effect of a proposed plan due to complicated corporate structures and industry dynamics. The facts of this case illustrate the point, as UMT itself did not learn that the Plan would expose its patented software to a competitor until it carefully reviewed the disclosure statement and SFD's portfolio. R. at 8. Development likely could have obtained UMT's consent to the assumption if, instead of ignoring UMT during pre-confirmation negotiations, r. at 6, it had simply promised to shield UMT's software from competitors. A statutory scheme that encourages negotiation with counterparties nips in the bud these disputes that, untreated, blossom into expensive litigation.

And negotiations between counterparties and debtors are likely to be amiable. After all, counterparties generally have an interest in debtors' successful reorganization. Indeed, UMT was eager for the DIP to assume the patent license until it realized that assumption would expose its software to a direct competitor. In this way, incentivizing negotiations would not "destroy a debtor's opportunity to reorganize." *Id.* at 27 (Jones, J., dissenting). Rather, it would ensure that the reorganizations that are confirmed appropriately balance the interests of all stakeholders.

Ultimately, even if concerns that the hypothetical test will frustrate reorganization prevail over the concerns for counterparties' rights under nonbankruptcy law, those policy matters still could not displace the text of § 365(c)(1) and § 1107(a). *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13–14 (2000) ("Achieving a better policy outcome—if what petitioner urges is that—is a task for Congress, not the courts."). Because § 365(c)(1) limits the trustee's assumption power to require consent, the DIP's assumption power is equally limited by the prefatory clause of § 1107(a). Thus, this Court should affirm the Thirteenth Circuit's ruling that the DIP must obtain the counterparty's consent before assuming a non-assignable executory

contract.

## II. THE THIRTEENTH CIRCUIT PROPERLY HELD THAT § 1129(a)(10) REQUIRES THAT EVERY DEBTOR OBTAIN ACCEPTANCE FROM AT LEAST ONE IMPAIRED CLASS OF CREDITORS.

A debtor seeking to reorganize under Chapter 11 must propose a plan that satisfies all applicable requirements of § 1129(a). *See* 11 U.S.C. § 1129(a). Under § 1129(a)(8), a plan may be confirmed consensually upon acceptance by each class of impaired claims. *See* 11 U.S.C. § 1129(a)(8). Otherwise, § 1129(a)(10) requires that "at least one class of claims that is impaired under the plan has accepted the plan the plan." *See* 11 U.S.C. § 1129(a)(10); *Windsor on the River Assocs., Ltd. V. Balcor Real Estate Fin., Inc. (In re Windsor on the River Assocs., Ltd.)*, 7 F.3d 127, 131 (8th Cir. 1993) ("To curb the inequities of such reorganization plans being 'crammed down' the throat of secured lenders, Congress enacted section 1129(a)(10).").

Additionally, a debtor may coordinate its Chapter 11 reorganization with affiliated debtors under a "joint plan." *See* Fed. R. Bankr. P. 1015. However, absent "substantive consolidation," an equitable remedy that joins separate estates, "entity separateness is fundamental." *See In re Tribune Co.*, 464 B.R. 126, 182 (Bankr. D. Del. 2011); *In re Affiliated Foods, Inc.*, 249 B.R. 770, 775 (Bankr. W.D. Mo. 2000) (finding that non-consolidated debtors under a joint plan remain "separate legal entities with separate assets and liabilities"). The practical effect is that a "joint plan" consists of "separate plan[s] for each Debtor." *Tribune*, 464 B.R. at 182. Therefore, the plain meaning of "plan" in § 1129(a)(10) refers to each distinct debtor's plan. In other words, absent substantive consolidation, § 1129(a)(10) must be fulfilled on a *per-debtor* basis. Because Development and the affiliated Debtors "are not being substantively consolidated," r. at 7, section 1129(a)(10) requires that each distinct debtor, including Development, obtain acceptance from at least one impaired class of creditors.

Moreover, § 1129(a)(10) reflects a "fine-tuned balance between the rights of a Chapter 11 debtor and the creditors." *In re Arnold*, 471 B.R. 578, 610 (Bankr. C.D. Cal. 2012). The voting-rights bargaining chip guaranteed by 1129(a)(10) promotes negotiation and consensus, which are at "[t]he heart of the Chapter 11 process." *Arnold*, 471 B.R. at 592 (citing Elizabeth Warren & Jay Westbrook, *The Law of Debtors and Creditors* 677 (6th ed. 2009)). A "per plan" approach would significantly lower the threshold for obtaining creditor support and render the § 1129(a)(10) bargaining chip worthless. Only a "per debtor" approach effectively protects creditors and promotes Congress's intent to "facilitate negotiation and consensus between the debtor and creditors in devising a reorganization plan." *In re Polytherm Indus., Inc.*, 33 B.R. 823, 835 (W.D. Wis. 1983).

A. <u>The plain language of § 1129(a)(10) requires that each debtor reorganizing under a "joint plan" obtain acceptance from at least one impaired class of creditors.</u>

Generally, the operation of § 1129(a)(10) is relatively clear: a plan cannot be confirmed unless the debtor obtains the affirmative vote of at least one impaired class of claims. *See* 11 U.S.C. § 1129(a)(10); *In re 266 Washington Assocs.*, 141 B.R. 275, 287 (Bankr. E.D.N.Y.) ("Section 1129(a)(10) operates as a statutory gatekeeper barring access to cram down where there is absent even one impaired class accepting the plan."). These voting rights are "critical" in a "cramdown" scenario, which allows plan confirmation over the objection of impaired classes only if the plan is "accepted by at least one class of impaired creditors, [pursuant to] § 1129(a)(10)." *Bank of Am. Nat. Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441 (1999).

The issue is whether § 1129(a)(10) requires anything different of a debtor that coordinates its reorganization with affiliated debtors under a "joint plan." Some courts have interpreted § 1129(a)(10) under the "per plan" approach to require one impaired consenting class from any debtor under the plan. *See JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props.,*

*Inc. (In re Transwest Resort Props., Inc.)*, 881 F.3d 724, 729 (9th Cir. 2018) (finding that § 1129(a)(10) requires only that a plan have one accepting impaired class); *JPMorgan Chase Bank, N.A. v. Charter Commc'ns Operating, LLC (In re Charter Commc'ns),* 419 B.R. 221, 266 (Bankr. S.D.N.Y. 2009) (overruling an "artificial impairment" objection because there were numerous other impaired accepting classes); *In re SGPA, Inc.*, 2001 Bankr. LEXIS 2291, at *19 (Bankr. M.D. Pa. Sept. 28, 2001) (holding that it was unnecessary "to have an impaired class of creditors of each Debtor to vote to accept the Plan"). However, these courts overlook the fundamental principle of corporate separateness, which mandates that a debtor may only reorganize the assets and liabilities of its own estate. *Tribune Co*, 464 B.R. at 182. Read in context of this rule, the plain language of "plan" in section 1129(a)(10) imposes a *per-debtor* requirement on each distinct Chapter 11 estate to obtain acceptance from at least one impaired class of creditors.

Statutory interpretation begins "with the language of the statute itself." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). "[W]here . . . the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *Id.* (citation and internal quotation marks omitted). Additionally, it is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000). A "cardinal rule" of statutory construction is 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). A statutory "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.,* 484 U.S. 365, 371 (1988).

Even when read in isolation, the statutory text of § 1129(a)(10) does not foreclose a "per debtor" interpretation. Section 1129(a)(10) must be examined in light of the Bankruptcy Code's own rules of statutory construction, including that "the singular includes the plural." *Tribune* 464 B.R. at 182 (citing 11 U.S.C. § 102(7)). It would be wrong to suggest that is a "contortion of section 1129(a)(10) [to] import[] section 102(7) . . . when interpreting . . . the Bankruptcy Code." R. at 28 (Jones, J., dissenting). The interpretive-direction canon requires that "definition sections and interpretation clauses are to be carefully followed." *See* Scalia & Garner, *supra*, at 225. And even if § 102(7) does not provide definitive clarity, application of the rule does create an opening for the text to support a per debtor interpretation. *See Tribune* 464 B.R. at 182 (explaining that the use of the singular "plan" in section 1129(a)(10) is insufficient to conclude that acceptance from only one impaired class is required in a multi debtor plan). Upon establishing that the text on its face can bear a per debtor interpretation, it is appropriate to look to context to understand the plain meaning of § 1129(a)(10). *See King v. St. Vincent's Hosp.,* 502 U.S. at 221.

We must always consider "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Furthermore, "when deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.'" *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). Both the "context" and its "place in the overall statutory scheme" reveal that the plain language of § 1129(a)(10) requires a per debtor approach.

First, section 1129(a)(10) "must be read in conjunction with the other subsections of § 1129(a)." *Tribune* 464 B.R. at 182. In particular, § 1129(a)(1) provides that the "plan" must comply with the applicable provisions of the Bankruptcy Code and § 1129(a)(3) requires that the "plan" be proposed in good faith and not by any means forbidden by law. It is patently obvious

that the Bankruptcy Code could not permit a debtor to confirm a plan, under the guise of a "joint plan" or otherwise, without complying with these requirements. *Tribune* 464 B.R. at 182. The same could be said about § 1129(a)(7), which embodies the "best interest of creditors" test. *Id*. See 7 Collier on Bankruptcy P 1129.02 (16th 2019) ("Section 1129(a)(7) is one of the cornerstones of chapter 11 practice. It is an individual guaranty to each creditor . . . that it will receive at least as much in reorganization as it would in liquidation.").

Moreover, the fundamental rule of corporate separateness is baked in to the overall statutory scheme of the Bankruptcy Code. *See Reid v. Wolf (In re Wolf)*, 595 B.R. 735, 765 (Bankr. N.D. Ill. 2018) ("[It is a] general and fundamental principle [that] corporations and other artificial legal entities enjoy a legal personality separate and distinct from that of the equity owners."). Entity separateness is a "fundamental rule of corporate law." *See Coughlin Chevrolet, Inc. v. Thompson (In re Thompson)*, 458 B.R. 409, 418 (Bankr. S.D. Ohio 2011); *In re Owens Corning*, 419 F.3d 195, 211 (3d Cir. 2005) (absent compelling circumstances, "the general expectation of state law and the Bankruptcy Code, and thus of commercial markets, is that courts respect entity separateness."). This rule maintains a clear distinction between corporate affiliates, so that their assets and liabilities never comingle. *In re DBSD N. Am., Inc.*, 506 B.R. 358, 368 (Bankr. S.D.N.Y. 2009) ("It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation . . . is not liable for the acts of its subsidiaries." (quoting *United States v. Bestfoods,* 524 U.S. 51, 61 (1998))). Accordingly, "each joint plan actually consists of a separate plan for each Debtor." *Tribune*, 464 B.R. at 182.

The exception to the rule is "substantive consolidation," an equitable remedy that combines the assets and liabilities of separate entities "as though they belong to a single entity." *Sharp v. Salyer (In re SK Foods, LP)*, 499 B.R. 809, 832 (Bankr. E.D. Cal. 2013). However, "[i]n the

absence of substantive consolidation, entity separateness is fundamental." *Tribune*, 464 B.R. at 182. In the present case, the ten Debtors' estates were not substantively consolidated, but only "jointly administered." *See* Fed. R. Bankr. P. 1015. The Advisory Committee Notes to Rule 1015(b) emphasize that joint administration is not substantive consolidation—the former is a matter of convenience, whereas the latter alters the substantive rights of parties. *See* Fed. R. Bankr. P. 1015 advisory committee's note.

Some courts have relied on the argument that because a business "is managed . . . on an integrated basis making it reasonable and administratively convenient to propose a joint plan," § 1129(a)(10) should be interpreted on a per plan basis. *Charter,* 419 B.R. at 266. Granted, integrated business management may very well make it "convenient" to jointly administer the coordinated reorganization of affiliated debtors. *See* Fed. R. Bankr. P. 1015 advisory committee's note. However, integrated business management does not break down the barriers of corporate separateness nor indicate that substantive consolidation would be appropriate. *Schechter v. 5841 Bldg. Corp. (In re Hansen)*, 341 B.R. 638, 643 (Bankr. N.D. Ill. 2006) ("To ignore a corporation's existence . . . [is] a drastic step . . . [reserved for] exceptional circumstances.").

The Debtors created a particular corporate structure, wherein Development, LLC, is a distinct entity and must live with that decision. *See Kreisler v. Goldberg*, 478 F.3d 209, 213 (4th Cir. 2007) ("It is a fundamental precept of corporate law that each corporation is a separate legal entity with its own debts and assets, even when such corporation is wholly owned by another corporate entity."); *Gilliam v. Speier (In re KRSM Props., LLC)*, 318 B.R. 712, 717 (B.A.P. 9th Cir. 2004) ("[A]n LLC, by virtue of its structure and limited liability features, fits comfortably within the Bankruptcy Code's definition of 'corporation.'"). In *Kreisler*, the court found no stay violation where a creditor brought an ejectment action against a wholly owned subsidiary of the

Chapter 11 debtor. *Id*. at 214. ("Having assumed whatever benefits flowed from that decision, it cannot now ignore the existence of the LLC in order to escape its disadvantages."). Similarly, the Debtors in this case cannot disregard the corporate structure they set up so as to avoid an unfavorable bankruptcy result. Because § 1129(a)(10) requires acceptance of at least one impaired class of claims on a *per debtor* basis, this Court cannot confirm the Debtors' chapter 11 plan over the objection of UMT, who control Development's only impaired class of claims. *See* R. at 8.

B. Requiring each debtor to obtain acceptance from at least one impaired class of claims is consistent with the purpose of § 1129(a)(10) and supports important chapter 11 policies.

While successful reorganization is a goal of chapter 11, "[t]he Code . . . does not permit anything and everything that might advance that goal." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1665 (2019). In enacting chapter 11, Congress did not have "a single purpose," but "str[uck] a balance" among multiple competing interests. *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U. S. 33, 51 (2008) (citing *Toibb v. Radloff,* 501 U.S. 157, 163 (1991)). Congress enacted chapter 11 with a clear eye towards balancing a debtor's reorganization efforts with a creditor's legitimate rights in protecting its interests. *See Id*. at 50 ("Chapter 11's twin objectives of preserving going concerns and maximizing property available to satisfy creditors." (quoting *Bank of Am. Nat'l Tr. & Savings Ass'n v. 203 N. LaSalle St. P'ship,* 526 U.S. 434, 453 (1999))); *Fields Station LLC. v. Capitol Food Corp. of Fields Corner (In Re Capitol Food Corp. of Fields Corner),* 490 F.3d 21, 25 (1st Cir. 2007) ("Two primary purposes of chapter 11 relief are the preservation of businesses as going concerns, and the maximization of the assets recoverable to satisfy unsecured claims.").

Further, negotiation and creditor consent is at "[t]he heart of the Chapter 11 process." *In re Arnold*, 471 B.R. 578, 592 (Bankr. C.D. Cal. 2012) (citing Elizabeth Warren & Jay

Westbrook, *The Law of Debtors and Creditors* 677 (6th ed. 2009)). By requiring that a joint plan obtain a minimum level of creditor on a per-debtor basis, § 1129(a)(10) gives creditors a real bargaining chip. Finding in the alternative, that a debtor can fulfill § 1129(a)(10) without obtaining any support form its *own* impaired creditors, would erode the very purpose of § 1129(a)(10) and disturb Congress's carefully legislated balance.

*i. The purpose of § 1129(a)(10), to obtain a minimum level of impaired creditor support, is a meaningful creditor protection only if interpreted on a per-debtor basis.*

Whenever a chapter 11 plan proposes to impair a class of creditors, § 1129(a)(10) requires a minimum level of impaired creditor support for the plan. *See Windsor,* 7 F.3d at 131 ("The purpose of [§ 1129(a)(10)] is 'to provide some indicia of support [for a plan of reorganization] by affected creditors and prevent confirmation where such support is lacking.'" (quoting *In re Lettick Typografic, Inc.,* 103 B.R. 32, 38 (Bankr. D. Conn. 1989))). Requiring "indicia of support" from at least one impaired class "curb[s] the inequities of such reorganization plans being 'crammed down' the throat of secured lenders." *Id*. In fact, "[t]here must be a manifestation of creditor support for the proposed plan before a court should even consider the merits of the proposed plan." *In re Fur Creations by Varriale, Ltd.*, 188 B.R. 754, 760 (Bankr. S.D.N.Y. 1995).

In a multi debtor "joint plan," § 1129(a)(10) could not remain faithful to its purpose without requiring a minimum level of support on a *per-debtor* basis. Under a per-plan approach, the threshold for acceptable support—a single impaired class of a single debtor—would be so watered down as to deprive § 1129(a)(10) of its core creditor protection purpose.

Considerable jurisprudence denounces "artificial impairment and gerrymandering," the manipulation of creditor classification and treatment, which demonstrates a serious concern for preserving the effectiveness of impaired creditors' votes under § 1129(a)(10). *Fed. Nat. Mortg.*

*Ass'n v. Vill. Green I, GP*, 483 B.R. 807, 816 (W.D. Tenn. 2012) (describing the decisions rejecting artificial impairment as "the majority view"); *Willows Convalescent Ctrs Ltd. P'ship V. Unum Life Insurance Co. (In re Willows Convalescent Ctrs. Ltd. P'ship)*, 151 B.R. 220, 223 (D. Minn. 1991) (citing *In re Meadow Glen, Ltd.,* 87 B.R. 421, 424–427 (Bankr. W.D. Tex. 1988)) ("A debtor must not be allowed to abuse the classification and/or impairment system of the bankruptcy code for the sole purpose of achieving a cramdown."). "The chief concern" with artificial impairment and classification "is that it potentially allows a debtor to manipulate the Chapter 11 confirmation process by engineering literal compliance with the Code while avoiding opposition to reorganization by truly impaired creditors." *In re All Land Invs., LLC*, 468 B.R. 676, 689–90 (Bankr. D. Del. 2012). A -plan interpretation should be disfavored for the same reason that artificial impairment is disfavored: both defeat the purpose of 1129(a)(10) by diminishing the effectiveness of the creditor's voting right.

*ii. Ensuring meaningful creditor protection under § 1129(a)(10) promotes healthy negotiation and consensus building.*

Section 1129(a)(10) reflects Congress's intent to enact a "fine-tuned balance between the rights of a Chapter 11 debtor and the creditors." *In re Arnold*, 471 B.R. 578, 610 (Bankr. C.D. Cal. 2012). Where a plan proposes to infringe on creditors by impairing their pre-bankruptcy rights or interests, it must first obtain a minimum level of impaired creditor support. *See In re Polytherm Indus., Inc.*, 33 B.R. 823, 835 (W.D. Wis. 1983) ("The authors of the Bankruptcy Reform Act of 1978 sought both to simplify the procedures for reorganizing a debtor . . . and to facilitate negotiation and consensus between the debtor and creditors in devising a reorganization plan.").

A per-plan approach would disturb this policy balance by depriving creditors of a meaningful bargaining chip. *See* Peter E. Meltzer, *Disenfranchising the Dissenting Creditor Through Artificial Classification or Artificial Impairment*, 66 Am. Bankr. L.J. 281, 320–21 (1992)

("If the purpose of § 1129(a)(10) is to force the debtor or any other plan proponent to establish some indicia of success in its negotiations with creditors, that section should not be interpreted or applied in such a manner as to defeat that purpose."). In the present case, creditor UMT was excluded from the plan negotiations. R. at 6. This result, condoned by the per-plan approach, is incompatible with the purpose of § 1129(a)(10) and its place in chapter 11's broader goals of promoting consensus building via negotiation. *See In re Arnold*, 471 B.R. 578, 592 (Bankr. C.D. Cal. 2012) (citing Warren & Westbrook, *supra*, at 677).

While such a requirement can "frustrate a debtor's interest in adopting a given plan," Congress recognized that "if no class of creditors agrees to the plan, it would not be equitable to impose acceptance of the plan upon the creditors." *In re Polytherm Indus., Inc.*, 33 B.R. 823, 835 (W.D. Wis. 1983). Providing impaired creditors with statutory voting rights reflects Congress's intent that "Chapter 11 strikes a balance between a debtor's interest in reorganizing and restructuring its debts and the creditors' interest." *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U. S. 33, 51 (2008).

Nor is it persuasive to insist that complying with Congress's intent that § 1129(a)(10) give creditors meaningful bargaining chips in negotiations constitutes a "hijacking" of a plan. *See* R. at 31–32 (Jones, J. dissenting. It is the role of judiciary to apply § 1129(a)(10) as it is written. *See SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 967 (2017) ("[W]e cannot overrule Congress's judgment based on our own policy views."). If Congress agreed that a single creditor class should not be able to prevent confirmation, then § 1129(a)(10) would not have been written to plainly require a per-debtor application.

Additionally, a per-debtor application conforms with larger chapter 11 policies, and does not represent a "hostage taking" of the debtor. Where a debtor will impair the pre-bankruptcy rights

of a creditor, it would be inequitable to allow the plan to be confirmed without it "pass[ing] muster in the opinion of creditors whose rights to repayment from the debtor are implicated by the reorganization." *In re Combustion Eng'g, Inc.,* 391 F.3d 190, 244 (3d Cir. 2004). Congress intended that impaired creditors serve as both watchdogs and as a barometer as to whether such a plan should be confirmed. *Id*. ("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."). Far from hijacking a plan, by exercising their right to vote provided for in the Code, impaired creditors embrace the "monitor" role given to them by Congress.

To flip the "hijacking" argument around, it would be wrong to allow *debtors* to force their *creditors* to swallow a raw deal without obtaining minimal support simply because affiliated, yet distinct, debtors obtained support from their creditors. *In re Polytherm Indus., Inc.*, 33 B.R. 823, 835 (W.D. Wis. 1983) ("I find nothing in the Bankruptcy Reform Act to indicate that Congress intended that the bankruptcy courts could saddle creditors with a stake in a reorganized corporation under a plan that had received no acceptances from impaired classes of creditors. Such a result would be inconsistent with the policy of protecting creditors that is inherent in the Bankruptcy Reform Act of 1978."). In the present case, creditor UMT should not be "saddled" with a plan that impairs its rights without the required consent under § 1129(a)(10).

Tellingly, the debtors, who treated § 1129(a)(10) on a per-plan basis, did not even see fit to bring UMT to the negotiating table. This reality encapsulates the pitfalls of the per-plan approach. Only a per-debtor approach effectively protects the creditor rights as intended by Congress in § 1129(a)(10) and in turn promotes the careful policy balance in chapter 11 in promoting reorganization borne from meaningful negotiation and creditor consensus.

*iii. Legislative history does not foreclose requiring each debtor to obtain acceptance from an impaired class of creditors under § 1129(a)(10).*

Statutory interpretation begins "with the language of the statute itself." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). "[W]here . . . the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *Id.* Only where the statutory text is ambiguous do we "look to other interpretive tools, including the legislative history," in order to determine the statute's meaning. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 567 (2005). A statutory "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.,* 484 U.S. 365, 371 (1988).

Because the statutory context removes any ambiguity, it is not necessary to turn to legislative history. Both the immediate context of the neighboring § 1129(a) requirements and the overall statutory scheme require that the plain language of § 1129(a)(10) be applied in a per-debtor fashion. However, even if an interpreter felt it appropriate to look to legislative history, the available and persuasive aspects of the legislative history is consistent with a per-debtor interpretation. Only certain forms of legislative history of § 1129(a)(10) is very revealing. The individual committee reports "shed no light on the purpose of the provision." Scott F. Norberg, *Debtor Incentives, Agency Costs, and Voting Theory in Chapter 11*, 46 U. Kan. L. Rev. 507, 537 (1998).

However, the amendment history itself provides a form of legislative history that demonstrates Congressional intent that § 1129(a)(10) provide substantive protection for impaired creditors. Congress enacted § 1129(a)(10) in 1978 when it overhauled the Bankruptcy Code. In creating a new chapter 11 reorganization scheme, Congress drew from Chapters X and XI of the

old Bankruptcy Act but demonstrated a clear preference for the policies of creditor consent under Chapter XI. *Arnold*, 471 B.R. at 593 ("Chapter 11 is descended from both of the reorganization chapters, Chapters X and XI, under the old Act, but more from the latter than the former. Consent was the essence of Chapter XI."). However, § 1129(a)(10) as originally enacted only required that a plan obtain acceptance from a class of creditors without specifying whether it had to be an *impaired* class of creditors. In response to confusion in the courts, Congress amended § 1129(a)(10) in 1984 to clarify that only an *impaired* accepting class was required. Suzanne T. Brindise, *Note and Comment: Choosing The "Per-Debtor" Approach to Plan Confirmation in Multi-Debtor Chapter 11 Proceedings*, 108 Nw. U.L. Rev. 1355, 1376 (2014). This legislative history indicates that "creditor consent, specifically impaired creditor consent, is a critical component to a successful Chapter 11 reorganization." *Id*. Section 1129(a)(10) balances the interests of both the debtor and the creditor, "which is a key foundational principle underlying all bankruptcy proceedings." Michael Chaisanguanthum, *Charter: The Most Important Recent Bankruptcy Decision for Secured Creditors*, 27 Emory Bankr. Dev. J. 9, 14 (2010) (citing 7 Collier on Bankruptcy ¶ 1129.LH[7], at 1129–204 (16th ed. 2013)). The amendment history of § 1129(a)(10)—both its enactment in 1978 and its amendment in 1984—demonstrate Congress's intent to create a firm creditor protection for impaired creditors.

The legislative history therefore confirms that Congress intended § 1129(a)(10) play a key role in maintaining balance in the plan confirmation process by fostering negotiation and creditor consensus. In a multi-debtor joint plan, a per-plan approach would disturb this balance by depriving impaired creditors of a real bargaining chip. This Court should affirm the Thirteenth Circuit's per-debtor application of § 1129(a)(10) because it remains faithful to the intent of Congress as expressed in the text and by the broader policy goals of a chapter 11.

## CONCLUSION

This Court should affirm the Thirteenth Circuit. The plain text of § 365(c)(1) and § 1107(a) favors the hypothetical test that bars nonconsensual assumption of non-assignable executory contracts, even when DIPs are to render performance to the counterparty. Similarly, § 1129(a)(10) does not permit one impaired class of one debtor to satisfy the minimum level of creditor acceptance required for the confirmation of a joint plan. Moreover, the holdings of the Thirteenth Circuit further chapter 11's policy goals to protect creditors' nonbankruptcy rights and to achieve reorganizations palatable to all parties involved, not just debtors.

# APPENDIX A

## 11 U.S.C. § 365 (2012). Executory contracts and unexpired leases

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

….

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

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

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

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

….

(e) (1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if--

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

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

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f) (1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.
(2) The trustee may assign an executory contract or unexpired lease of the debtor only if--
(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and
(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.
(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

**11 U.S.C. § 1107 (2012). Rights, powers, and duties of debtor in possession**

(a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.
(b) Notwithstanding section 327(a) of this title, a person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case.

**11 U.S.C. § 1129 (2012). Confirmation of plan**

(a) The court shall confirm a plan only if all of the following requirements are met:
(1) The plan complies with the applicable provisions of this title.
(2) The proponent of the plan complies with the applicable provisions of this title.
(3) The plan has been proposed in good faith and not by any means forbidden by law.
….
(7) With respect to each impaired class of claims or interests--
(8) With respect to each class of claims or interests--
(A) such class has accepted the plan; or
(B) such class is not impaired under the plan.
….
(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.