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 UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

BRIEF FOR RESPONDENT

Team 31

Counsel for Respondent

QUESTIONS PRESENTED

1.) Whether the language of §365(c)(1) permits a debtor in possession to assume an executory contract when the non-debtor party to such contract objects and when applicable nonbankruptcy law excuses the non-debtor party from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession?

2.) Whether §1129(a)(10) requires acceptance from an impaired class of claims of each debtor under a joint, multi-debtor plan when one of the debtors' impaired classes rejects the plan, but the rest of the debtors agree and proceed to confirmation as though all bankruptcy estates had been substantively consolidated?

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STATEMENT OF JURISDICTION

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

STATEMENT OF THE CASE

On January 11, 2016, the Debtors commenced voluntary cases under Chapter 11 of the Bankruptcy Code. These cases were jointly administered pursuant to Bankruptcy Rule 1015(b). R. 3. Tumbling Dice, Inc. ("TDI"), a holding company that owned the membership interests of its nine wholly-owned debtor-subsidiaries, filed the lead bankruptcy case. R. 4. Eight of the debtor-subsidiaries each operate a luxury casino and resort (each a "Debtor" and, collectively, "Debtors"). *Id*. Tumbling Dice Development, LLC ("Development"), the remaining debtor-subsidiary, acts as the licensee under a non-exclusive software license agreement with Under My Thumb, which is a leading software designer that specializes in customer loyalty and reservations programs for the hospitality industry. *Id*. Nearly thirty years ago, the Debtors launched their casino loyalty program, Club Satisfaction. *Id*. The Debtors aimed to create stronger brand loyalty by doing so. *Id*. The Debtors offered incentives and rewards to Club Satisfaction members who frequently engaged in gaming and other activities at their properties. *Id*.

In 2008, Development contracted with Under My Thumb to create a comprehensive, integrated software system that would modernize Club Satisfaction. *Id.* Under My Thumb incurred approximately $10 million in costs to create the Club Satisfaction software (the "Software"). *Id*. Development agreed to reimburse Under My Thumb for a portion of these costs pursuant to an unsecured $7 million promissory note (the "R&D Note"). *Id*. After the Software was completed, Under My Thumb and Development entered into a license agreement (the "Agreement") that granted Development a non-exclusive license to use its copyrighted and patented Software. Its terms permitted Development to "extend the benefits of the Agreement to its affiliated entities only," even though such affiliated entities were technically not parties to the Agreement. R. 5. Additionally, the Agreement prohibited the Debtors from assigning or

sublicensing their rights to other parties without Under My Thumb's express written consent. *Id*. Development agreed to pay Under My Thumb a monthly fee that was calculated based on the amount of spending activity by Club Satisfaction members in exchange for the license. *Id*.

Under the new system, Club Satisfaction members were given player cards. The Debtors used the Software to learn a variety of things about their members: what games they played, how often and for how long, and what types of food and beverages they purchased. *Id*. The Debtors then used this data to track members' habits and capture their preferences with the hope of enticing the members to return frequently, play for longer and spend more. *Id*. While the Software was an important part of the Debtors' ongoing business model, Under My Thumb was permitted to, and did, license similar versions of the Software to third parties. *Id*. Under My Thumb also received higher than expected payments under the Agreement each month due to the increased popularity of Club Satisfaction. *Id*. Yet, in June 2015, the Debtors ceased making payments and as such no longer remained current under the R&D note. R. 5-6.

In December 2011, the stock of TDI was acquired by a hedge fund called Start me Up, Inc. through a leveraged buy-out. R. 6. TDI and the Debtors granted first priority liens on their assets to a group of lenders with common interests (the "Lenders") in exchange for a $3 billion loan. *Id*. Since Development had a limited purpose under the non-exclusive nature of the Software license, and restrictive covenants in the loan agreement, the Lenders did not require Development to act as a borrower or guarantor under the credit facility. *Id*. The Debtors commenced the Chapter 11 cases in January 2016 because of the debt load from the leveraged buy-out transaction. *Id*. As of the petition date, TDI and each of the Debtors jointly and severally owed the Lenders approximately $2.8 billion. *Id*. While the primary goal of the bankruptcy cases was to restructure or refinance the debt load, the Debtors owed an estimated $120 million more to unsecured creditors

like Under My Thumb. *Id.* Specifically, under the R&D Note, the Debtors still owed more than $6 million to Under My Thumb. *Id.*

After lengthy negotiations with Start Me Up, the Lenders, the unsecured creditors' committee and other stakeholders (minus Under My Thumb), the Debtors announced that they had reached a deal, the terms of which were memorialized in a plan support agreement. R. 7. Consistent with the plan support agreement, the Debtors filed the Plan and disclosure statement in August 2016. *Id.* The Plan was a joint plan that expressly stated that "the Debtors' estates are not being substantively consolidated, and no Debtor is to become liable for the obligations of another." *Id.* With respect to Under My Thumb, the Plan proposed to assume the Agreement under §§365 and 1123(b)(2). *Id.* Under My Thumb would continue to receive the monthly payments for the use of the Software under the Agreement. *Id.* The Plan also provided for a pro rata distribution of $66 million (i.e. 55% of new capital injected by Start Me Up that was used to fund distribution to unsecured creditors), including the $6 million plus obligation owed by Development to Under My Thumb under the R&D Note. *Id.* With its Agreement assumed and its distribution on account of its unsecured claim greatly exceeding the value of Development's assets, Under My Thumb initially viewed the plan favorably. *Id.*

Yet, Under My Thumb discovered that Start Me Up was directly funding only $31 million of the unsecured distribution. *Id.* Sympathy for the Devil ("SFD"), a private equity group, was investing the other $35 million. R. 7-8. SFD's portfolio of companies includes a direct competitor of Under My Thumb who tried for several years to replicate the software. R. 8.The Plan provided that SFD would receive 51% of voting shares of the reorganized TDI and hold several seats on the reconstituted board of directors; Start Me Up would only receive 49%. *Id.*

Almost all creditor groups supported the Plan. *Id*. Development did not support the Plan because they were concerned with SFD's potential access to the Software. *Id*. Under My Thumb controlled Development's only class of creditors and thus Development had no impaired accepting class of creditors. *Id*.

Under My Thumb timely objected to the Plan and pursued two questions on appeal. *Id*. First, relying on the so-called "hypothetical test," it argued that the proposed assumption of the Agreement by the Debtors was impermissible under § 365(c)(1) because applicable nonbankruptcy law excused performance by Under My Thumb in the absence of its consent, which it was not giving. *Id*. Second, it argued that the Plan was not confirmable under §1129(a)(10) because no impaired class of creditors of Development voted to accept it. *Id*. The bankruptcy court overruled the objections and confirmed the Plan. *Id*. The bankruptcy court adopted the "actual test" and held that §365(c)(1) contemplates a case-by case inquiry into whether the non-debtor party actually was being forced to accept performance under its executory contract from someone other than the party with whom it originally contracted. *Id*. They found that Under My Thumb was asked to do nothing more than honor its existing contractual obligation with Development and Development could assume the Agreement. *Id*. Additionally, the bankruptcy court held that §1129(a)(10) is satisfied where at least one impaired class in a joint, multi-debtor plan accepts the plan. *Id*. The bankruptcy court found that the Plan was not confirmable simply because no impaired class of Development voted in favor of it. *Id*. The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court on both issues, but the United States Court of Appeals for the Thirteenth Circuit reversed the decisions of the bankruptcy court. R. 8, 21.

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Thirteenth Circuit properly reversed the bankruptcy court's decision. The text of §365(c)(1) is unambiguous and clear on its face, and courts are bound to follow the plain language of a statute when it is clear and explicit. The Court should find that Development cannot assume the Agreement. Subsections (1)(A) and (1)(B) of §365(c) are satisfied because federal intellectual property law makes the Agreement personal and non-delegable, and Under My Thumb does not consent to Development assuming the Agreement. Even if the Court determines that it must look beyond the plain language to answer this question, the Court should find that a literal reading of §365(c)(1) does not conflict with other language and provisions of the statute, statutory history, or policy.

Because the Debtors pursued one "joint" chapter 11 plan of reorganization for all ten debtors and the Plan expressly provided that the Debtors' estates were not being substantively consolidated, the Court should find that all debtors must satisfy each of the confirmation requirements of §1129(a). Joint administration cannot be used as *de facto* substantive consolidation to bypass the necessarily rigorous requirements of substantive consolidation. Even if the Court finds that substantive consolidation is irrelevant to a technical requirement like §1129(a)(10), the Court should find that if Under My Thumb should retain the powerful voting rights that chapter 11 preserves for *each* impaired class of creditors as an impaired class of claims for one debtor cannot speak for the creditors of another and consequently deprive another of their substantive rights. For the above reasons, this Court should affirm the United States Court of Appeals for the Thirteenth's Circuit's decision.

ARGUMENT

Here, the petition for a writ of certiorari is granted, limited to the following questions: (1) whether 11 U.S.C. §365(c)(1) permits a debtor in possession to assume an executory contract over the objection of the non-debtor party to such contract when applicable nonbankruptcy law excuses the non-debtor party from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession and (2) whether, in a case where a class of claims is proposed to be impaired under a joint, multi-debtor plan, 11 U.S.C. §1129(a)(10) requires acceptance from at least one impaired class of claims of each debtor, or, alternatively, acceptance from one impaired class of claims of any one debtor.

The parties do not dispute the facts; rather, the issues addressed involve questions of law. Therefore, this Court should apply a *de novo* standard of review and should view the case from the same position as the district court but consider the matter anew. *Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1004 (9th Cir. 2006).

I. THE LANGUAGE OF §365(C)(1) PERMITS A DEBTOR IN POSSESSION TO ASSUME AN EXECUTORY CONTRACT WHEN THE NON-DEBTOR PARTY TO SUCH CONTRACT OBJECTS AND APPLICABLE NONBANKRUPTCY LAW EXCUSES THE NON-DEBTOR PARTY FROM ACCEPTING PERFORMANCE FROM OR RENDERING PERFORMANCE TO AN ENTITY OTHER THAN THE DEBTOR OR THE DEBTOR IN POSSESSION.

A. Because applicable nonbankruptcy law excuses Under My Thumb from accepting performance from a third-party, and Under My Thumb explicitly does not give its permission for Development to assume or assign the Agreement, §§365(c)(1)(A) and (B) are satisfied.

In this case the parties are dealing with a non-exclusive license of intellectual property (i.e., a license of the Software). This type of license "generally...is an executory contract as such is contemplated in the Bankruptcy Code." *See, e.g., In re Kmart Corp.*, 290 B.R. 614, 618 (Bankr. N.D. Ill. 2003) (*quoting In re Novon Intern. Inc.*, 2000 WL 432848, *4 (W.D.N.Y. March 31,

2000)). An executory contract, in the bankruptcy context, "is one 'under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other.'" *In re Penn Traffic Co.*, 524 F.3d 373, 379 (2d Cir. 2008) (quoting Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 Minn. L.Rev. 439, 460 (1973)). Here, Under My Thumb has given permission to Development to use the intellectual property (the Software), subject to some restrictions, in exchange for a fee. This is the Agreement.

Federal intellectual property law allows the licensor to control who uses the license and who it is assigned to; therefore, the licensee cannot assign the license to a third-party without the licensor's consent. *In re Golden Books Family Entertainment, Inc.*, 269 B.R. 311, 314 (Bankr. D. Del. 2001); *see also Unarco Indus., Inc. v. Kelley Co., Inc.*, 465 F.2d 1303, 1306 (7th Cir. 1972); *In re Trump Entm't Resorts, Inc.*, 526 B.R. 116, 123-25 (Bankr. D. Del. 2015). Since a licensor does not have to render performance to an entity that is different from the entity it entered into an agreement with, the licensee cannot assign a license of intellectual property without the licensor's consent; the license is therefore said to be personal and non-delegable. *See, e.g., In re Lil' Things, Inc.*, 220 B.R. 583 (Bankr. N.D. TX 1998) (using the terms "personal" and "non-delegable" to describe contracts under §365(c)). Applying this law, as the non-debtor party and licensor, Under My Thumb does not have to accept performance from or render performance to an entity other than Development, the licensee. §365(c)(1)(a) is thus satisfied.

This applicable nonbankruptcy law makes the license not assignable. Additionally, Under My Thumb has explicitly withheld its consent to Development assuming or assigning the license. Sections 365(1)(A) and (B) are therefore satisfied.

B. Because the plain language of the statute is unambiguous, Development cannot assume the Agreement under §365(c)(1).

Having satisfied subsections (1)(A) and (B) of §365(c), the remaining issue for this Court is to decide whether a debtor in possession can assume the license. The Court must essentially determine the meaning of the word "or" within the statute's phrase "assume *or* assign." 11 U.S.C. §365(c)(1) (emphasis added).

1. Development may not assume or assign the license because a plain-language reading calls for use of the hypothetical test.

As an initial matter, courts have long held that the terms "trustee" and "debtor in possession" are interchangeable since, in a Chapter 11 case where no trustee is appointed , the debtor takes on the role of debtor in possession and performs the same duties as a trustee. 11 U.S.C. §1107; *see also In re Cybergenics Corp.*, 226 F.3d 237, 243 (3d. Cir. 2000). As such, "trustee" as it appears in §365(c) can be read as "debtor in possession." Here, Development is the debtor in possession.

A plain language reading of the statute reveals that the Bankruptcy Code drafters explicitly chose to use the phrase "assume *or* assign." 11 U.S.C. §365(c)(1). The plain language would therefore imply that, if both subsections 1(A) and (B) are satisfied (as they are here), the debtor in possession can *neither* assume *nor* assign the license. *See In re James Cable Partners, L.P.*, 27 F.3d 534, 537 (11th Cir. 1994) ("Under the plain language of §365(c)(1), James Cable (debtor in possession) may not assume the agreement...if two conditions are met.").

This plain language interpretation is referred to as the hypothetical test. *See Matter of West Electronics Inc.*, 852 F.2d 79, 83 (3d Cir. 1988) (holding that the language of §365(c) creates the hypothetical test). If the debtor in possession would not be able to assign the license to a theoretical third-party, then it cannot assume said license. *In re Catapult Entm't, Inc.*, 165 F.3d 747, 750 (9th Cir. 1999). The Ninth Circuit explains the test as barring a "debtor in possession from assuming

an executory contract without the non-debtor's consent where applicable law precludes assignment of the contract to a third party." *Id*. It follows that even if the debtor in possession does not intend to assign the license to another party, it still cannot assume it.

The hypothetical test is merely the name given to the results of plainly reading the statutory language. *See Matter of West Electronics Inc.*, 852 F.2d at 83. A majority of circuit courts have adopted its use. *In re Aerobox Composite Structures, LLC*, 373 B.R. 135, 140 (Bankr. D. N. M. 2007). For the Court to find in favor of Under My Thumb would merely require a plain reading of the text.

The first step of statutory interpretation is always reading the statute's language. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)). When the text is unambiguous, this is the end of the analysis; courts are to presume that the legislature "says in a statute what it means and means in a statute what it says." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992). The Supreme Court has even explicitly applied this maxim to interpretation of the Bankruptcy Code. *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41 (1989).

Applying this analysis to the situation yields a relatively straightforward result:

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

11 U.S.C. §365(c)(1) (substitutions in italics); *see In re Catapult Entm't, Inc.*, 165 F.3d at 750. Applicable nonbankruptcy law (in this case, intellectual property law) makes the Agreement

personal and non-delegable. Under My Thumb has explicitly withheld its consent. Having established subsections 1(A) and (B), applying the hypothetical test therefore clearly prevents Development from assuming the license.

2. Even if the Court were to initially conclude that the plain language was not clear, various other methods of interpretation compel adoption of the hypothetical test and reading the word "or" in its literal sense.

The first step of interpretation is always, as described above, a plain reading of the statute's language. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. at 438. Going hand in hand with this, however, is the presumption that the legislature meant what it said in the statute. *See Connecticut Nat. Bank v. Germain*, 503 U.S. at 253-54. For example, when the framers of a statute explicitly choose to use the word "or" as opposed to the word "and," canons of construction tell us that we must assume the legislators meant what they said. *Id.* The Second Circuit explicitly held in 2016 that "established canons of statutory construction 'ordinarily suggest that terms connected by a disjunctive be given separate meanings.'" *United States v. Harris*, 838 F.3d 98, 105 (2nd Cir. 2016) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)).

Courts should also presume that Congress was capable enough to know the difference between the two words. In *Wisconsin Central Ltd. v. U.S.*, the Supreme Court dealt with a case regarding the Railroad Retirement Tax Act (RRTA) and its companion statute, the Federal Insurance Contributions Act (FICA). 138 S.Ct. 2067, 2071 (2018). The central issue was that the RRTA taxed "*money* remuneration" while the FICA taxed "*all* remuneration. *Id.* The Court held that difference in language, like the one in this present case, usually means difference in meaning. *Id.* The Court's main conclusion here was that "the Congress that enacted both of these pension schemes knew well the difference between "money" and "all" forms of remuneration. Its choice to use the narrower term in the context of railroad pensions alone requires respect, not disregard."

Id at 2072. In this case at hand, "or" has a different meaning than "and." Therefore, the Court must give meaning to the word that Congress chose to use. The Court must give "or" its plain meaning here.

The Debtors will likely point out that §102(5) of the Bankruptcy Code explicitly states that the word "or" is not exclusive. 11 U.S.C. §102(5). However, this merely presents another option for interpretation and does not by itself lend support to reading the word "or" as the word "and" in §365(c)(1); courts repeatedly hold that just because "or" is not exclusive does not mean that Congress intended the interpretation of the word to give rise to a result that is false or illogical. *See, e.g., In re Williams*, 168 F.3d 845, 847 (5th Cir. 1999) (holding that just because "or" is not exclusive does not mean that Congress intended the word to "create a fourth alternative"). What's more, courts have used the statutory maxim that a more specific statute controls over a more general statute to override §102(5). *In re Schwartz,* No. 96–18913, 1998 WL 37551 (Bankr.E.D.Pa. Jan.22, 1998) ("Utilizing this maxim, the plain language of subsections (B) and (C) of § 1325(a)(5) must be given effect over the definition of "or" contained in §102(5).") (citing *Morton v. Mancari*, 417 U.S. 535, 550-551 (1973)).

The Debtors may also argue that a literal reading of §365(c)(1) creates inconsistencies with §365(f)(1), the applicable portion of which states:

> (f)(1) Except as provided in subsection (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....

11 U.S.C. § 365(f)(1) (emphasis added). The argument effectively is that, under §365(c)(1), "applicable law" determines when assignment (and therefore assumption) is barred, while

"subsection (f)(1) states that, *contrary provisions in applicable law notwithstanding*, executory contracts may be assigned." *In re Catapult Entm't, Inc.*, 165 F.3d at 751. In other words, §365(f)(1) appears to say that the contrary applicable laws which have effect in §365(c)(1) do not have effect anymore. *Id.*

As a result of this apparent inconsistency, the Debtors' solution is to petition this Court to ignore the plain language of §365(c)(1). They instead desire what is referred to as the "actual test," a reading in which the debtor may assume the contract so long as they lack actual intent to assign it to a 3rd party. *In re Mirant Corp.*, 440 F.3d 238, 248 (5th Cir. 2006) (citing *Summit Inv. and Development Corp. v. Leroux*, 69 F.3d 608, 613 (1st Cir. 1995). This analysis would require reading the phrase "assume or assign" instead as "assume *and* assign." *In re Footstar, Inc.*, 323 B.R. 566, 569 (Bankr. S.D. N.Y. 2005) (emphasis added).

There is no need, however, to forsake the plain language for this interpretive reading which goes beyond the unambiguous text. The Thirteenth Circuit correctly pointed out that a deeper examination renders this inconsistency illusory, since "each subsection recognizes an 'applicable law' of markedly different scope." *In re Catapult Entm't, Inc.*, 165 F.3d at 752 (citing *In re Magness*, 972 F.2d 689, 695 (6th Cir. 1992). Believing it to be the clearest explanation, the following excerpt from the Fourth Circuit is the same one used by the Thirteenth Circuit:

> First, §365(f)(1) lays out the broad rule - "a law that, as a general matter, 'prohibits, restricts, or conditions the assignment' of executory contracts is trumped by the provisions of subsection (f)(1)." Section 365(c)(1), in contrast, creates a carefully crafted exception to the broad rule, under which "applicable law does not merely recite a general ban on assignment, but instead more specifically 'excuses a party ... from accepting performance from or rendering performance to an entity'

> different from the one with which the party originally contracted...." Therefore, under the broad rule of §365(f)(1), the "applicable law" is the law prohibiting or restricting assignments as such; whereas the "applicable law" under §365(c)(1) embraces "legal excuses for refusing to render or accept performance, regardless of the contract's status as 'assignable'...." In order to determine whether a law is overridden by §365(f)(1) under the foregoing interpretation of §365(f)(1) and §365(c)(1), a court must ask why "applicable law" prohibits assignment. And only applicable anti-assignment law predicated on the rationale that the identity of the the contracting party is material to the agreement and is resuscitated by §365(c)(1).

In re Sunterra Corp., 361 F.3d 257, 266-67 (4th Cir. 2004) (internal citations omitted) (emphasis added). This demonstrates that the two sections are not at odds with each other. As such, this argument is not grounds for ignoring the plain meaning of §365(c)(1).

There is no legislative history that could defeat the plain language. Courts generally hold that, "absent a clearly expressed legislative intention to the contrary, the language of the statute itself must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *See also Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987); *City of Auburn v. U.S. Government*, 154 F.3d 1025, 1029-30 (9th Cir. 1998).

Courts find that there is no contemporaneous legislative history for the current §365(c)(1). *In re Catapult Entm't, Inc.*, 165 F.3d at 754 (citing *In re Cardinal Industries*, 116 B.R. 964, 978-80 (Bankr. S.D. Ohio 1990) ("[T]here is no authoritative legislative history for BAFJA as enacted in 1984."). The only example comes from a little-known committee report for a "1980 House

amendment to an earlier Senate technical corrections bill."[1] *Id*. This report, however, predates §365(c)(1) by four years, was written for a different bill, and only reflects a single committee's thoughts. *Id*. This is hardly a convincing display of intent. And, as shown above, the text of §365(c) is not ambiguous; when unambiguous, there is no need to consult legislative history. *Id* (*citing Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808-09 (1989)). This is a fairly standard principle of interpretation. *See In re Lucas*, 924 F.2d 597, 600 (6th Cir. 1991) ("It is an axiom of statutory construction that resort to legislative history is improper when a statute is unambiguous.").

However, one of the most basic principles of statutory interpretation is that, if possible, a statute should be construed in a way so as to not render any word, sentence, or clause superfluous or inoperative. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). Parties in previous cases have argued that using the hypothetical test renders §365(c)(1)(A)'s phrase "or the debtor in possession" superfluous. *In re Catapult Entm't, Inc.*, 165 F.3d at 752. Their argument is as follows: "'[i]f the directive of Section 365(c)(1) is to prohibit assumption whenever applicable law excuses performance relative to any entity other than the debtor, why add the words 'or debtor in possession?' The [hypothetical] test renders this phrase surplusage.'" *Id* (quoting *In re Hartec Enterprises, Inc.*, 117 B.R. 865, 871 (Bankr. W.D. TX 1990).

This argument does not hold merit, however. Because §365(c)(1) encompasses both assumption and assignment, which are two separate concepts, it requires the non-debtor to consent

[1] The relevant text of that report: "This amendment makes it clear that the prohibition against a trustee's power to assume an executory contract does not apply where it is the debtor that is in possession and the performance to be given or received under a personal service contract will be the same as if no petition had been filed because of the personal service nature of the contract." *In re Cardinal Industries, Inc.*, 116 B.R. 964, 979 (Bankr. S.D. Ohio 1990) (*quoting* H.R.Rep. No. 1195, 96th Cong., 2d Sess. § 27(b) (1980)).

separately to each. *In re Catapult Entm't, Inc.*, 165 F.3d at 752. §365 (c)(1) must be applied again if the debtor wishes to assign the contract, and this time the phrase "debtor in possession" must be used. *Id*[2] Therefore, the hypothetical test does not render the phrase superfluous; rather, it "dovetails neatly with the disjunctive language that opens subsection (c)(1): 'The trustee may not assume or assign....'" *Id* (quoting 11 U.S.C. § 365(c)).

The Debtors argue against the plain language interpretation by contending that application of the plain language would produce an absurd result by disfavoring the debtors. It is indeed true that a main goal of bankruptcy law is to help the debtor successfully regain its footing and reorganize. *See In re Berman*, 629 F.3d 761, 765 (7th Cir. 2011) (citing *In re Crosswhite*, 148 F.3d 879, 881 (7th Cir.1998). However, as the Fourth Circuit provided, Congress did not disregard every right of the non-debtor for the debtor's good. *In re Sunterra Corp.*, 361 F.3d at 268. As such, "courts should not assume that "sections of the Bankruptcy Code unfavorable to the debtor were enacted in error."" *Id*. Whether or not the Debtors believe that this is good policy is irrelevant; Congress bears the job of "achieving a better policy outcome." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13 (2000); *See Kawaauhau v. Geiger,* 523 U.S. 57, 64 (1998); *United States v. Noland*, 517 U.S. 535, 541-42 (1996); *Union Bank v. Wolas*, 502 U.S. 151, 162 (1991). Therefore, even if this Court finds that the result achieved by applying the hypothetical test is not ideal policy, it should leave it to Congress to fix any issues.

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[2] "On that second application, the relevant question would be whether 'applicable law excuses a party from accepting performance from or rendering performance to an entity other than ... the debtor in possession.'" (*quoting* 11 U.S.C. § 365(c)(1)(A)).

II. 11 U.S.C. §1129(a)(10) requires acceptance from at least one impaired class of claims of each debtor in a case where a class of claims is proposed to be impaired under a joint, multi-debtor plan and therefore affirm the United States Court of Appeals for the Thirteenth Circuit's decision to adopt the *per debtor* approach.

A. 11 U.S.C. §1129(a)(10) mandates a *per debtor* approach.

Section 1129(a) of the Bankruptcy Code lays out the 16 elements that must be satisfied in order for a debtor to confirm its plan. The tenth element provides that the court shall only confirm a plan when, "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). This seemingly simple requirement has complex consequences when applied to cases involving multiple debtors.

Cases which substantively consolidate under a joint plan are easy to understand, but those debtors who choose not to substantively consolidate and seek to reorganize under a single joint plan cause snafus in the lower courts. Many large and complex businesses use the tools in Chapter 11 to reorganize dozens, hundreds, and even thousands of subsidiaries and affiliates. The debtor here today is small in comparison to its predecessors in the case law. *See e.g. In re Enron Corp.*, No. 01-16034 (AJG), 2004 Bankr. LEXIS 2549 (Bankr. S.D.N.Y. July 15, 2004) (involving over 2,000 subsidiaries); *In re Tribune Co.*, 464 B.R. 126 (Bankr. D. Del. 2011) (involving 127 subsidiaries).

However smaller than the average consolidation, the parties here find themselves with the same fundamental question in the interpretation of Section 1129(a)(10): may this requirement be satisfied if one impaired class of creditors with claims against only one of the Debtors rejects the plan with other classes of impaired creditors against a different Debtor that accepts the plan? The lower courts are split on whether §1129(a)(10) requires the affirmative vote of one impaired class

(the *per plan* approach), or if the element can only be satisfied through acceptance of the plan by an impaired consenting class for each debtor (the *per debtor* approach).

The *per debtor* approach is the appropriate way to interpret §1129(a)(10) based on a plain reading of the text, the rules of construction of the bankruptcy code, and taking the language in context of the other elements required to confirm a plan.

The Debtors at hand began as a joint filing of 10 different subsidiaries. The Debtors proceeded to confirmation as though they were substantively consolidated from the beginning, when at the date of the petition they operated as one joint Chapter 11 plan for all the Debtors. Because they filed as joint debtors and not consolidated debtors, the Debtors were required to reorganize their bankruptcy estates individually under this joint plan. *In re Tribune Co.*, 464 B.R. at 181. The creditors were put on notice through language of the Plan that "the Debtors' estates are not being substantively consolidated and no Debtor is to become liable for the obligations of another." The Debtors argue that the Plan satisfies each of the requirements for confirmation because the majority of creditors voted in favor of the Plan.

1. A plain reading of the text supports a per debtor approach.

As with the analysis of any statute that is causing confusion, we begin by looking to the plain language of that statute. *See United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 241 (1989). When a statute is unambiguous as it is here, it is unnecessary for judicial review to take place. *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253 (1992).

The plain language of the statute supports a reading of each Debtor being required to have a class of impaired creditor support, and this Court should follow this reading. The language of §1129(a)(10) reads: "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." (emphasis added). With an initial reading of this statute, the Code seems to lean towards the *per debtor* approach, requiring each plan within the join Plan to be approved by its own creditors.

The fact that the section refers to the "plan" and not to the "plans" does not conclude that only one debtor in a multiple debtor case can satisfy this standard in §1129(a)(10). The Bankruptcy Code provides rules of construction which state that "the singular includes the plural." §102(7). Because the Debtors filed a joint plan, and not a substantively consolidated Plan, the Plan is in fact ten plans.

2. Looking at the statute in context of the other elements of confirmation supports a per debtor approach.

A key canon of bankruptcy code interpretation is for all sections to be read within the context of each other. *King v. St. Vincent's Hospital,* 502 U.S. 215, 221(1991); *see RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). § 1128(a) lists the requirement for approval of a cramdown plan, and "contains a number of safeguards for secured creditors who could be negatively impacted by a debtor's reorganization plan." *In re the Village at Lakeridge, LLC,* 814 F.3d. 993, 1000 (9th. Cir. 2016). Reading § 1129(a)(10) in context of the other provisions of §1129(a)(10) clearly indicates that the other elements require satisfaction by each debtor to a joint plan. In other words, each debtor must separately satisfy all the requirements of § 1129 in order to have a confirmable plan even if the debtors are reorganizing under a single plan document.

The Delaware Bankruptcy Court is recognized as a leader with respect to complex issues of commercial bankruptcy law. *Bullard v. Blue Hills Bank*, 575 U.S. 496 (2015). The Bankruptcy Courts of Delaware use this reasoning in as to why a *per debtor* plan is the correct reading, and

why the 13th Appellate court found the same. *See In re Tribune*, 464 B.R. 126 (Bankr. D. Del. 2011); *see also In re Woodbridge Grp. Of Cos.,* 464 B.R. 126 (Bankr. D. Del. 2011); *In re JER/Jameson Mezz Borrower II, LLC,* 461 B.R. 293 (Bankr. D. Del. 2011). The Delaware Bankruptcy Court concluded in *In re Tribune* that "entity separateness is fundamental" unless debtors are substantively consolidated. 464 B.R. at 182. Only if § 1129(a)(10) applied to each debtor could the other confirmation standards of 1129(a) flow as a section like the Bankruptcy Code provided for.

Reading through just some of the § 1129(a) elements, there are three examples *In re Tribune* brought to light that require each debtor to participate fully. For example, Section (a)(1) requires that the plan must be proposed in good faith, a standard that cannot be satisfied if only one debtor and not the others proposes a plan in good faith. *Id*. at 183. All debtors must comply with the applicable provisions of the Bankruptcy Code in good faith for a plan to be confirmed.

Continuing down the elements checklist of §1129(a), Section (a)(7)'s best interest of creditors test is interpreted to mean that an entitlement to the prescribed treatment for every impaired class of creditors for each debtor that is a part of the plan. The best interests of creditors test requires that either the creditor accept the plan, or in the alternative, the plan allows them to receive or retain under the plan property of the estate that is not less than the amount they would receive from the same debtor in a chapter 7 liquidation proceeding.

The third required element of confirmation that demonstrates the need for the Debtors to act individually if they are not consolidated are the cramdown provisions found in §1129(a)(8). § 1129(a)(8) requires "each class of claims" to accept the plan or be unimpaired by the plan. This is yet another section which read in context with the section at issue, § 1129(a)(10), requires that

all debtors in jointly administered plan must satisfy each of the confirmation requirements as separate plans.

The three sections discussed above illustrate the principle that all debtors in a jointly administered case must satisfy each of the confirmation requirements. § 1129(a)(10) must be analyzed on a per debtor based on this principle found throughout the same section of the Code.

3. Convenience is not a canon of interpretation.

It is important to note what is not a canon of bankruptcy code interpretation: convenience. Yes, multi-debtor chapter 11 proceedings are jointly administered for the convenience of the debtors, the creditors, and the court. As aptly put by Judge Carey in *In re Transwest*, however, "convenience alone is not sufficient reason to disturb the rights of impaired classes of creditors of a debtor not meeting confirmation standards." 464 B.R. at 142.

In practice, large complex multi debtor cases, a single distribution scheme is often proposed. *Id.* These schemes are made without considering where the assets and liabilities fall amongst the debtors. These schemes are made without objection or done on a consensus. The Debtors here did not obtain the permission of all creditors before waiving the creditors' rights and using a single distribution scheme.

4. The fundamental policy of § 1129(a)(10) is to encourage consensus among creditors.

The seminal case, *Enron*, stated in favor of the *per plan* approach: "The plain language and inherent fundamental policy behind §1129(a)(10) of the Bankruptcy Code provides that an affirmative vote of one impaired class under a plan is sufficient to satisfy §1129(a)(10) of the Bankruptcy Code." This is a powerful statement with no foundation. The court makes a blanket statement with no attempt to give a background on legislation. The statement in Enron's dicta was

followed by two other important cases the petitioner will rely upon for policy reasons. 554 B.R. at 900; *In re Station Casinos, Inc.*, Nos. BK-09-52477, BK 10-50381, BK 09-52470, BK 09-52487, 2010 Bankr. LEXIS 5380, *82 (Bankr. D. Nev. 2010).

Enron's policy summary is incorrect and this court should disregard the reliance on it. Instead, as the Appellate court appropriately cited, the element requiring acceptance of the plan was included to encourage consensus. "By providing impaired creditors the right to vote on confirmation, the Bankruptcy Code ensures the terms of the reorganization are monitored by those who have a financial stake in its outcome." *In re Combustion Eng'g, Inc.,* 391 F.3d 190, 243 (3d Cir. 2004).

B. The Court should not allow the Debtors to proceed to confirmation as though all ten bankruptcy states were substantively consolidated because in a joint administration proceeding, creditors maintain their substantive legal rights since there is a different plan for each of the debtors.

Because this is a joint-multi debtor plan, the Court should not allow Debtors to proceed as if they pursued substantive consolidation because allowing them to proceed in that matter would deprive creditors of the substantive rights they retain in a joint administration proceeding. In bankruptcy, substantive consolidation is a process where assets and liabilities of different entities are consolidated and treated as a single entity. J. Stephen Gilbert, *Substantive Consolidation in Bankruptcy: A Primer*, 43 Vand. L. Rev. 207, 208 (1990). This process creates a single fund from which all claims against the consolidated creditors are satisfied. *Id.* Creditors share equally in the assets of the consolidated estate and intercompany claims of debtor companies and duplicative claims against related debtors are eliminated. *Id.* at 209. Additionally, creditors are combined for purposes of voting on reorganization plans. *In re Augie/Restivo Baking Co.*, 860 F.2d 515, 518 (2d Cir. 1988). Yet, substantive consolidation lacks clear statutory guidance and therefore courts have to examine the facts of each case closely to ascertain whether consolidation is warranted. *Id.*

Courts agree that they should use substantive consolidation sparingly and only apply it in unusual circumstances. *See e.g.*, *Alexander v. Compton (In re Bonham)*, 229 F.3d 750, 767 (9th Cir. 2000). Courts or parties may initiate a proposal for consolidation pursuant to a reorganization plan. J. Stephen Gilbert, *Substantive Consolidation in Bankruptcy: A Primer*, 43 Vand. L. Rev. 207, 214 (1990) n.50. Still, a court will not grant substantive consolidation absent a clear and convincing showing that it is warranted. Tatelbaum, *The Multi-Tiered Corporate Bankruptcy and Substantive Consolidation—Do Creditors Lose Rights and Protection?*, 89 COM. L.J. 285, 286 (1984). When deciding to substantively consolidate entities, a bankruptcy court evaluates "(i) whether creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit; or (ii) whether the affairs of the debtors are so entangled that consolidation will benefit all creditors." *FDIC v. Colonial Realty Co.*, 966 F.2d 57, 61 (2d Cir. 1992)(quoting *In re Augie/Rustivo Baking Co., Ltd.*, 860 F.2d 515, 518 (2d Cir. 1988).

Substantive consolidation is an equitable remedy and a powerful tool that is applied with the increase use of complex corporate structures, but it also violates a cornerstone of American corporate law that separate entities are to be treated separately, with each responsible for their own assets and liabilities. *See Skidmore, Owings & Merrill v. Canada Life Assurance Co*., 907 F.2d 1026, 1027 (10th Cir. 1990). For example, if a court applies substantive consolidation, the creditor of a debtor whose asset-to-liability ratio is higher than that of its affiliated debtor could receive a proportionately smaller satisfaction of its claim because the asset-to-liability ratio of the merged estates could be lower. *See In re Snider Bros., Inc.*, 18 B.R. 230, 234 (Bankr. D. Mass 1982).

Substantive consolidation is related to joint administration procedures, but parties cannot confuse the two as they must request to seek substantive consolidation or pursue a "joint" reorganization plan. Here, Debtors did not seek substantive consolidation, but rather pursued one

"joint" chapter 11 plan of reorganization for all ten debtors. If debtors pursue a joint, multi-debtor plan, the court can hear two or more related cases of entities that filed bankruptcy petitions in a single case. *See In re Parkway Calabasas, Ltd.*, 89 B.R. 832, 836 (Bankr. C.D. Cal. 1988). While joint administration makes case administration easier and less costly because related debtors proceed together rather than separately, unlike substantive consolidation, joint administration requires that the estate of each debtor is kept separate and distinct. J. Stephen Gilbert, *Substantive Consolidation in Bankruptcy: A Primer*, 43 Vand. L. Rev. 207, 212 (1990).

Another difference between substantive consolidation and joint administration is that after consolidation, creditors of specific entities can no longer look only to the assets of the debtor with which they bargained for satisfaction of their claims, rather, they have to the assets of the consolidated estate and become creditors of the consolidated entity. *In re Parkway Calabasas, Ltd.*, 89 B.R. at 837. In joint administration however, because debtors' estates are kept separate, the creditors of each jointly administered entity may only look to the assets of the debtor with which they bargained for satisfaction of their claims. *Id.* at 836.

Additionally, Bankruptcy Rule 1015(b) authorizes joint administration and instructs bankruptcy courts to "give consideration to protecting creditors of different estates against potential conflicts of interest." Here, each of the Debtors, under the Plan, were required to reorganize their individual bankruptcy estate separately and not proceed to confirmation as though all ten bankruptcy estates were substantively consolidated. *See In re Tribune Co.*, 464 B.R. 126, 181 (Bankr. D. Del. 2011). Accordingly, Debtors cannot pursue joint administration to bypass the necessarily rigorous requirements for substantive consolidation. *See Reider v. Fed. Deposit Ins. Corp. (In re Reider)*, 31 F.3d 1102, 1109 (11th Cir. 1994).

Consolidation depends on substantive considerations and affects the substantive rights of the creditors of the different estates. *Alexander v. Compton (In re Bonham)*, 229 F.3d 750, 762 (9th Cir. 2000). Joint administration does not affect the substantive rights of creditors or parties-in-interest because each debtor's estate is considered a separate entity that must individually meet the requirements set forth in the Bankruptcy Code for confirmation, absent substantive consolidation, which is why the Court should adopt the *per debtor* approach. Here, the Debtors were not substantively consolidated and so the plan consists of ten different plans, one for each of the Debtors. Thus, convenience and broad policy considerations like encouraging reorganizations and preserving jobs cannot override specific chapter 11 statutory provisions. *See, e.g. SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 967 (2017).

Delaware bankruptcy courts rule correctly most of the time. *Accord Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1695 (2015). A number of bankruptcy courts out of the District of Delaware hold that each debtor must be able to meet the requirements of §1129(a), including the requirement in §1129(a)(10) that the plan must contain an accepting class of non-insider impaired creditors. *See, e.g., In re Tribune Co*, 464 B.R. 126 (Bankr. D. Del. 2011); *see also In re Woodbridge Grp. Of Cos., LLC,* 592 B.R. 761 (Bankr. D. Del. 2018); *In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293 (Bankr. D. Del. 2011).

Under Bankruptcy Code §1123(a)(2) and (3), the plan must provide what classes of claims and interests are "impaired" and "unimpaired." Creditors in impaired classes get to vote on the plan and creditors in unimpaired classes do not get to vote and are deemed to have accepted the plan. 7 Collier on Bankruptcy P 1124.01 (16th 2019). The objection of an impaired creditor class may be overridden only 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."

§1129(b)(1). Under Bankruptcy Code §1124(1), a claim is impaired if the plan changes the claimholder's legal, equitable, and contractual rights. 7 Collier on Bankruptcy P 1124.01 (16th 2019). Under Bankruptcy Code §1124(2), a plan can make up past due payments to a secured creditor or lessor overtime without it being considered an impairment of the claim. *Id*.

The Debtors may argue that Tumbling Dice is bringing this issue forward because Sympathy for the Devil's portfolio contains a direct competitor in the software realm. Under My Thumb, the petitioner will argue, is only concerned with this Plan going forward because they do not want their software stolen by a major competitor if that competitor owns every stock interest in the reorganized Debtors. The Seventh Circuit has stated that the "standard for impairment is very lenient and 'any alteration of the rights constitutes impairment even if the value of the rights is enhanced.' " *In re Wabash Valley Power Assoc., Inc*., 72 F.3d 1305, 1321 (7th Cir. 1995). If Sympathy for the Devil would take control of the Under My Thumb as reorganized business, they would have access to Tumbling Dice's software. Therefore, Tumbling Dice's concerns on competitors constitutes impairment.

If separate plans do not exist for each debtor, then a party's substantive rights are altered because one impaired class of creditors could speak on behalf of another and thereafter take away another impaired class of creditors' voting rights. Related debtors simply cannot become one debtor in a joint plan as this runs contrary to long established principles of American corporate law. *See e.g., Keisler v. Goldberm*, 478 F.3d 209, 213 (4th Cir. 2007). Each debtor must stand on its own and the *per plan* approach does not allow for this because it ignores corporate separateness. Here, no impaired class of creditors of Development voted in favor of the Plan. A group of debtors are not one debtor and a joint plan is not a single plan. The Court should find that if it adopts the *per debtor* approach, Development is not forced to settle and agree with the Plan, rather, its vote

would invite all parties to negotiate and come to an agreement they all accept without violating any party's substantive rights.

CONCLUSION

The Thirteenth Appellate Court correctly ruled in both of the certified questions, and this court should uphold their decisions. Ultimately, there is simply not enough cause to abandon the literal reading of §365(c)(1). The text is clear and unambiguous. Applicable federal intellectual property laws permit Under My Thumb to refuse to accept or render performance to any party other than Development. Under My Thumb has explicitly withheld its consent for Development to assume the Agreement. Not only do basic methods of interpretation lead to adoption of the hypothetical test, but the strongest counterarguments fall well short of warranting abandonment of the plain language. The Court should follow a literal interpretation of the text and adopt the hypothetical test.

Joint administration should not affect the substantive rights of creditors or parties-in-interest. Here, Debtors did not seek substantive consolidation, but, rather, pursued one "joint" chapter 11 plan of reorganization for all ten debtors. If separate plans do not exist for each debtor in a jointly administered proceeding, then one impaired class of creditors would be able to speak for another impaired class of creditors who may not agree to the Plan or who hold claims against an entirely different entity. Debtors should not proceed to confirmation as though all ten bankruptcy estates had been substantively consolidated and should not use joint administration to bypass the necessarily rigorous requirements for substantive consolidation. The Court should find that each debtor's estate is considered a separate and distinct entity that must individually meet the requirements set forth in the Bankruptcy Code for confirmation and therefore adopt the *per debtor*

approach. For the foregoing reasons, the Respondent respectfully asks this Court to sustain the judgment entered by the United States Court of Appeals for the Thirteenth Circuit.