No. 19-1004

IN THE

Supreme Court of the United States

October Term, 2019

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

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

v.

UNDER MY THUMB, INC.,
Respondent.

On Writ of Certiorari to the
Supreme Court of the United States

BRIEF FOR THE PETITIONER

Team 30 P
Counsel for Petitioner

QUESTIONS PRESENTED

I. Does 11 U.S.C. § 365(c)(1) permit a debtor in possession to assume an executory contract without the non-debtors' consent if applicable non-bankruptcy law only prohibits assignment of executory contracts without a non-debtor's consent?

II. Does 11 U.S.C. § 1129(a)(10) require acceptance from at least one impaired class of claims *per plan*, as the plain meaning of the statute indicates, or, alternatively, *per debtor*, as a limited number of courts have held?

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OPINIONS BELOW

In an unreported opinion, the Bankruptcy Court for the District of Moot answered both questions in favor of the Debtors, and the Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed. R. at 3. First, the bankruptcy court adopted the "actual test," holding that section 365(c)(1) requires a case-by-case inquiry and that under such an inquiry, Development could assume its Agreement with Under My Thumb under the proposed reorganization plan. R. at 8–9. Second, the bankruptcy court adopted the "per plan" approach and held that section 1129(a)(10) only requires the acceptance of at least one impaired class per joint, multi-debtor plan, rather than at least one impaired class per debtor. R. at 9. The Thirteenth Circuit Court of Appeals reversed; its opinion is reproduced as the record in this appeal.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

11 U.S.C. § 101
In this title the following definitions shall apply:
(1) [omitted]
(2) The term "affiliate" means—
(A) entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities—
(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or
(ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;
(B)–(D) [omitted]
(3)–(55) [omitted]

11 U.S.C. § 102
In this title—
(1)–(6) [omitted]
(7) the singular includes the plural;
(8)–(9) [omitted]

<u>11 U.S.C. § 365</u>

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

(b) [omitted]

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

> **(1)**
>
> > **(A)** applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and
> >
> > **(B)** such party does not consent to such assumption or assignment; or
>
> **(2)–(4)** [omitted]

(d) [omitted]

(e)(1) [omitted]

> **(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)** [omitted]

(g)–(p) [omitted]

<u>11 U.S.C. § 1124</u>

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

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

(2) [omitted]

<u>11 U.S.C. § 1129</u>

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

(1)–(7) [omitted]

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

(A) such class has accepted the plan; or

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

(9) [omitted]

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

(11)–(16) [omitted]

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

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

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

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

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims—

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

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

(C) With respect to a class of interests—

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

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

(c)–(e) [omitted]

STATEMENT OF FACTS

Tumbling Dice, Inc. ("TDI") is a holding company created to own membership interests of nine wholly-owned debtor-subsidiaries. R. at 4. Eight of the debtor-subsidiaries[1] (collectively "Operating Debtors") operate luxury casinos and resorts. Tumbling Dice Development, LLC ("Development"), the ninth debtor-subsidiary, serves a limited purpose in the corporation and acts as the licensee of Under My Thumb, Inc.'s ("UMT") non-exclusive software license agreement. *Id.* TDI, the Operating Debtors, and Development (collectively, the "Debtors" or "TDI") formed to create one of the largest gaming operations in the United States. *Id.*

I. "Everything is Turning to Gold": TDI contracted with UMT to modernize Club Satisfaction, boosting membership and profits.

Thirty years ago, the Debtors launched their casino loyalty program, Club Satisfaction, to foster brand loyalty from frequent customers and provide members with incentives, including free and discounted nights at their hotels and complimentary meals and drinks at in-house chain of steakhouses, among other perks. *Id.* In 2008, the Debtors partnered with software developer UMT to modernize Club Satisfaction. *Id.*

UMT incurred approximately $10 million in costs to create the Club Satisfaction software ("Software"), and Development agreed to reimburse approximately $7 million pursuant to an unsecured promissory note ("R&D Note"). *Id.* Once the Software was complete, Development and UMT entered into a license agreement ("Agreement") in which Development paid UMT a monthly fee[2] in exchange for a non-exclusive license to use the copyrighted and patented Software and permission to extend the benefits of the Agreement to affiliated entities. R. at 5.

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[1] (i) Tumbling Dice Atlantic City, LLC; (ii) Tumbling Dice Chicagoland, LLC; (iii) Tumbling Dice Detroit, LLC; (iv) Tumbling Dice Lake Tahoe, LLC; (v) Tumbling Dice Las Vegas, LLC; (vi) Tumbling Dice New Orleans, LLC; (vii) Tumbling Dice Palm Springs, LLC; (viii) Tumbling Dice Tunica, LLC

[2] Calculated based on the amount of Club Satisfaction members' spending activity.

The Agreement also prohibited the Debtors from assigning or sublicensing their rights without UMT's express written consent. *Id.*

The new Software, essential to TDI's business model, allowed the Debtors to collect data on members' habits, which was used to develop more incentives to entice members to return often, stay longer, and spend more. *Id.* As a result of the modernization efforts, Club Satisfaction membership tripled and member spending increased. *Id.* UMT also benefited from the agreement because the agreement permitted it to license similar versions of the Software to third parties, which it did, and UMT received higher payments from the Debtors than expected because of Club Satisfaction's popularity. R. at 5–6.

II. "New Faces": Start Me Up purchased Tumbling Dice stock in a leveraged buy-out.

In December 2011, a hedge fund, Start Me Up, Inc. ("Start Me Up"), acquired TDI's stock through a leveraged buy-out where the Debtors granted a group of lenders (the "Lenders") first priority liens on their assets in exchange for a $3 billion loan. R. at 6. Development was not required to act as a borrower or guarantor because of its limited purpose, the non-exclusivity of the Software license, and restrictive covenants in the loan agreement. *Id.*

III. "Down in the Hole": Debtors filed for Chapter 11 bankruptcy.

In June 2015, the Debtors could no longer keep up with the money they owed. *Id.* The Debtors ceased making payments on the R&D Note, but remained current on their monthly obligations under the Agreement. R. at 6–7. Then, in January 2016, the Debtors realized they were facing an unserviceable debt load from the leveraged buy-out and commenced these chapter 11 cases under a joint plan. R. at 6. When the Debtors filed their petition, they each jointly and severally owed $2.8 billion to the Lenders and $120 million to unsecured creditors, which included more than $6 million owed UMT per the R&D Note. *Id.*

IV. "Around and Around": negotiations between Debtors and creditors led to a deal.

The Debtors' primary goal in filing under Chapter 11 was to negotiate a deal to restructure the debt load with the Lenders. *Id.* Lengthy negotiations were conducted with the Debtors, Start Me Up, the Lenders, the unsecured creditors' committee, and other stakeholders, but notably not UMT. *Id.* A deal was reached, and the Debtors memorialized it in a plan support agreement (the "Plan"), which was filed with a disclosure statement in August 2016. R. at 7. The Plan included that: (1) the Debtors would restructure all secured debt owed to the Lenders, with a lower interest rate over an extended twenty-year period; (2) Start Me Up would fund a fifty-five percent distribution to unsecured creditors and be entitled to retain equity interest in the Debtors; and (3) existing shares and membership interests in the Debtors would be cancelled and new shares and membership interests would be issued without the corporate structure changing. *Id.*

With respect to UMT, the Plan was to assume the Agreement, and UMT would continue receiving monthly payments. *Id.* The Plan also included a $66 million *pro rata* distribution to the Debtors' unsecured creditors, which included the $6 million Development owed UMT pursuant to the R&D Note. *Id.* UMT declined to accept the agreement once it discovered its direct competitor, Sympathy for the Devil, LP ("SFD"), planned to invest $35 million of the $66 million and receive fifty-one percent of the voting shares of reorganized TDI, as well as several seats on the board of directors. R. at 7–8. UMT used its control over Development's only class of creditors to vote to reject the Plan. R. at 8. Meanwhile, the remaining Debtors each had at least one impaired accepting class of creditors who voted in favor of the Plan. *Id.*

V. "Aftermath": UMT had two objections to the Plan.

UMT timely objected to the Plan on multiple grounds, of which two were pursued on appeal. *Id.* First, UMT relied on the "hypothetical test" to argue the Debtors' proposed assumption of the Agreement was impermissible per section 365(c)(1) because applicable bankruptcy law excused UMT's performance in the absence of consent. *Id.* Second, UMT asserted the Plan could not be confirmed under section 1129(a)(10) because Development had no impaired class of creditors vote to accept. *Id.*

VI. "You Win Again": Appellate Panel affirms for Debtors on both objections.

In light of overwhelming creditor support (all creditors except UMT voted in favor of the Plan), the bankruptcy court overruled UMT's objections and confirmed the Plan. *Id.* Regarding UMT's first objection, the bankruptcy court relied on the "actual test" and held section 365(c)(1) observes case-by-case inquiries into whether the non-debtor party was actually forced to accept performance of an executory contract from someone other than the original contracting party. R. at 8–9. The bankruptcy court concluded UMT was only being asked to honor its existing contractual obligation with Development and therefore Development could assume the agreement. R. at 9. UMT's second objection was also rejected, and the bankruptcy court held that section 1129(a)(10) is satisfied when at least one impaired class in a joint, multi-debtor plan accepts. *Id.* The court also noted all but one of the Debtors' impaired classes voted to accept the Plan. *Id.* The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed on both issues. *Id.*

SUMMARY OF ARGUMENT

Congress created Chapter 11 to provide debtors with opportunities to avoid liquidation and mass job loss. Section 365 primarily allows debtors to assume contracts to avoid liquidation; however, subsection (c)(1) implements express limitations on debtors' rights to balance debtors' and non-debtors' interests. Nonetheless, courts have had trouble interpreting section 365(c)(1)'s meaning and disagree about whether the "hypothetical" or "actual test" is appropriate.

The Thirteenth Circuit erred in concluding section 365(c)(1) is unambiguous and as a result improperly applied the "hypothetical test," which does not comply with Congress' intent for companies to avoid liquidation. Because section 365(c)(1) is likely ambiguous, this Court may rely on several canons of statutory construction (including legislate history; the meaning of "or;" avoiding absurd results; and/or the rule against surplusage) to ensure the state as a whole is consistent. Any of the statutory canons applied to the instant matter should support the conclusion that Congress intended the "actual test" to be applied under section 365(c)(1) because it balances the interests of both parties in accordance with Chapter 11 policy.

The "hypothetical test," which circuit courts generally rely on, states that debtors cannot assume executory contracts if, hypothetically, they cannot assign the contract and does not consider whether a debtor actually intends to assign such contracts. If this Court adopts the "hypothetical test," TDI would not be able to assume the Agreement and would lose access to the Software which is critical to its business model. Without the Software, it is likely TDI would be forced into liquidation because of the unserviceable debt they had, which would be the exact opposite result of what Congress intended in writing Chapter 11. The "actual test," which most bankruptcy courts and a few circuit courts have adopted, allows debtors to assume executory contracts when there is no actual intent to assign the contract to third parties. TDI's Plan plainly stated that Development would continue to fulfill its obligations pursuant to the original terms of the Agreement, which meant that UMT would continue to receive monthly payments for the Software's use and would not have to perform the obligations of the contract with a third party. Because the "actual test" promotes Congressional intent to prevent company liquidation, this Court should reverse the Thirteenth Circuit decision and affirm the bankruptcy courts rejection of the "hypothetical test."

Turning to the second question, the plain meaning of section 1129(a)(10) of the Code is unambiguous and requires only that at least one impaired class of creditors per reorganization plan approves. Based on the plain meaning of section 1129(a)(10), because TDI secured nearly universal support from its impaired classes of creditors, the lack of support from UMT does not preclude TDI's Plan from being confirmed.[3] Because courts are tasked with interpreting statutes, not changing their meaning to fit their desired interpretation, courts must presume that if Congress intended to distinguish between multiple debtors in section 1129(a)(10), then it would have done so. Because the plain meaning unambiguously supports the per-plan approach, this Court's analysis need not continue beyond the statute's plain meaning.

However, courts often use statutory context to discern whether the construction of surrounding statutes provides any additional insight into the meaning of the provision in question. Because none of the other subsections under section 1129(a) distinguish between single and multiple debtors, it is clear that taken as a whole, the requirements apply on a per-plan, not per-debtor, basis. Congress' intent in passing the Code was to balance creditors' and debtors' rights, preventing one creditor from having veto power over confirmation. UMT had the opportunity to shape the Plan and take its seat at the negotiation table, but it failed to do so. Instead, it objected to the Plan after the fact, risking its own distributions, those of its fellow creditors, and the jobs of TDI's thousands of employees nationwide.

UMT contends that the per-plan approach to section 1129(a)(10) achieves the same result as the rarely used equitable remedy of substantive consolidation. Here, TDI explicitly specified that its plan was to be jointly administered, not substantively consolidated, and the bankruptcy

[3] In fact, under the plain meaning of section 1129(a)(10), even if TDI had secured support from only *one* of its impaired classes of creditors, such support would be sufficient for a court to confirm the Plan in a cram down scenario.

court and Bankruptcy Appellate Panel for the Thirteenth Circuit both proceeded as such. Even if TDI's plan was a de facto substantive consolidation, the issue is not before this Court because UMT failed to pursue an objection on that basis on appeal. Thus, this Court should reverse the Thirteenth Circuit and adopt the per-plan approach to section 1129(a)(10), in accordance with its plain meaning, statutory context, and Congress' intent to balance creditors' and debtors' rights.

ARGUMENT

I. Legal Standard

A de novo standard of review is appropriate when no factual dispute exists. *Sims v. United States HHS (In re TLC Hosps.)*, 225 B.R. 709, 710 (Bankr. N.D. Cal. 1998). The parties do not dispute the facts in this case. R. at 9. Thus, this Court should apply a de novo standard of review for issues of law and should act as if it were the original trial court. *Texas v. Soileau (In re Soileau)*, 488 F.3d 302, 305 (5th Cir. 2007) (citation omitted).

II. Section 365(c)(1) does not prohibit assumption because the Debtors will continue to be the licensee performing the Agreement with UMT.

The first issue presented on appeal is whether 11 U.S.C. § 365(c)(1) permits a debtor in possession to assume a non-exclusive license of intellectual property. Generally, section 365 gives debtors in possession the power to *assume*, that is, continue to perform and receive benefits of, executory contracts created prior to bankruptcy. 11 U.S.C. § 365(a); R. at 10. However, the terms of section 365(a) are expressly limited pursuant to subsections b, c, and d. *Id.* Although this Court previously denied certiorari on this issue, it acknowledged that the meaning of section 365(c)(1) is an important issue for *bankruptcy courts* to resolve. *N.C.P. Marketing Grp., Inc. v. BG Star Productions, Inc.*, 129 S. Ct. 1577, 1578 (2009) (hereinafter "*N.C.P. Marketing*"). Following this Court's direction in *N.C.P. Marketing*, the Bankruptcy Court for the District of

Moot ("bankruptcy court") in the instant matter adopted the "actual test" and dismissed UMT's objection that TDI could not assume the Agreement pursuant to section 365(c)(1). R. at 8–9.

Through the "actual test," the bankruptcy court held that section 365(c)(1) requires a case-by-case inquiry into whether a reorganization plan intends to *assign* an executory contract and force a non-debtor (here, UMT) to accept performance of a contract (here, the Agreement) from a party not privy to the original contract (a third party). R. at 8–9. As the bankruptcy court noted and the Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed, UMT was asked only to honor its existing contractual obligations with TDI. R. at 9. In its reversal of the bankruptcy court and Bankruptcy Appellate Panel, the Thirteenth Circuit focused only on the phrase "trustee may not assume or assign" and relied on the so-called "hypothetical test" to hold that section 365(c)(1) is unambiguous. R. at 12–13. The Thirteenth Circuit's analysis and decision fail to comply with the cardinal rule of statutory construction 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 Hospital*, 502 U.S. 215, 221 (1991).

Without express guidance from this Court, *N.C.P. Marketing*'s intent for bankruptcy courts to resolve the meaning of 365(c)(1) has gone ignored while the circuits remain split regarding which test—hypothetical or actual—should be applied. R. at 11. As the "actual test" aligns with the purpose and policy behind Chapter 11 of the Bankruptcy Code (hereinafter "the Code"), this Court should reverse the Thirteenth Circuit and affirm the bankruptcy court. *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) (finding that the fundamental purpose of reorganization is to prevent liquidation, loss of jobs, and "misuse of economic resources.").

A. The plain language of section 365(c)(1) is ambiguous and does not support the Thirteenth Circuit's findings.

When faced with a statutory construction question, a court's first step is "to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1996). Generally, "the plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992). However, if the statutory language is ambiguous, the Court may consider other tools and canons of statutory construction—such as legislative history, the meaning of the disjunctive term "or," absurd results and policy considerations, and the rule against surplusage—to ensure "the statutory scheme [as a whole] is coherent and consistent." *Id.* (quoting *United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 240 (1989)). Relying on any of the following canons of statutory construction, this Court should reverse the Thirteenth Circuit's decision because section 365(c)(1) is ambiguous.

i. The legislative history, combined with the interpretation disparity between circuit courts and bankruptcy courts, supports the conclusion that Section 365(c)(1) is ambiguous.

When a statute's plain language is unclear, courts may examine congressional intent or legislative history. *In re Comshare, Inc., Securities Litigation*, 183 F.3d 542, 549 (6th Cir. 1999). The Code was enacted in 1978 as part of the Bankruptcy Reform Act, which repealed the previous Bankruptcy Act and created Chapter 11. Charles J. Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 5 (1995). Because courts have not reached consensus about whether section 365(c)(1) allows a debtor to merely assume an executory contract, the statute is likely ambiguous. Michelle M. Harner, *et. al.*, *Debtors Beware:*

The Expanding Universe of Non-Assumable/Non-Assignable Contracts in Bankruptcy, 13 AM. BANKR. INST. L. REV. 187, 239 (Spring 2005) (hereinafter "*Debtors Beware*").

Initially, section 365(c)(1) stated that trustees could not "assume or assign an executory contract" if "applicable law excuses a party, other than the debtor, to such contract from accepting performance or rendering performance to the *trustee*." Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 365(c)(1), 92 Stat. 2549, 2575 (1978) (emphasis added); R. at 24–25. In 1980, Congress considered revisions to section 365(c) wherein the latter use of "trustee" would be replaced with "an entity other than the debtor or the debtor in possession." Bankruptcy Technical Correction Amendments Act of 1980, H.R. Rep. No. 96-1195, § 27(b) (1980). Although the revisions were not enacted in 1980, the Committee on the Judiciary published a report that explained the purpose of the proposed amendment was to "make clear the prohibition against a trustee's power to assume an executory contract and does not apply" when the debtor is in possession, and performance will remain the same under the contract's original terms. *Id.*

The Bankruptcy Amendments and Federal Judgeship Act of 1984 revisited discussions from 1980 and enacted the proposed amendments to section 365(c)(1)(A). 11 U.S.C. § 365(c)(1)(A); Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 362(a), 98 Stat. 333, 362 (1984). Although Congress did not clarify why it changed section 365(c)(1)(A) in 1984, the revision and prior history indicate legislative intent to separate the trustee in Chapter 11 proceedings from the debtor in possession. Further, the revision and prior history also support the conclusion that Congress intended for debtors in possession to assume executory contracts when no intent to assign such contracts to third parties exists. As such, this Court should reverse the decision and hold that with regard to section 365(c)(1), "trustee" and "debtor in possession" are not interchangeable, and also that it was permissible for TDI to assume the Agreement per TDI's proposed Plan.

ii. The meaning of the disjunctive term "or" permits TDI to assume the Agreement because it does not intend to assign the Agreement to a third party.

The Thirteenth Circuit majority focused its analysis on the disjunctive term "or" in the beginning phrase of section 365(c)(1) ("trustee may not assume *or* assign") and relied on the "hypothetical test" to conclude that the statute prohibits the Debtors from assuming an executory contract if, hypothetically, it would not be permitted to assign the contract to another party. R. at 11 (emphasis added). Singling out the prefatory phrase in 365(c)(1) fails to conform with this Court's holdings and the cardinal rule of statutory construction that "a statute is to be read as a whole." *King*, 502 U.S. at 221. Had the Thirteenth Circuit interpreted the statute as a whole, it should have concluded that section 365(c)(1) excuses non-debtor performance in cases where the trustee or debtor in possession seeks to *assign* the executory contract to a third party. Because the Debtors simply seek to assume, not assign, the Agreement, the applicable patent and copyright law that section 365(c)(1) references is not triggered. R. at 11.

With respect to the assumption and/or assignment of executory contracts, most courts conclude that nonexclusive licenses are inherently personal and that applicable federal law within the meaning of section 365(c)(1) excuses non-debtor licensors from accepting or receiving performance from anyone *other than* the original licensee. *In re CFLC, Inc.*, 89 F.3d 673, 677 (9th Cir. 1996) (concluding federal law holds nonexclusive patent licenses as personal and non-assignable and excuses a non-debtor's performance from anyone *other than* the original licensee); *In re Patent Educ. Media, Inc.*, 210 B.R. 237, 243 (S.D. New York 1997) (noting well-established law regarding non-assignability of patent licenses extends to copyright licenses).

Because the Software is both patented and copyrighted, the Debtors cannot assign the Agreement to a third party without UMT's consent. R. at 5, 12. UMT asserts that because the license cannot be assigned under applicable patent or copyright law, then it cannot be assumed. R. at 12–13. However, neither applicable law nor a reading of the statute supports UMT's assertions. Section 365(c)(1)(A) states, in pertinent part, "trustee[s] may not assume or assign any executory contract…if— applicable law excuses [non-debtors] from accepting performance from or rendering performance to [third parties]." 11 U.S.C. § 365(c)(1)(A). As indicated above, the applicable law of section 365(c)(1)(A) is intellectual property law, which only bars *assignment* of patents and copyrights, like the Software, without a non-debtor's consent. *In re CFLC*, 89 F.3d at 677; *In re Patent Educ. Media, Inc.*, 210 B.R. at 243. The applicable law does not discuss prohibitions against debtors who wish to *assume* and continue performing their obligations under a contract's original terms. *See id.* Because the applicable law only prohibits *assignment* of contracts like the Agreement in this matter, section 365(c)(1)(A) is not applicable. Therefore, TDI did not need UMT's consent to assume the contract under section 365(c)(1)(B).

Moreover, TDI's Plan does not contemplate a change in the relationship between UMT and Development under the Agreement. R. at. 7. Rather, the Plan is exceptionally beneficial for UMT because it would receive a *pro rata* share of its unsecured claim under the R&D Note and would also continue to receive performance and the monthly fee from the Debtors for their continued use of the Software under the Agreement. *Id.* Because TDI planned to simply assume the Agreement and not assign it to a third party, this Court should affirm the bankruptcy court's decision, hold that the Thirteenth Circuit's use of the "hypothetical test" was misguided, and conclude that their failure to interpret the statute as a whole yielded improper conclusions.

iii. The Thirteenth Circuit's plain meaning interpretation creates an absurd result and does not conform with Chapter 11 policy considerations.

This Court should reverse the Thirteenth Circuit's decision because its plain meaning interpretation creates an absurd result that conflicts with Chapter 11's policy, which is meant to encourage companies to reorganize and avoid liquidation. It is well established that courts must interpret to avoid absurdity if a literal construction of a statute would lead to an "absurd, unjust, or unintended result." *U.S. v. Mendoza*, 565 F.2d 1285, 1288 (5th Cir. 1978). Additionally, when the plain meaning does not produce absurd results but merely an unreasonable one clearly at odds with the policy of legislation as a whole, this Court "has followed [the purpose of the act], rather than the literal words." *Perry v. Com. Loan Co.*, 383 U.S. 392, 400 (1966).

If this Court were to accept the Thirteenth Circuit's interpretation of 365(c)(1) prohibiting assumption of an agreement where there is no assignment to a third party, the Chapter 11 policy encouraging reorganization would practically become obsolete. Moreover, non-debtors could be dangerously empowered to extort the vulnerability of companies undergoing Chapter 11 bankruptcy and use section 365(c) as a bargaining chip. Here, TDI's Plan only proposes that UMT continue performing its obligations under the Agreement with Development, the licensee with whom UMT originally contracted. R. at 4–5, 7. The First Circuit has concluded that where a debtor remains the legal entity with whom the non-debtor originally contracted, said debtor may assume an executory contract without the non-debtors' consent, under section 365(c)(1). *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 495 (1st Cir. 1997).

Although a new entity, Start Me Up, purchased TDI's stock, the Agreement included terms that allowed TDI to share its limited license of the Software with affiliated entities. R. at 5. The Code defines an affiliate as "any entity that directly or indirectly owns, controls, or holds the power to vote," which encompasses both Start Me Up and SFD. 11 U.S.C. § 101(2)(A); R. at 5.

Even with the new affiliated entities, TDI did not intend to assign the Agreement to a third party. R. at 7. Therefore, under 365(c)(1), TDI is permitted to assume the Agreement under the Plan. TDI also timely filed its disclosure letter along with the proposed reorganization plan before it proceeded with negotiations. R. at 7. Thus, UMT had adequate time to review the plan and propose solutions and restrictions regarding continued use of the Software under the Agreement.

iv. The Thirteenth Circuit's reliance on the "hypothetical test" violates the rule against surplusage.

Courts must "give effect, if possible, to every clause and word of a statute" and are cautioned not to render statutory terms insignificant or superfluous, so as to avoid violating the rule against surplusage. *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *Knutsen v. Eben Ezer Lutheran Housing Ctr.*, 815 F.2d 1343, 1348 (10th Cir. 1987). The Thirteenth Circuit violated the rule against surplusage when it relied on the "hypothetical test" to interpret section 365(c)(1) because the "hypothetical test" would make the phrase "or assume" superfluous. R. at 24.

Section 365(f), a sister provision to section 365(c)(1), provides that executory contracts cannot be assigned unless first assumed, meaning that assumption is a prerequisite to assignment. 11 U.S.C. § 365(f)(2)(A). If section 365(c)(1) were meant to be interpreted using the "hypothetical test," Congress would have had no reason to include "or assume." Thus, if section 365(c)(1) were meant to apply to both the assumption *and* assignment of a contract, then the addition of "or assign" in 1984 would not have been necessary.

Additionally, if Congress wanted to preclude assumption on the basis of an impermissible hypothetical assignment, it could have written subsection (c)(2) to say "trustees may not assume executory contracts" because other subsections of section 365 support the assertion that assumption is a prerequisite to assignment. *In re Cardinal Indus., Inc.*, 116 B.R. 964, 977 (Bankr. S.D. Ohio 1990). Then, the "hypothetical test" might be applicable because it would not violate the rule against surplusage. However, as discussed *supra*, section 365(c)(1) uses "assume or assign" as separate actions, which suggests Congress did not intend a company's ability to assume executory contract to be predicated on the hypothetical ability to assign those contracts. To avoid violating the rule against surplusage, the "actual test" should be used instead of the "hypothetical test," and this Court should "give effect" to the entire statute, which would permit TDI to assume the Agreement because it had no existing intent to assign the Agreement to a third party. R. at 7. Thus, this Court should reverse the decision of the Thirteenth Circuit and affirm the bankruptcy court's holding.

B. This Court should adopt the "actual test" because the "hypothetical test" yields results contrary to the Code's objectives.

Section 365 was created to provide debtors with opportunities to relieve themselves of some burdensome contracts, while assuming others, in order to start fresh and avoid liquidating assets. Harner, *Debtors Beware*, *supra* at 193 n.28. Nevertheless, courts have struggled to agree on whether section 365(c)(1) permits debtors to assume a contract without the non-debtor's consent. *Perlman v. Catapult Entm't, Inc. (In re Catapult Entm't, Inc.)*, 165 F.3d 747, 749–50 (9th Cir. 1999). Circuit courts faced with facts similar to those in the instant matter generally rely on the "hypothetical test" to interpret section 365(c)(1) to mean a debtor in possession may not assume a contract if, hypothetically, the contract could not be assigned. *See, e.g.*, *RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257, 271 (4th Cir. 2004); *In re Catapult Entm't, Inc.*, 165 F.3d at 750; *In re West Elec., Inc.*, 852 F.2d 79, 83 (3d Cir. 1988). Conversely, the First Circuit and a majority of bankruptcy courts have adopted the "actual test" when interpreting section 365(c)(1) and allow Chapter 11 debtors to assume executory contracts so long as they have no actual intent to assign the contract to a third party. Harner, *Debtors Beware*, *supra* at 233–34. The Fifth Circuit has also adopted the "actual test" when interpreting sister section 365(e)(2). *Bonneville Power Admin. v. Mirant Corp. (In re Mirant Corp.)*, 440 F.3d 238, 248–49 (5th Cir. 2006). The following discussion explores the problems surrounding the "hypothetical test," its failure to conform to Chapter 11 policy, and the rationale supporting that this Court should adopt the "actual test."

i. The "hypothetical test" does not conform with the policy behind Chapter 11 reorganization.

The "hypothetical test" bars assumption of a contract if *hypothetically* the contract could not be assigned to a third party under applicable law. *In re James Cable*, 27 F.3d 534, 537 (11th Cir. 1994). The Third Circuit was the first to adopt the "hypothetical test," holding that debtors could not assume contracts without the non-debtor's consent because the Anti-Assignment Act prevents debtors from assigning executory contracts. *In re West Elecs., Inc.*, 852 F.2d at 83. Relying on section 365(c)(1)'s use of "or" instead of "and" between "assume" and "assign," the Third Circuit incorrectly determined it was faced with a plain meaning question and believed it was Congress' intent for courts to apply the "hypothetical test." *Id.* However, as mentioned above, section 365(c)(1) is ambiguous and requires a more thorough investigation into the legislature's intent when it implemented the Code. Therefore, the Third Circuit erred in attempting to decipher the statute's plain meaning.

If this Court were to adopt the "hypothetical test" as the Thirteenth Circuit did, it would effectively abandon the legislative intent behind Chapter 11, which is to prevent debtors from liquidating their assets and to preserve jobs. *Bildisco & Bildisco*, 465 U.S. at 528. TDI is faced with an "unserviceable debt load" and without access to the Software, TDI will lose Club Satisfaction—an essential component to its business model—and likely be forced to liquidate its assets. R. at 5–6. As indicated throughout this brief, Chapter 11 was developed to help debtors avoid liquidation, but the "hypothetical test" makes probable that unfavorable outcome.

Bankruptcy courts have criticized the Third Circuit's application of the "hypothetical test" in *In re West Elecs., Inc.* and observe that in the presence of an anti-assignment statute, a debtor would never be permitted to assume an executory contract when a non-debtor objects. *In re Fastrax, Inc.,* 129 B.R. 274, 276–77 (Bankr. M.D. Fla. 1991). Such results are inconsistent, not only with the purposes of section 365, but also with the purposes of the anti-assignment statutes themselves. Anti-assignment law relevant to intellectual property, discussed *supra*, only imposes express prohibitions on *assignments* in bankruptcy cases, but contracts themselves are not terminated upon the filing of bankruptcy. *Id.* Therefore, debtors maintain the right to *assume* contracts under section 365. *Id.* Because TDI's contracts were not terminated when these bankruptcy proceedings were initiated, and because it did not intend to assign the Agreement to a third party, TDI maintained the right to assume the Agreement.

The ability to assume the agreement is critical for TDI because without it, TDI will be unable to continue using the improved version of Club Satisfaction, which is essential for the continued success of the casino and resort operations. R. at 5. Further, under the proposed Plan, UMT would receive a *pro rata* share of the $6 million it was owed under the R&D Note, along with the monthly payments from TDI for continued use of the software per the Agreement. R. at 7. If the Thirteenth Circuit's holding is affirmed, the pro-debtor policies behind Chapter 11 would be moot, and any creditor could prevent profitable reorganization efforts in future cases and exercise unethical bargaining power. Thus, this Court should reverse the Thirteenth Circuit's opinion and find that the "hypothetical test" is improper when interpreting section 365(c)(1).

ii. The "actual test" balances TDI's goal to reorganize with UMT's rights under the Agreement as a non-debtor.

Under the "actual test," debtors can assume executory contracts even if applicable law precludes assignment of such contracts to third parties. Harner, *Debtors Beware*, *supra* at 237.

The test requires "a showing that the nondebtor party's contract will *actually* be assigned or that the nondebtor party will…be asked to accept performance or render performance to a party…other than the party with whom it originally contracted." *Summit Inv.*, 69 F.3d 608, 613 (1st Cir. 1995). Those courts that support adoption of the "actual test" argue it better comports with the Code's purpose than the "hypothetical test." *In re Hartec, Inc.*, 117 B.R. 865, 872 (Bankr. W.D. Tex. 1990) (noting 365(c)(1) is "harmonious with other sections of the Code and with the Code's purpose.") (*vacated by settlement*)*;* Harner, *Debtors Beware*, *supra* at 238. Because UMT cannot prove that TDI has actual intent to assign the Agreement to a third party, nor can UMT show it will be asked to perform contractual obligations with a party other than Development, TDI should be permitted to assume the Agreement.

Here, the pre-petition Agreement between Development and UMT is critical to the Debtors' ongoing business operations. R. at 5. Pursuant to the Agreement, Development was required to pay UMT a monthly fee and could only share the software with "affiliated entities." *Id.* Because the Agreement made Club Satisfaction successful, it was logical for the Debtors to propose to assume the Agreement in their reorganization efforts so as to avoid being forced into liquidation. *See* R. at 7. The Debtors' proposed Plan would allow both parties to continue receiving the benefit of their bargain contemplated in the Agreement. In addition to continued monthly payments per the Agreement, UMT was also slotted to receive a *pro rata* distribution—fifty-five percent—of the $6 million it was owed pursuant to the R&D note, a value which greatly exceeds that of Development's assets. *Id.*

The majority's application of the "hypothetical test" allows UMT to rescind its contractual obligations under the Agreement simply because the Debtors filed for bankruptcy, which is not a right permitted anywhere in the Code. R. at 26. Moreover, the Thirteenth Circuit's decision goes against Chapter 11's intent to grant debtors opportunities to avoid liquidation and prevent job loss. *Bildisco & Bildisco*, 465 U.S. at 528. The "actual test" better balances both TDI and UMT's interests: TDI could continue to use the Software essential to their business model and avoid liquidation while UMT would receive continued payments for the use of the Software, as well as a distribution per the R&D Note that "greatly exceeds" the Debtors' assets. R. at 7. Therefore, this Court should reverse the Thirteenth Circuit and adopt the "actual test" when debtors plan to assume, but not assign, an executory contract.

III. Under section 1129(a)(10), acceptance of at least one impaired class in a joint, multi-debtor plan is sufficient.

The meaning of section 1129(a)(10) of the Code is unambiguous and clearly requires that at least one, but not all, impaired creditors under a reorganization plan must approve of the plan in order for a court to confirm it. 11 U.S.C. § 1129(a)(10). Because TDI's Plan earned nearly universal support from creditors, despite UMT's single vote against, it met the section 1129(a)(10) requirement where "at least one class of claims that is impaired under the plan has accepted the plan." 11 U.S.C. § 1129(a)(10); R. at 17. The objective behind section 1129(a)(10) is to ensure that whether a plan is confirmed consensually or non-consensually, at least some creditor support exists, so as to maintain balance between creditors' and debtors' substantive rights. *See In re 266 Wash. Assocs.*, 141 B.R. 275, 287 (Bankr. E.D.N.Y. 1992). Here, such support existed, rendering the bankruptcy court's confirmation of the plan appropriate. Thus, this Court should reverse the Thirteenth Circuit and uphold the bankruptcy court's confirmation.

The statutory context surrounding section 1129(a)(10)—including the other section 1129 provisions and the Code as a whole—illustrates Congress' intent to include creditors in the voting process without requiring universal support from creditors, in order to prevent a single creditor from obtaining veto power over a fair, reasonable plan. Nothing in the plain language of section 1129(a)(10) or its statutory context indicates a requirement for Debtors to have substantively consolidated instead of forming a joint plan. Thus, TDI's joint plan did not preclude it from being confirmed under the 1129(b) cram down process. Further, to promote the goals of Congress in creating Chapter 11, courts must confirm reorganization plans if they are fair and reasonable, in order to promote Debtors' ongoing operations, employment, and revenue streams. *See Bildisco & Bildisco*, 465 U.S. at 528 ("The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources."). For the foregoing reasons, TDI respectfully asks this Court to adopt the per-plan approach and to reverse the Thirteenth Circuit's decision.

A. Background survey of the Code and precedent regarding section 1129(a)(10)

Before discussing the requirements under section 1129(a)(10) in depth, this brief will provide a general overview of impaired classes of creditors and their statutory rights, the two alternative ways in which debtors may achieve plan confirmation, and a survey of existing—albeit limited—precedent on the "per-plan" versus "per-debtor" debate.

i. Impaired classes of creditors and their substantive rights under the Code

In Chapter 11 proceedings, creditors are grouped into classes based on the similarity of their claims, including whether their claims are secured or unsecured, whether they are impaired or unimpaired, etc. *See* 1 COLLIER ON BANKRUPTCY ¶ 1.07 (3)(d)(ii) (16th ed. 2019). An impaired class is one whose "legal, equitable, [or] contractual rights" are altered[4] under a plan of reorganization. 11 U.S.C. § 1124(1). "If a class will be left with its legal and equitable rights unchanged by the plan, it is not impaired and it is deemed to accept the plan. Thus, it will not vote on the plan. Only impaired classes will vote." COLLIER ON BANKRUPTCY at ¶ 1.07 (3)(d)(ii).

[4] Any change to a creditor's legal or equitable rights, even if advantageous, results in the class being classified as impaired. COLLIER ON BANKRUPTCY at ¶ 1.07 (3)(d)(ii).

Because voting is a right reserved for impaired classes and is a tool that may be used as leverage in negotiations, it is one of impaired classes' most important rights provided for in the Code. *See In re Adelphia Commc'ns Corp.*, 359 B.R. 54, 61 (Bankr. S.D.N.Y. 2006) ("A right to vote on a plan is a fundamental right of creditors under Chapter 11."); R. at 21. Once grouped into classes, each impaired class must secure "more than one-half in number of creditors voting and two-thirds in dollar amount of the claims of the creditors voting in the particular class . . . for the class to accept the plan." *See* COLLIER ON BANKRUPTCY at ¶ 1.07 (3)(d)(iii).

Another right that impaired and unimpaired creditors alike may choose to exercise is that they *may* (not must) participate in negotiations with other creditors and debtors. Nothing in the Code indicates that creditors are required to participate in negotiations; however, it is generally in their best interest, as negotiation provides creditors with a proverbial seat at the table, where they can advocate for their best interests and have a say in how the final reorganization plan affects them. *See In re Indianapolis Downs, LLC*, 486 B.R. 286, 297 (Bankr. D. Del. 2013) ("the filing of a Chapter 11 petition is an invitation to negotiate.").

Here, UMT is classified as a member of an impaired class because under TDI's proposed Plan, UMT would receive a fifty-five percent distribution of the approximately $6 million it was owed under the R&D Note. R. at 7. Because it would receive a different—here, lower—amount than it anticipated, UMT's rights changed, thus rendering it a member of an impaired class. *See* COLLIER ON BANKRUPTCY at ¶ 1.07 (3)(d)(ii). As discussed *infra*, UMT had the right to participate in negotiations with its fellows creditors and the Debtors, but it chose not to, thereby leaving its fate in others' hands. R. at 6.

ii. The Code provides two alternative paths to plan confirmation: consensual and non-consensual (cram down).

Chapter 11 provides two alternative ways to confirm a reorganization plan, either consensual or non-consensual. *See* 11 U.S.C. § 1129(a)–(b). Consensual confirmation occurs when all terms under section 1129(a) are met, including the section 1129(a)(8) requirement that each class of impaired creditors vote in favor of a plan. 11 U.S.C. § 1129(a). If even one class of impaired creditors votes against a plan, then a court may confirm the plan non-consensually (often referred to as a "cram down" confirmation) under section 1129(b), if the plan is "fair and equitable," among other requirements. *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (*hereinafter "*Transwest*"), 881 F.3d 724, 729 (9th Cir. 2018). Thus, "[i]f an impaired class rejects the plan, it may not be confirmed under section 1129(a) but must be confirmed, if at all, under section 1129(b)." COLLIER ON BANKRUPTCY at ¶ 1.07 (3)(d)(vi).

In a cram down scenario, all of the terms of section 1129(a) must be met, except for section 1129(a)(8). Thus, "[s]ection 1129(b) does not relieve a plan proponent of the § 1129(a)(10) requirement." *In re Tribune Co.*, 464 B.R. 126, 183 (Bankr. D. Del. 2011) (hereinafter "*Tribune*"). In fact, section 1129(a)(10) is considered the "statutory gatekeeper" to cram down. *In re 266 Wash. Assocs.*, 141 B.R. at 287. Section 1129(a)(10) reads 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, determined without including any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(10). The policy behind section 1129(a)(10) "is that before embarking upon the tortuous path of cram down and compelling the target of cram down to shoulder the risks of error necessarily associated with a forced confirmation, there must be some other properly classified group that is also hurt and nonetheless favors the plan." *In re 266 Wash. Assocs.*, 141 B.R. at 287.

Here, because impaired creditor UMT rejected TDI's Plan, confirmation under section 1129(a) was not statutorily permitted and was only possible through the cram down provision of section 1129(b). R. at 8. UMT—an impaired creditor—voted against the Debtors' Plan, and in fact, UMT controlled "the *only* class of creditors that did not vote in favor of the Plan." *Id.* (emphasis added). Because of UMT's vote against the Plan, it did not have universal support from impaired creditors. *Id.* Therefore, the bankruptcy court could not confirm the Plan consensually and could only confirm it through the cram down method under section 1129(b). In a cram down, courts are tasked with confirming a plan only if it is "fair and equitable" to the rejecting creditor(s). COLLIER ON BANKRUPTCY at ¶ 1.07 (3)(d)(vi). "[A] plan is fair and reasonable as to that rejecting class only if that class will receive under the plan payment in full or, if not, no class junior to it will receive or retain anything." *Id.* The bankruptcy court concluded that TDI's Plan was fair and reasonable under that standard—as UMT and the other creditors were poised to receive a more than fair share of what they were owed—and thus the bankruptcy court confirmed the Plan. R. at 8–9.

iii. Precedent, although limited, supports the per-plan approach.

Precedent is limited on the "per-debtor versus per-plan" debate with respect to section 1129(a)(10), regarding joint, multi-debtor plans where several debtors' bankruptcy cases are consolidated for efficiency and convenience. *See In re Transwest Props., Inc.*, 881 F.3d at 729 (referring to this holding as "a matter of first impression among the circuit courts."). However, the highest court that has addressed the issue, the Ninth Circuit Court of Appeals, held that the per-plan approach is the correct interpretation of section 1129(a)(10)'s meaning and Congress' intent. *See id.* Outside of the Ninth Circuit's opinion in *Transwest*, "[t]here exists little decisional authority on whether § 1129(a)(10) is to be applied 'per debtor' or 'per plan.'" *In re Tribune Co.*, 464 B.R. at 181. Even "[t]he leading treatise on bankruptcy law, Collier in Bankruptcy . . . contains no discussion of the 'per plan/per debtor' issue," indicating the recentness of this issue's emergence within the bankruptcy law realm. *Id.* at 182.

Despite courts' limited discussion of this issue, the Ninth Circuit's unanimous opinion on this issue of first impression demonstrates that the plain meaning of section 1129(a)(10) unambiguously shows Congress' intent to secure some creditor support for a cram down plan, without requiring support from every class of creditor. *See In re Transwest Props., Inc.*, 881 F.3d at 729–30. The controversy surrounding section 1129(a)(10) is somewhat recent, and prior to 2011, courts appear to have applied the per-plan approach nearly uniformly. Alexander J. Gacos, Note, *Reconciling the "Per-Plan" Approach to 11 U.S.C. § 1129(a)(10) with Substantive Consolidation Principles Under In Re Owens Corning*, 14 SETON HALL CIR. REV. 295, 304 (2018). In 2009, the Bankruptcy Court for the Southern District of New York followed the per-plan approach, just as the Bankruptcy Court for the Middle District of Pennsylvania did as early as 2001. *In re Charter Commc'ns*, 419 B.R. 221, 266 (Bankr. S.D.N.Y. 2009); *In re SGPA, Inc.*, No. 01–02609, 2001 WL 34750646, at *12–22 (Bankr. M.D. Pa. Sept. 28, 2001).

Although courts followed the per-plan approach in those two cases and others for decades after the Code was adopted, a split in authority on this issue emerged in October 2011 when the Bankruptcy Court for the District of Delaware—considered by the Thirteenth Circuit and others to be "one of the country's most influential business bankruptcy courts"—contradicted other courts' precedent by adopting the per-debtor interpretation. *In re Tribune Co.*, 464 B.R. at 183–84; R. at 17. Following *Tribune*, the same court in the District of Delaware upheld the per-debtor approach twice more, emphasizing that if multiple debtors file jointly, rather than moving for substantive consolidation, a plan cannot be confirmed without each debtor having at least one consenting class of creditors. *In re Woodbridge Grp. of Cos., LLC*, 592 B.R. 761 (Bankr. D. Del. 2018) (hereinafter "*In re Woodbridge*"); *In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293, 302 (Bankr. D. Del. 2011).

While the Thirteenth Circuit described the District of Delaware as one of the most influential bankruptcy courts in the country, the Bankruptcy Court for the Southern District of New York is "arguably the most influential bankruptcy court in the nation" and has never adopted the per-debtor approach. Nicholas W. Quesenberry, *Recent Developments in the Treatment of Original Issue Discount Under Bankruptcy Code § 502 in the Context of Pre-Petition Debt-for-Debt Exchanges*, 2017 NORTON ANN. SURV. OF BANKR. L. 11 (2017) (hereinafter "Recent Developments"); R. at 17. *See In re Charter Commc'ns*, 419 B.R. at 266; *In re Enron Corp.*, No. 01-16034, 2004 WL 6075307, at *108 (Bankr. S.D.N.Y. July 15, 2004).[5]

Following the three opinions coming out of the District of Delaware, the Ninth Circuit addressed the issue just two years ago in 2018. *In re Transwest Props., Inc.*, 881 F.3d at 729–30. In that case, the unanimous panel of judges adopted the per-plan approach, relying on the plain meaning of section 1129(a)(10), statutory context, and policy considerations under the Code. *Id.* at 729–30. As discussed *infra*, the facts in the Ninth Circuit opinion and in the instant case are similar. *See id.* Thus, just as the Ninth Circuit held in *Transwest* that the per-plan approach applies when multiple debtors have jointly filed for Chapter 11 bankruptcy, so too should this Court hold that the overwhelming support of the Plan from TDI's creditors is sufficient under section 1129(a)(10), despite UMT's vote against the Plan.

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[5] Notably, a total of 889 Chapter 11 cases (the most out of any district in the country) were filed in the Bankruptcy Court for the Southern District of New York during the one-year reporting period from 2018 to 2019, compared to only 629 filed in the District of Delaware. U.S. Courts, *U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending September 30, 2019* (2019), https://www.uscourts.gov/sites/default/files/data_tables/bf_f2_0930.2019.pdf.

B. This Court should adopt the per-plan approach to section 1129(a)(10) and hold that TDI obtained the statutorily required creditor support for its Plan.

When analyzed together, the plain meaning and statutory context of section 1129(a)(10) clearly indicate that at least one creditor total, not per-debtor, must vote to confirm a Plan. This requirement is meant to serve as a check on debtors, to ensure that debtors do not have the power to force unfavorable conditions upon creditors entirely without their consent. However, Congress recognized in its adoption of section 1129(a) that because bankruptcy proceedings by their nature must prejudice some party, a balance between creditors and debtors' interests is ideal. It is in the creditors' and debtors' interest for a struggling company to continue operating, rather than liquidate, in order to preserve jobs and maximize profits. Thus, the plain meaning, statutory context, and policy considerations of section 1129(a)(10) all support the interpretation that persisted amongst courts for decades: the per-plan approach is all that is required in order to confirm a joint, multi-debtor plan.

i. The plain meaning of section 1129(a)(10) unambiguously requires acceptance of at least one impaired class per plan, not per debtor.

Following analysis of the plain meaning of section 1129(a)(10), courts have concluded that at least one impaired class is required to accept each joint, multi-debtor plan, not at least one impaired class per debtor. Nothing in the plain meaning of section 1129(a)(10) differentiates between different debtors or even refers to joint, rather than substantively consolidated, plans. Therefore, because TDI secured support from at least one impaired class of creditors (indeed, it secured overwhelming support from all but one creditor), it met the section 1129(a)(10) requirement, rendering the bankruptcy court's confirmation of TDI's Plan appropriate.

When interpreting a statute, courts begin by analyzing the statute's language. *BedRoc Ltd., LLC v. U.S.*, 541 U.S. 176, 177 (2004) ("The inquiry begins with the statutory text, and ends there [if] the text is unambiguous."). Courts must not change a statute's meaning through interpretation, but "[i]f the statutory language is plain . . . [a court] must enforce it according to its terms." *King v. Burwell*, 135 S.Ct. 2480, 2489 (2015). This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992).

In *Transwest*, the Ninth Circuit began its analysis, as all courts must, with a discussion of the plain language of section 1129(a)(10). *In re Transwest Props., Inc.*, 881 F.3d at 729. The Ninth Circuit reasoned that section 1129(a)(10) "makes no distinction concerning or reference to the creditors of different debtors under 'the plan,' nor does it distinguish between single-debtor and multi-debtor plans." *Id.* Further, "[u]nder its plain language, once a single impaired class accepts a plan, section 1129(a)(10) is satisfied as to the entire plan." *Id.* The Ninth Circuit referenced "the only court that has applied the 'per debtor' approach" in its discussion and held that the Bankruptcy Court for the District of Delaware reached the wrong conclusion in its interpretation of section 1129(a)(10). *Id.* at 729–30.

Just as the creditors did in *Transwest*, UMT asks the Court to adopt the "per-debtor" approach, which wrongly interprets the plain meaning of section 1129(a)(10) and also cuts against Congress' intent in passing that statute. UMT contends that because it did not support the Plan, Development (as a separate Debtor entity) did not have the support of at least one impaired creditor and thus fails the section 1129(a)(10) requirement. R. at 8. UMT's interpretation of section 1129(a)(10) rests on its assertion that because the Debtors pursued a joint reorganization plan, rather than a substantive consolidation, the Debtors, in essence, had ten separate plans, rather than one. R. at 18. Substantive consolidation will be further discussed *infra*, but based on the plain meaning of the statute itself, all that is required is that "at least one class of claims that is impaired under the plan has accepted [it].” 11 U.S.C. § 1129(a)(10). In its majority opinion in the instant matter, the Thirteenth Circuit “strains” to “expand[] section 1129(a)(10) to include a prepositional phrase not found anywhere in the text.” R. at 27 (citation omitted). As Judge Jones notes in the dissent, nothing in the plain meaning of section 1129(a)(10) differentiates “between creditors of different debtors or even between a single plan and a joint, multi-debtor plan.” R. at 28.

TDI secured the minimum required support when nearly all creditor groups—including those with significantly more capital at stake than UMT—provided “near universal support.” R. at 8 (TDI’s unsecured creditors were collectively owed approximately $120 million, minus the comparatively lower amount of $6 million owed to UMT). The holding company, TDI, and each of its eight Operating Debtors had support from at least one impaired class of creditors, but because UMT controlled Development’s impaired class of creditors, Development did not have support from an impaired class. *Id.* This is substantially similar to facts in *Transwest*, where the debtors secured support from several classes of impaired creditors but faced dissent from one, a lender. *In re Transwest Props., Inc.*, 881 F.3d at 726. The dissenting lender in *Transwest* objected on the grounds that the debtors had not secured adequate creditor support under section 1129(a)(10) and thus advocated for a per-debtor approach. *Id.* Just as the Ninth Circuit concluded the debtors had met the requirement under the plain meaning of section 1129(a)(10), so too should the Court conclude here.

ii. The statutory context of section 1129(a)(10) demonstrates congressional intent to ensure per-plan support and to balance a debtor’s interest in reorganization with a creditor’s statutory rights under the Code.

“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.” *In re Tribune Co.*, 464 B.R.

at 182 (quoting *King*, 502 U.S. at 221) (internal quotation marks omitted). Thus, section 1129(a)(10) must be examined both within the context of the other requirements in section 1129(a) and within the context of Chapter 11 as a whole. Turning to the section of Chapter 11 that addresses its "rules of construction," section 102(7) states that "in this title . . . the singular includes the plural." 11 U.S.C. § 102(7). In its opinion in the instant case, the Thirteenth Circuit emphasized this provision in its analysis. R. at 19. This is the same approach the District of Delaware took in its 2011 *Tribune* opinion that instigated the "per-plan versus per-debtor" divide amongst courts. *In re Tribune Co.*, 464 B.R. at 182.

As Judge Jones explained in his dissent in the instant case, "even if section 1129(a)(10) is modified to transform the singular to the plural, the result remains the same – 'at least one' of the impaired classes of the Debtors' creditors has still accepted the plans." R. at 28. Such modification of changing the singular to plural would yield the following revised language: "at least one class of claims that is impaired under the plans has accepted the plans." *In re Transwest Props., Inc.*, 881 F.3d at 730 (internal quotation marks omitted). When sections 102(7) and 1129(a)(10) are read together to pluralize the singular, as above, then *at least one class of claims* (here, the multitude of creditors who overwhelmingly voted in favor of TDI's Plan) *that is impaired under the plans* (under section 1124(1), only impaired creditors are permitted to vote) *has accepted the plans*.

Even when applying the construction rules of section 102(7) to section 1129(a)(10), the meaning—and Congress' intent—remain unambiguous and consistent. *See id.* Even without UMT's consent to the Plan, TDI secured enough support to move forward with confirmation. R. at 8. Under section 1129(a)(10), even if only one class of impaired creditors in total had voted in favor of the Plan, that would have been sufficient. However, TDI and the creditors who participated in negotiations operated in good faith to reach a mutually beneficial plan that not just one, but nearly all, creditors supported. R. at 6, 8.

As for other subsections of 1129(a), which list the other requirements that debtors must meet in order to achieve plan confirmation, none of them specify that they must be met on a per-debtor basis. *See* 11 U.S.C. § 1129(a); R. at 29. The Thirteenth Circuit's majority opinion in the instant matter characterizes sections 1129(a)(1), (3), and (8) as requiring that "*all* debtors must satisfy *each* of the confirmation requirements of section 1129(a) absent substantive consolidation." R. at 20 (emphasis added). Such an interpretation ignores that section 1129(a)(10) specifically refers to a quantity ("at least one"), indicating Congress' intent to secure that amount (no less, but possibly more). The other subsections of section 1129 referenced by the majority do not indicate a quantity required, as they are general requirements in the confirmation checklist and do not require a certain quantity of creditors to approve. *See* 11 U.S.C. §§ 1129(a)(1), (3), (8).

iii. Chapter 11's main objective, which is to confirm a reorganization plan and thereby preserve jobs and maximize the value of a debtor's assets, supports the per-plan approach.

In objecting to TDI's Plan on the grounds that section 1129(a)(10) requires support from at least one impaired class per debtor, UMT risks the entire confirmation of the Plan, which could result in less favorable distributions—including the chance of no distribution—for itself and its fellow creditors. Throughout the negotiation process, UMT chose not to participate and thus voluntarily gave up its opportunity to shape the Plan to its liking. Further, UMT's objections to SFD's involvement appear baseless and could have potentially been avoided had UMT taken its seat at the negotiating table.

The Bankruptcy Court of the District of Delaware has declared that "the filing of a Chapter 11 petition is an invitation to negotiate." *In re Indianapolis Downs, LLC*, 486 B.R. at 297. The purpose of such negotiations is "to permit parties to have a voice and to make their own economic decisions." *Id.* The Thirteenth Circuit's opinion in the instant matter discusses the flexibility of Chapter 11 and explains that such "flexibility is designed to foster meaningful negotiations between management, creditors and shareholders regarding the terms of any plan." R. at 15. While that may be true, UMT failed to embrace that flexibility when it chose not to participate in the pre-confirmation negotiations, including non-binding mediation ordered by the bankruptcy court. R. at 6. Although other unsecured creditors participated and took the opportunity to ensure their voices were heard, UMT instead chose not to participate and thus missed a crucial opportunity to influence the contents of the Plan. Alternatively, UMT has objected to two parts of the Plan and threatens to prevent confirmation of the Plan, risking its own investments and those of other creditors, along with the jobs of Tumbling Dice's thousands of employees. Thus, "[p]arties who were not at the table during this process have become the main objectors to confirmation." *In re Charter Commc'ns*, 419 B.R. at 233.

Notably, although UMT voted against it, the Plan is favorable to UMT. Under the proposed Plan, UMT would receive fifty-five percent of what it was owed, in addition to continuing to receive its monthly payments based on TDI customers' use of Club Satisfaction. R. at 7. TDI's only apparent qualm with the Plan is that SFD, the private equity group that agreed to provide $35 million of the new capital that would be used to distribute *pro rata* shares to each creditor, purportedly attempted to replicate UMT's Club Satisfaction software in the past. R. at 8.

While UMT may have reason to suspect SFD's motives, UMT itself has sold its software to other third parties, as permitted by the Agreement. R. at 5. If other third-party companies in which UMT does not have a majority voting share—and thus does not have control over—already have access to the software, it is unclear why UMT would risk confirmation of TDI's Plan, including the possibility of receiving a significant distribution of what it is owed. The record merely indicates that UMT was concerned about SFD's "access to the Software," but other third parties already had access to the software directly from UMT.[6] R. at 8.

Because the Plan would allow UMT to receive a distribution "greatly exceeding the value of Development's assets" and for its Agreement to be assumed (TDI would continue making monthly payments based on Club Satisfaction usage), the Plan is fair and reasonable and would place UMT in a position far superior to the one it would be in if Tumbling Dice was forced to liquidate. *See* R. at 7. Furthermore, if this Court were to adopt the per-debtor approach, it would set a dangerous precedent that would risk directly contradicting congressional intent and would subvert Chapter 11's main goal—successful reorganization. *See Bildisco & Bildisco*, 465 U.S. at 528. Thus, this Court should adopt the per-plan approach, based on the plain meaning, statutory context, and policy considerations of section 1129(a)(10).

C. This Court need not reach the issue of substantive consolidation because UMT failed to pursue that objection on appeal.

Joint administration and substantive consolidation are two alternative ways for debtors to proceed through a Chapter 11 filing. Each method changes how creditors are treated as a bankruptcy case proceeds, which is why creditors sometimes object to the method a debtor chooses. UMT contends that because TDI filed for a jointly administered plan, rather than a substantively consolidated one, the ten Debtors effectively had ten separate plans, each of which

[6] In the event that SFD did somehow obtain access to the Software and replicate it, then Under My Thumb could pursue alternative legal remedies, such as filing a lawsuit against SFD for violation of its intellectual property rights. Such a remedy would ensure protection of Under My Thumb's rights while also preventing the unnecessary blockage of a fair, reasonable reorganization plan, like the one TDI proposed.

required approval from at least one impaired class of creditors. R. at 19. Under this argument, because Development did not have approval from at least one impaired class of creditors, its Plan would fail to be confirmed. However, TDI explicitly specified its Plan as jointly administered and UMT failed to object to the classification. R. at 7. Thus, regardless of whether the case was truly jointly administered or was a de facto substantive consolidation, because UMT did not object on that basis, the issue is not before this Court and thus should not be considered.

i. TDI explicitly specified that its Plan was a joint plan, and the bankruptcy court proceeded in accordance with that express declaration.

"Joint administration and substantive consolidation are both mechanisms to facilitate multi-debtor reorganizations." *In re Transwest Props., Inc.*, 881 F.3d at 731 (Judge Friedland, concurring). Joint administration is considered a "tool of convenience" used in multi-debtor filings, where the assets and liabilities of multiple debtors are not merged. *Id.* On the other hand, substantive consolidation involves replacing "two or more debtors, each with its own estate and body of creditors, with a single debtor, a single estate with a common fund of assets, and a single body of creditors." *Id.* (quoting *In re Parkway Calabasas Ltd.*, 89 B.R. 832, 836–37 (Bankr. C.D. Cal. 1988); *In re Bonham*, 229 F.3d 750, 764 (9th Cir. 2000) (internal quotation marks omitted)). "[B]ecause substantive consolidation is extreme (it may affect profoundly creditors' rights and recoveries) and imprecise, this 'rough justice' remedy should be rare." *In re Owens Corning*, 419 F.3d 195, 211 (3d Cir. 2005) (citations and footnotes omitted).

Here, TDI expressly stated that its plan was jointly filed on behalf of all the Debtors: "the Debtors' estates are not being substantively consolidated and no Debtor is to become liable for the obligations of another." R. at 7. If TDI wanted to pursue substantive consolidation, it would have requested the court to allow it, as did the *In re Woodbridge* debtors. *In re Woodbridge Grp. of Cos., LLC*, 592 B.R. at 766–67. The Thirteenth Circuit majority held that because TDI was effectively "treated as if they were, in fact, one single entity," TDI's Plan was de facto substantively consolidated. R. at 18. The Thirteenth Circuit majority emphasized that "[j]oint administration cannot be used to bypass the necessarily rigorous requirements for substantive consolidation." R. at 20. UMT asserts that "use of the 'per plan' approach [would have] the same effect as substantive consolidation because one impaired class of creditors for one Debtor [would be] able to bind all of the involved creditors, nullifying the leverage [UMT] would have otherwise had in the confirmation process under the 'per debtor' approach." *In re Transwest Props., Inc.*, 881 F.3d at 731 (Judge Friedland, concurring).

The facts here are substantially similar to those of *Transwest*, where the debtors filed a joint plan, and the creditors contended the plan was effectively substantively consolidated. *In re Transwest Props., Inc.*, 881 F.3d at 730. The *Transwest* majority only minimally addressed this issue when it said, "the Lender never objected to the Plan on this basis . . . Therefore, whether the parties and the bankruptcy court dealt with the Plan approval as if it were a substantive consolidation is not properly before us on appeal." *Id.* (further discussed *infra*). However, Judge Friedland substantially addressed the issue in his concurrence and explained that "the problem . . . is not the interpretation of [section 1129(a)(10)], but rather that the Plan effectively merged the Debtors without an assessment of . . . whether it was fair to proceed on a consolidated basis." *Id.* at 732 (Judge Friedland, concurring). Thus, in the absence of an objection from UMT regarding TDI's decision to file jointly, it was up to the bankruptcy court to determine whether consolidation was appropriate and whether the Plan was fair and equitable. R. at 8–9. Because TDI expressly pursued a joint plan, only one singular plan existed, and TDI secured more than enough creditor support for the Plan.

ii. Even if TDI's Plan was a de facto substantive consolidation, the issue is not before this Court, as UMT failed to object on that basis.

Turning back to *In re Woodbridge*, that case is distinguished from the instant matter because those debtors moved for substantive consolidation, while here, TDI did not. *In re Woodbridge Grp. of Cos., LLC*, 592 B.R. at 766–67. Further, in *In re Woodbridge*, the creditors objected to the debtors' proposed substantive consolidation in their plan, but here, UMT did not. *Id.* at 775–78. Just as the *Transwest* court determined that the issue of substantive consolidation versus joint administration was not before it on appeal because the creditors failed to object on that basis, so too should this Court determine here. UMT may have objected on multiple grounds, but only two objections are before this Court, and substantive consolidation is not among them.

CONCLUSION

Chapter 11 was created to provide companies with options to avoid liquidation and mass job loss. However, Section 365(c)(1)'s ambiguity has caused discord among courts about whether to apply the "hypothetical test" or "actual test." This Court should adopt the "actual test" which balances interests of both debtors and non-debtors and conforms with Chapter 11's objectives. Additionally, to provide clarity and uniformity to lower courts, this Court should adopt the per-plan approach to section 1129(a)(10), based on the plain meaning of the statute, its statutory context, and Congress' intent. TDI respectfully requests that this Court reverse the Thirteenth Circuit's decision on both issues and affirm the bankruptcy court's confirmation of TDI's Plan.

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