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

Petitioner,

v.

Under My Thumb, Inc., Respondent

Respondent,

On Writ of Certiorari to
The United States Court of Appeals
For the Thirteenth Circuit

BRIEF FOR RESPONDENT

35R
Counsel for Respondent

QUESTIONS PRESENTED

I. Whether 11 U.S.C. § 365(c)(1) permits a debtor in possession to assume an executory contract over the objection of the non-debtor party to such contract when applicable non-bankruptcy law excuses the non-debtor party from accepting performance to an entity other than the debtor or the debtor in possession.

II. 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.

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OPINIONS BELOW

The United States Bankruptcy Court for the District of Moot and the Bankruptcy Appellate Panel for the Thirteenth Circuit held for the Debtors on both issues. R. at 8. Specifically, the court found that: (I) under the "actual test" Tumbling Dice Development, LLC could assume the software license under section 365(c)(1); and (II) section 1129(a)(10) does not require an impaired class of Tumbling Dice Development, LLC to vote in favor of the Plan. *Id.* at 9. The Thirteenth Circuit Court of Appeals reversed on both issues. *Id.* at 21. This Court then granted Debtors' petition for writ of certiorari. *Id.* at 1.

STATEMENT OF JURISDICTION

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

STATUTES INVOLVED

The relevant federal laws controlling the case are 11 U.S.C. §§ 365(c)(1), 1129(a)(10) (2012) of the United States Bankruptcy Code. The text of these provisions are attached in their entirety in Appendix A.

STATEMENT OF THE CASE

I. Facts

Tumbling Dice, Inc. ("TDI") and its affiliated debtors (collectively, the "Debtors"), one of the largest gaming operations in the country, was acquired in a leveraged buyout transaction in December of 2011. R. at 6. As part of the transaction, a syndicated group of lenders loaned TDI $3 billion in exchange for first priority liens on the assets of eight of TDI's subsidiaries. *Id.* Over the next five years, TDI repaid only about $200 million of the principal. *Id.* On January 11, 2016, facing total debt obligations of approximately $2.92 billion, TDI commenced the instant chapter 11 action. *Id.* at 3.

TDI is itself a holding company comprised of ownership interests in eight luxury casinos and resorts (each an "Operating Debtor" and, collectively, the "Operating Debtors") and Tumbling Dice Development, LLC ("Development") which acts as a licensee for a non-exclusive software license agreement with the Respondent, Under My Thumb, Inc. ("Under My Thumb"). *Id.* at 4.

In 2008, Development, on behalf of TDI and the Operating Debtors, asked Under My Thumb to modernize its casino loyalty program ("Club Satisfaction"). *Id.* In a two-part transaction, Under My Thumb developed, patented, and copyrighted a comprehensive, integrated software system (the "Software") and subsequently licensed it to Development. *Id.* In return, Development agreed to a $7 million unsecured promissory note and to pay a monthly fee that was calculated based on the amount of spending activity by Club Satisfaction members. *Id.* at 5.

The license agreement between Under My Thumb and Development (the "Agreement") granted a non-exclusive license to Development to use the Software. *Id.* In addition, Under My Thumb permitted Development to "extend the benefits of the Agreement to its affiliated entities only." *Id.*

After implementing the Software, membership in Club Satisfaction tripled and spending increased on a per member basis. *Id.* TDI acknowledges that the Software is an essential part of its ongoing business model. *Id.* Despite this uptick in business and eight years after launching the Software, Development still owed more than $6 million of the total $7 million obligation under the unsecured promissory note. *Id.* at 6.

Under the Debtors' joint plan of reorganization, Under My Thumb would be repaid $3.3 million of the $6 million owed under the unsecured promissory note. The reorganized TDI would be controlled by Sympathy for the Devil ("SFD"), which also has ownership interest in a competitor of Under My Thumb. *Id.* at 8. This competitor has tried unsuccessfully to replicate the Software for several years. *Id.*

Suspicious of SFD's involvement in the plan, Under My Thumb objected to the plan on numerous grounds, only two of which survived on appeal: (1) Assumption of the Agreement by the Debtors is impermissible under section 365(c)(1) because the Agreement broadly prohibits the Debtors from assuming or assigning their rights to others without Under My Thumb's express written consent; and (2) the plan cannot be confirmed by the bankruptcy court under section 1129(a)(1) because no impaired class of creditors of Development has voted to accept it. *Id.* at 8.

II. Procedural History

On January 11, 2016 the following entities filed a petition for relief under chapter 11 of the United States Bankruptcy Code: (1) Tumbling Dice, Inc.; (2) Tumbling Dice Chicagoland, LLC; (3) Tumbling Dice Detroit, LLC; (4) Tumbling Dice Lake Tahoe, LLC; (5) Tumbling Dice Las Vegas, LLC; (6) Tumbling Dice New Orleans, LLC; (7) Tumbling Dice Palm Springs, LLC; (8) Tumbling Dice Tunic, LLC; and (9) Tumbling Dice Development (collectively, the "Debtors"). *Id.* at 3. The lead bankruptcy case was filed by TDI; the remaining claims were jointly administered for the convenience of the parties and the court pursuant to Bankruptcy Rule 1015(b). *Id.* at 4.

In August 2016, after non-binding mediation ordered by the bankruptcy court, the Debtors filed a Joint Plan of Reorganization (the "Plan"). *Id.* at 7. After creditor ballots were reviewed and tallied, Under My Thumb voted to reject the Plan, giving Development no impaired accepting class of creditor. *Id.* at 8. Further, Under My Thumb timely objected to the plan under section 365(c)(1), arguing that the explicit language in the non-assignment clause of the software license contract prevented Development from assuming the contract under the Plan. *Id.* The bankruptcy court overruled Under My Thumb's objections and confirmed the plan. *Id.* On appeal, the Bankruptcy Panel for the Thirteenth Circuit affirmed the bankruptcy court. *Id.* at 9. Under My Thumb appealed the decision to the Thirteenth Circuit where the decision was reversed on both issues. *Id.* at 21.

STANDARD OF REVIEW

The parties do not dispute the facts in this case. *Id.* at 9. The Thirteenth Circuit's holding that (1) the "hypothetical test" under section 365(c)(1) prevents Development from assuming the Software license; and (2) that section 1129(a)(10) requires an impaired class of Development to vote in favor of the Plan are both questions of law, which are reviewed *de novo*. *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit properly held that section 365(c)(1) precludes Debtors from assuming the Agreement over the objection of Under My Thumb. The plain meaning of section 365(c)(1) prevents a debtor in possession from assuming or assigning an executory contract if (1) applicable law excuses the non-debtor party from accepting or rendering performance to someone other than the debtor in possession; and (2) the non-debtor party does not consent.

Here, applicable law excuses Under My Thumb from performance because federal patent law, which governs the Agreement, qualifies as an "applicable law" under the statute, thereby prevents licensees, like the Debtors, from assigning intellectual property licenses. And because Under My Thumb does not consent to the Debtors assuming the Agreement, the plain meaning of section 365(c)(1) prevents the Debtors from assuming the Agreement.

Section 365(c)(1) applies to the Debtors because the Agreement is an executory contract. The Agreement satisfies the Countryman Test for executory contracts because both the Debtors and Under My Thumb have ongoing obligations under the Agreement. Also, courts have consistently held that non-exclusive licensing agreements of intellectual property, like the Agreement at issue here, qualify as executory contracts.

Also, Debtors cannot use their status as debtors in possession to avoid compliance with section 365(c)(1)'s requirements. While section 365(c)'s text only limits the trustee, section 1107 grants debtors in possession all the limitations that the Bankruptcy Code imposes on the trustee. With few exceptions, courts have generally recognized that the Code limits the debtor in possession in the same way it limits the trustee. Therefore, section 365(c)(1) should apply to the Debtors too.

A close reading of section 365(c)(1) reveals its clear and unambiguous applications to this case: the Debtors cannot assume the Agreement. This Court need not go any further. Indeed, the majority of circuits that reviewed this issue have applied the plain meaning of section 365(c)(1), also known as the "hypothetical test." And while some circuits have not applied the plain meaning, that does not mean section 365(c)(1) is ambiguous. In other cases, this Court has concluded that a statute is unambiguous despite a circuit split on its interpretation.

Debtors have attempted to avoid the plain meaning of section 365(c)(1) by showing that the statute produces absurdities, but their arguments are misguided. First, the plain meaning of section 365(c)(1) does not create internal inconsistencies within the statute. Section 365(c)(1)(A) is not superfluous when a debtor in possession only intends to assume an executory contract. In fact, this case shows that section 365(c)(1)(A) still protects the non-debtor party because an assumption could still result in an effective assignment to a competitor.

Legislative history fails to demonstrably show that plain meaning of section 365(c)(1) runs contrary to congressional intent. The legislative history that the Debtors will offer consists of isolated committee reports from years before Congress enacted section 365(c)'s current text. One committee report relates to a similar, but distinct provision of section 365. This evidence is not enough to conclusively show that the "hypothetical test" runs contrary to congressional intent.

Lastly, while the "hypothetical test" may conflict with successful reorganization in chapter 11, there are two plausible reasons why Congress intended the courts to apply section 365(c)(1) as written. First, the Bankruptcy Code has always preserved non-debtor rights in many of its provisions. Section 365(c)(1) is no different. Second, the "hypothetical test" protects patent and copyright holders, which serves the purposes of federal patent law. Far from producing absurdities, these are plausible reasons for why this Court should apply the "hypothetical test." The Thirteenth Circuit properly held that the Debtors cannot assume the Agreement over the objection of Under My Thumb. This Court should affirm.

Furthermore, the Thirteenth Circuit properly held that section 1129(a)(10) required acceptance of the Plan from at least one impaired class of each debtor (the "per debtor" approach). The plain meaning of section 1129(a)(10) requires this Court to adopt the "per debtor" approach. Section 1129(a)(10) requires that at least one impaired class must accept the plan. While on its face, plan is singular, section 102(7) allows for the singular to include the plural. Thus, just as a one plan for one debtor requires acceptance from an impaired class, one plan with multiple debtors requires acceptance from an impaired class of each debtor under section 1129(a)(10). Holding otherwise would create an absurd result where debtors can ignore impaired creditors so long as one class of impaired creditors accepts the plan.

The "per plan" approach, which only requires acceptance from one impaired class for all debtors, creates problems that the "per debtor" approach does not. First, the "per plan" approach fails to give full effect to section 1126 because it diminishes the creditor's ability to bargain with its vote. Only requiring one impaired class to accept for all debtors could take away the creditor's bargaining power, which cuts against what section 1126 was designed to do. Second, the "per plan" approach would undermine impaired creditors in a "cram down," which cuts against the provision that ensures the debtors get a minimal level of support for the Plan.

In contrast, the "per debtor" approach fosters meaningful negotiations among the parties to a plan. Section 1129(a)(10) exists to protect creditors like Under My Thumb by giving them a vote. But if the vote does not provide bargaining power, then section 1129(a)(10) hardly does anything for creditors. Section 1129(a)(10) exists to protect entities like Under My Thumb, and should not be abrogated by the "per plan" approach. The "per debtor" approach is the appropriate theory because it is consistent with the purpose of section 1129(a)(10).

Lastly, the "per plan" approach should not apply here because the Debtors declined their opportunity to pursue a substantive consolidation. Substantive consolidation is an equitable remedy that accomplishes all the goals that a "per plan" approach would accomplish. Instead of a substantive consolidation, the Debtors pursued a joint reorganization, but sought all the benefits of a substantive consolidation without the risks, especially to their creditors. Adopting a "per plan" approach here would allow the Debtors to selectively ignore the corporate form and unduly disadvantage entities like Under My Thumb. This will not do. This Court should apply the "per debtor" approach.

ARGUMENT

I. THE THIRTEENTH CIRCUIT PROPERLY HELD THAT THE DEBTORS IN POSSESSION MAY NOT ASSUME A SOFTWARE LICENSE OVER THE OBJECTION OF THE LICENSOR UNDER SECTION 365(c)(1).

The Thirteenth Circuit correctly reasoned that the unambiguous language of section 365(c)(1) requires adoption of the "hypothetical test," which prevents the Debtors from assuming the Agreement over Under My Thumb's objection. R. at 12.

While Congress designed the Bankruptcy Code to foster successful reorganization for the Debtors in chapter 11, the Code also protects the rights and interests of non-debtor parties like Under My Thumb. To let the Debtors assume the Agreement without Under My Thumb's consent would ignore the Code's protections for the rights of creditors like Under My Thumb. In fact, it would allow a direct competitor access to patented and copyrighted Software, which Under My Thumb would never allow by its own consent. Section 365(c)(1) can prevent this outcome under the "hypothetical test." This Court should affirm the Thirteenth Circuit and prevent the Debtors from assuming the Agreement.

A. <u>The plain language of section 365(c)(1) prevents the Debtors from assuming the Agreement because federal patent law excuses Under My Thumb from performance.</u>

The text is the most indicative of the statute's meaning and any inquiry should start there. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). Section 365 generally grants to debtors in possession broad power to assume, assign, or reject executory contracts, even if provisions in those contracts forbid them to do so. *See* 11 U.S.C. §§ 365(a)-(f) (2012). But section 365 also provides an exception to this broad power in subsection 365(c)(1). Under subsection (c)(1), the trustee (or debtor in possession) "may not assume or assign any executory contract" if two conditions are satisfied: (1) "applicable law" must excuse the non-debtor party from "accepting performance from or rendering performance to any entity other than the debtor or the debtor in possession"; and (2) non-debtor party "does not consent to such assumption or assignment." 11 U.S.C. § 365(c)(1). Accordingly, if applicable law excuses Under My Thumb from accepting or providing performance under the Agreement, then the Debtors can neither assume nor assign the Agreement without Under My Thumb's consent.

i. *Federal patent law, which qualifies as "applicable law" under section 365(c)(1), prevents licensees like the Debtors from assigning the Agreement.*

Here, applicable law does excuse Under My Thumb from performance. As the Thirteenth Circuit held, the federal patent law which governs the Agreement should qualify as "applicable law" under section 365(c)(1). R. at 12; *see also Perlman v. Catapult Entm't, Inc. (In re Catapult*

Entm't, Inc.), 165 F.3d 747, 750 (9th Cir. 1999); *Everex Systems, Inc. v. Cadtrak Corp. (In re CFLC, Inc.)*, 89 F.3d 673, 679 (9th Cir. 1996). And federal patent law has long prevented the assignment of intellectual property licenses because licensees only have personal rights in licenses; not property rights. *Id.* Courts have generally agreed on this rule of law. *See Gilson v. Republic of Ireland*, 787 F.2d 655, 658 (D.C. Cir. 1986); *Stenograph Corp. v. Fulkerson*, 972 F.2d 726, 729 n. 2 (7th Cir. 1992); *PPG Industries, Inc. v. Guardian Industries Corp.*, 597 F.2d 1090, 1093 (6th Cir. 1996).

Because federal patent law prevents the Development from assigning the Agreement, section 365(c)(1) excuses Under My Thumb from performance to anyone besides the Debtors. And since Under My Thumb never consented to assumption or assignment of the Agreement, the Debtors can do neither.

Section 365(c)(1)'s application in this case is clear if one applies the instant case's facts to the statutory text:

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

11 U.S.C. § 365(c)(1) (substitution in italics). If section 365(c)(1) means what it says, then the Debtors cannot assume or assign the Agreement absent Under My Thumb's consent.

ii. *Section 365(c)(1) should apply to the Debtors because the Agreement is an executory contract and the Debtors are subject to section 365(c)(1)'s statutory limitations on a trustee.*

Even if section 365(c)(1) means what it says, the Debtors may still argue that section 365(c)(1) should not apply to them for two reasons. First, the Agreement is not an executory contract. And second, section 365(c) prevents the *trustee* from assuming an executory contract;

not the debtor in possession. 11 U.S.C. § 365(c)(1) (emphasis added). And since the Debtors are not trustees, section 365(c)(1) should not apply. However, both arguments ultimately fall short.

The first argument fails because the Agreement satisfies the test for what qualifies as an executory contract. Courts traditionally apply the Countryman Test, which says an agreement constitutes an executory contract if either would breach the agreement by failing to complete performance at the time of petition. R. at 10 n. 9. *See also RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257, 264 (4th Cir. 2004). Here, the Agreement has imposed ongoing obligations on both parties. For the Debtors, continued use of the Software means continued monthly fees owed to Under My Thumb. R. at 5. And as for Under My Thumb, they must continue to let Development use the Software. *Id.* What is more, courts have consistently held that non-exclusive licenses of intellectual property, like the Agreement, qualify as executory contracts. *See id.*; *In re Catapult Entm't, Inc.*, 165 F.3d at 750; *In re Kmart Corp.*, 290 B.R. 614, 618 (Bankr. N.D. Ill. 2003); *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 490 n. 2 (1st Cir. 1997).

The second argument also fails because the Bankruptcy Code grants debtors in possession all relevant *limitations*, conditions, rights, powers, functions, and duties that it grants a trustee. 11 U.S.C. § 1107 (2012) (emphasis added). *See also Cybergenics Corp. v. Chinery (In re Cybergenics Corp.)*, 226 F.3d 237, 243 (3d Cir. 2000) ("[w]hen no trustee is appointed, the Bankruptcy Code gives a debtor in possession the powers and duties of a trustee"). On that basis, because section 365(c)(1) limits a trustee from assuming or assigning an executory contract, it also limits the debtor in possession.

However, the courts are not unanimous on this point. In order to avoid section 365(c)(1)'s limitation on a debtor in possession, one court held that the Bankruptcy Code treats the debtor in possession and trustee as two different parties. *See In re Footstar, Inc.*, 323 B.R. 566, 571 (Bankr. S.D.N.Y. 2005). In concluding that section 365(c)(1) does not apply to the debtor in possession, the court reasoned that the Bankruptcy Code never defined trustee "as synonymous" with debtor in possession. *Id.* Instead, the debtor in possession and trustee are "different parties" with "different meanings," which means that section 365(c)(1) can limit the trustee, but not the debtor in possession. *Id.*

But section 1107 never required a debtor in possession to be synonymous with a trustee. Even if they are different parties, section 1107 imputes to a debtor in possession any limitations that the Bankruptcy Code imposes on a trustee. In fact, section 1107 *assumes* that a debtor in possession and trustee are different parties. Otherwise, section 1107 becomes superfluous. Yet the *Footstar* decision makes section 1107 even worse than superfluous. If section 365(c)(1) does not limit the debtor in possession, then section 365(c)(1) and section 1107 contradict each other. Under *In re Footstar*, section 365(c)(1) fails to impute a trustee's limitation on the debtor in possession, which section 1107 requires. This cannot do. Courts should construe statutes so they do not contradict each other. *Roberts v. Sea-Land Services, Inc.*, 566 U.S. 93, 100 (2012). Reading section 365(c)(1) to limit the debtor in possession to the extent that it limits the trustee is the proper approach to harmonize these statutes.

And contrary to the court in *Footstar*, courts have generally recognized that the debtor in possession shares the same obligations as the trustee. *See, e.g., Commodity Futures Trading Com'n v. Weintraub*, 471 U.S. 343, 355-56 (1985) (finding that the debtor in possession owes the "same fiduciary obligation" as a trustee). What is more, many courts have extended section 365(c)(1)'s limitations on trustees to also limit the debtor in possession. *See In re West Elec., Inc.*, 852 F.2d 79, 82 n. 1 (3d Cir. 1988); *Wellington Vision, Inc. v. Pearle Vision, Inc. (In re Wellington Vision,* *Inc.)*, 364 B.R. 129, 136-37 (S.D. Fla. 2007); *In re Kazi Food of Michigan, Inc.*, 473 B.R. 887, 890 (Bankr. E.D. Mich. 2011). In summary, section 365(c)(1) should apply to the Debtors even if they are not the trustee.

B. <u>This Court should prevent the Debtors from assuming the Agreement because a close reading shows that the plain meaning of section 365(c)(1) is clear and unambiguous.</u>

The Debtors cannot escape section 365(c)(1)'s limits on assumption. Thus, this Court should prevent the Debtors from assuming the Agreement because the plain meaning of the statute unambiguously requires it. *See In re Catapult Entm't, Inc.*, 165 F.3d at 751. And if the statute is unambiguous, then this Court does not need to go any further. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Indeed, if the statutory text itself shows clear congressional intent, then this Court "must give effect to the statute as it is written." *FMC Corp. v. Holliday*, 498 U.S 52, 58 (1990).

A closer reading of section 365(c)(1) reveals its proper application in this case. Section 365(c)(1) prevents the debtor in possession from "assuming *or* assigning" an executory contract. 11 U.S.C. § 365(c)(1) (emphasis added). The disjunctive language means that even if the debtor in possession does not intend to assign the contract, the debtor in possession still cannot assume the contract without the party's consent. Applying the statutory language to this case, its meaning is unambiguous: although the Debtors only intend to assume the Agreement, the Debtors cannot assume the Agreement because the Debtors have not satisfied the conditions in subsections (1)(A) and (1)(B). And since this is clear and unambiguous from the explicit language of the statutory text, this Court should end its inquiry there.

Indeed, most circuit courts that reviewed this issue have adopted this plain meaning interpretation of section 365(c)(1), also known as the "hypothetical test." *See In re West Elec., Inc.*, 852 F.2d 79, 82-83 (3d Cir. 1988); *City of Jamestown v. James Cable Partners, L.P. (In re*

James Cable Partners, L.P.), 27 F.3d 534, 537 (11th Cir. 1994); *In re Catapult Entm't, Inc.*, 165 F.3d 747, 750-51 (9th Cir. 1999); *In re Sunterra Corp.*, 361 F.3d 257, 265 (4th Cir. 2004).

However, not all circuits have adopted the "hypothetical test." *See, e.g., Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493-94 (1st Cir. 1997). While *Institut Pasteur* highlights a circuit split on whether to adopt the "hypothetical test," that does not necessarily suggest that section 365(c)(1) is ambiguous. In fact, this Court has held a statute as unambiguous despite a circuit split on the interpretation. *See, e.g., Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 781-82 (2018) (resolving a circuit split by applying an "unambiguous" statutory definition, which then precluded deference to an agency interpretation). The Debtors simply cannot escape an unambiguous statute as written. This Court should prevent the Debtors from assuming the Agreement.

C. <u>The plain language of section 365(c)(1) does not produce any absurdities that justify circumventing its statutory text as written.</u>

Despite its plain and unambiguous meaning, the Debtors would have this Court interpret section 365(c)(1) in a way that contradicts its own text. That is, they would allow a debtor in possession to assume an executory contract so long as the debtor in possession does not intend to assign it to another party. In effect, the Debtors want this Court to read "assume or assign" as "assume *and* assign" in section 365(c)(1). Some circuit courts have adopted this interpretation, also known as the "actual test." *See Institut Pasteur*, 104 F.3d at 493-94 (1st Cir. 1997); *Bonnevill Power Admin. v. Mirant Corp. (In re Mirant Corp.)*, 440 F.3d 238, 248-49 (5th Cir. 2006). Under this test, the Debtors can assume the Agreement with or without Under My Thumb's consent.

But to get to this test, the Debtors must first circumvent the statute's plain meaning. To do this, they must show that the "hypothetical test" produces absurdities that Congress could have never intended. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (recognizing that unless the outcome is absurd, courts must follow the plain meaning of the statute). While the Debtors may offer several arguments to avoid following the plain meaning of the text, all of them fail.

i. *The plain meaning of section 365(c)(1) under the "hypothetical test" does not create internal inconsistencies within the statute.*

The Debtors may argue that the "hypothetical test" produces absurdities because it renders the provisions of section 365 superfluous, thus creating internal inconsistencies. For instance, the "hypothetical test" renders the "applicable law" language in section 365(c)(1)(A) superfluous if, as in this case, a debtor in possession plans to assume, but not assign, an executory contract. R. at 23, *see Summit Inv. & Development Corp. v. Leroux*, 69 F.3d 608, 613 (1st Cir. 1995). This interpretation is a result of a misunderstanding as to section 365(c)(1)'s purpose in preventing assumption in the first place.

In a chapter 11 case, assumption without consent can cause the same problems that assignment without consent can cause. This case is instructive on this point: under the Plan, the Debtors only intend to assume the Agreement. R. at 7. The Plan will also have SFD owning 51% of the voting shares and several seats on the board of directors of TDI. R. at 8. But Under My Thumb did not vote for the Plan. *Id.* Under My Thumb also refuses consent to assumption of the Agreement because SFD owns a direct competitor to Under My Thumb. *Id.* In refusing consent, Under My Thumb intends to prevent SFD's access to its Software because assumption of the Agreement could effectively mean assignment of the Agreement to a direct competitor. *Id.*

Section 365(c)(1)(A) can protect Under My Thumb from this outcome if this Court adopts the "hypothetical test." Section 365(c)(1) remains operative even when a debtor in possession only assumes a contract because, as this case shows, assumption does not necessarily preclude a licensor from licensing a competitor in a chapter 11 case. Far from superfluous, section 365(c)(1)(A) remains an important safeguard in either assumption or assignment. Therefore, section 365(c)(1) retains its internal consistency.

ii. *Legislative history fails to demonstrably show that the "hypothetical test" produces outcomes that Congress never intended.*

The Debtors may invoke legislative history to show that the "hypothetical test" produces absurdities that Congress never intended. But this argument fails before it starts. If the statute is unambiguous, courts should not look beyond the statutory text. *Germain*, 503 U.S. at 253-54. As discussed above, a straightforward application of section 365(c)(1) to this case makes its meaning clear and unambiguous: Development cannot assume the Agreement because federal patent law excuses Under My Thumb from performance and Under My Thumb does not consent. This Court can stop there.

Nevertheless, some courts will not apply the plain meaning of a statute in *rare cases* where "the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (citation omitted) (emphasis added). Even so, this is not one of those rare cases for two reasons. First, the legislative history does not demonstrably render the "hypothetical test" at odds with congressional intent. The Debtors will probably refer to a 1980 committee report attached to a House Amendment to a Senate corrections bill as the relevant legislative history. *In re Sunterra Corp.*, 361 F.3d at 270 (citing H.R. 1195, 96th Cong., 2d Sess. § 27(b) (1980)). The 1980 Report says that this amendment allows the debtor in possession to assume an executory contract if it is a personal service contract and performance has not changed between prepetition and time of assumption. *Id.*

While the 1980 Report suggests that some congressional support for the "actual test" existed at some point, it is too inconclusive to override section 365(c)(1)'s plain meaning for two reasons. First, the 1980 Report does not even correspond to the 1984 legislation that enacted section 365(c)(1) as it is written today. *Id.* In fact, Congress never enacted the 1980 proposal. *Id.* Courts "are not free to replace a statute's meaning with unenacted legislative intent." *Id.* (citation omitted). And while the language enacted in 1984 may resemble the 1980 proposal, it does not necessarily follow that Congress enacted the language for the rationale stated in an obscure committee report from years ago. Indeed, Congress can enact similar language for different reasons.

Second, the 1980 Report is inconclusive because it represents just one House committee's opinion. *Id.* And one committee report is not reliable enough to determine the intent of the whole congressional body. Committee reports do not get voted on, changed, or even read at times. *See Somers*, 138 S. Ct. at 783-84 (2018) (Thomas, J., concurring in part and concurring in judgment) (doubting the reliability of committee reports as indicative of congressional intent). Therefore, to discard the unambiguous plain meaning of section 365(c)(1), the Debtors need much more than one House committee report from failed legislation years before the current statutory text was enacted. Thus, this Court should not go beyond the plain meaning of section 365(c)(1).

However, the 1980 Report is not the only legislative history that the Debtors could invoke. Even so, none of the legislative history is persuasive in this case. For instance, They may offer the legislative history of section 365(e) as evidence against the plain meaning of section 365(c)(1). *Leroux*, 69 F.3d at 612-613. A 1978 committee report indicated that section 365(e) will require that courts "ensure that…performance under the contract…gives the other contracting party the *full benefit of his bargain*." *Id.* This supposedly suggests that all of Congress intended that courts inquire into the actual consequences in each case, rather than an "abstract analysis" that the "hypothetical test" requires. *Id.* Courts have agreed with *Leroux* court in holding that this legislative history also applies to section 365(c)(1) because section 365(c)(1) is a "companion" to section 365(e). *See, e.g.*, *Institut Pasteur*, 104 F.3d at 493. This legislative history is supposed to conclusively shows that courts should discard the "hypothetical test" in favor of the pragmatic "actual test." *Id.*

But like the others, this legislative history fails to show conclusive congressional rejection of the "hypothetical test." Much like the 1980 Report, this 1978 Report is only one committee report written several years before Congress enacted section 365(c)'s current text in 1984. And one committee report is not reliable enough to conclusively show a general congressional intent contrary to the plain meaning of section 365(c). *See Somers*, 138 S. Ct. at 783-84. And it gets even worse for the 1978 Report: unlike the 1980 Report, the 1978 report is not even legislative history for section 365(c)(1). Although section 365(c) is similar to section 365(e), there remains significant differences in their text, function, and legislative histories. To mesh their legislative histories together and then call it conclusive evidence of contrary congressional intent to an unambiguous statute cannot meet the high bar required to go beyond a statute's plain meaning. Therefore, this Court should adopt the plain meaning of the "hypothetical test" and prevent the Debtors from assuming the Agreement.

iii. *While the "hypothetical test" may conflict with debtor reorganization, there are plausible reasons why Congress intended courts to apply section 365(c)(1) as written.*

Lastly, the Debtors may argue that this Court should reject the "hypothetical test" as producing absurdity because it conflicts with the fundamental purpose of chapter 11: "successful reorganization." *In re Sunterra*, 361 F.3d at 268. The "hypothetical test" frustrates reorganization by giving parties like Under My Thumb a right to "rescind" agreements just because the Debtors filed for bankruptcy. R. at 26. This gives parties unwarranted leverage that disadvantages the debtor in possession in negotiations. *Id.*

While this argument raises valid concerns, it still ultimately falls short. The bar to prove that a statute produces an absurdity is high: the statute must produce an outcome that "demonstrably" contravenes congressional intent. *See Ron Pair Enters., Inc.*, 489 U.S. at 242. So that means if a plausible reason explains a statute's questionable outcome, the statute did not produce an absurdity. *Sigmon Coal Co., Inc. v. Apfel*, 226 F.3d 291, 308 (4th Cir. 2000), *aff'd sub. nom. Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002).

Here, at least two plausible reasons can explain why Congress intended the plain meaning of section 365(c)(1) to hinder successful reorganization. First, the Bankruptcy Code has never favored debtor reorganization so much that the Code ignored all non-debtor rights and interests. In fact, the Code preserves non-debtor rights in many of its statutes. *See, e.g.,* 11 U.S.C. § 362(b) (2012) (recognizing many exceptions to the automatic stay). Thus, courts should never just assume that Congress erroneously enacted provisions of the Code that disfavor the debtor. *In re Sunterra Corp.*, 361 F.3d at 268.

Second, Congress may have intended the plain meaning of section 365(c)(1) under the "hypothetical test" because it preserves the main policy of federal patent law: fostering new technologies by excluding others, especially competitors, from using the technologies without the inventor's consent. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150-51 (1989). And licensing agreements like the Agreement allow an inventor to benefit from her labor while still retaining ownership and control over her patent. *In re CFLC, Inc.*, 89 F.3d at 676 n. 2. Any rule of law that allows the licensee to freely assign a patent license frustrates the patent holder's exclusive right to control and risks assignment to patent holder's competitor. *Id.* at 679.

The "actual test" would hinder federal patent law policy in a way that the "hypothetical test" would not. While the "actual test" would still preserve an inventor's control over assignment of a licensing agreement, it fails to preserve the inventor's control over assumption. And assumption of a license in chapter 11 could still risk an effective assignment of a license to a competitor.

The present case is an instructive example of how the pragmatic "actual test" fails protect inventors like Under My Thumb from a direct competitor. Under the "actual test," the Debtors can assume the Agreement without Under My Thumb's consent. That means SFD will have access to the Software, which means Under My Thumb effectively licensed their Software to a direct competitor and Under My Thumb cannot do anything to prevent it. And while the Bankruptcy Court could still use its equitable powers to prevent assumption of the Agreement, that does not necessarily mean the Bankruptcy Court will. After all, Bankruptcy Courts must focus only on "how the equities relate to the success of the reorganization." *N.L.R.B. v. Bildisco & Bildisco*, 104 S. Ct. 1188, 1197 (1984). In fact, the Bankruptcy Court confirmed the Plan over Under My Thumb's objections despite SFD's majority ownership called for by the Plan. R. at 8.

In contrast, the "hypothetical test" protects Under My Thumb's Software from competitors. Without Under My Thumb's consent, the Debtors cannot assume the Agreement. This would keep control of the Software with Under My Thumb, thus protecting the Software from a competitor and preserving the fundamental policies of federal patent law. And instead of having to rely on the unpredictable equitable powers of the Bankruptcy Court under the "actual test," Under My Thumb can rely on a predictable, bright line rule that protects patented inventions in every case. What is more, because Congress concerns itself with more than reorganization in a chapter 11 case, this protection for inventors provides another plausible reason why Congress would want courts to apply section 365(c)(1)'s text the way it is written. This Court should adopt the "hypothetical test" and prevent the Debtors from assuming the Agreement under section 365(c)(1).

II. THE THIRTEENTH CIRCUIT PROPERLY HELD THAT THE ACCEPTANCE FROM AT LEAST ONE IMPAIRED CLASS OF EACH DEBTOR (THE "PER DEBTOR" APPROACH) IS REQUIRED UNDER SECTION 1129(a)(10) OF THE BANKRUPTCY CODE.

The Thirteenth Circuit correctly reasoned that a "per plan" approach to section 1129(a)(10) effectively sabotages the voting requirement for impaired creditors and impedes effective negotiation in pursuit of an effective chapter 11 plan. R. at 21.

While chapter 11 reorganization seeks broadly to create flexible and efficient reorganizations, it does not do so at the expense of the corporate form or the interests of impaired creditors. Each Debtor must demonstrate acceptance from at least one class of impaired creditors in order to secure plan approval. As a result, the Debtors must negotiate with Under My Thumb to reach a plan that is acceptable to them.

The Court should affirm the Thirteenth Circuit and hold that the "per debtor" approach is the correct interpretation of section 1129(a)(10).

A. The plain meaning of section 1129(a)(10) requires that the Court adopt the "per debtor" approach.

Debtors argue that the plain meaning of section 1129(a)(10) clearly demands that, no matter how many debtors are involved in a joint plan, the approval of a single class of impaired creditors is all that is needed to approve the entire plan. This is not the case.

"The court shall confirm a plan only if all of the following requirements are met." 11 U.S.C. §1129(a) (2012) (emphasis added). This language is conjunctive – all sixteen of the provisions that follow it must be met before a plan can be confirmed. *See, e.g., Buffalo Sav. Bank v. Marston Enters., Inc. (In re Marston Enters., Inc.)*, 13 B.R. 514, 516-18 (Bankr. E.D.N.Y. 1981) (Duberstein, J.). Included in this list is section 1129(a)(10), under which a plan may only be approved "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).

Debtors would argue that the term "plan" plainly includes "joint plan," but they do not and cannot present any language that supports such an interpretation. Additionally, this interpretation ignores the other fifteen limitations and the larger statutory framework. "Statutory construction is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes the meaning clear, or because only one of the permissible meaning produces a substantive effect that is compatible with the rest of the law." *United Savings Ass'n v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (1988).

On its face, "plan" is singular and unadorned with modifiers like "joint." However, within the bankruptcy code, "the singular includes the plural." 11 U.S.C. § 102(7) (2012). Applying this rule of interpretation, a singular plan with at least one impaired class of creditors must also receive approval from at least one such class. Applying the plural to the clause creates the rational outcome – in a plan with multiple debtors each debtor must receive approval from at least one class of its impaired creditors. To hold otherwise would create an absurd result in which conglomerates of innumerable subsidiaries can ignore impaired creditors so long as there is at least one class of impaired creditors that is happy.

Joint, as defined in Black's Law Dictionary, is "united; combined; undivided; done by or against two or more unitedly; shared by or between two or more." Joint is not the plural of a single-debtor plan; rather it is a descriptor of a method of dealing with multiple debtors. Joint administration allows for procedural efficiencies but does not change any of the substantive requirements for each debtor.

Debtors rely on the 9th Circuit's adoption of the "per plan" test as persuasive precedent. *JPMC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (In re Transwest Resort Props., Inc.)*, 881 F.3d 724 (9th Cir. 2018). The court in *Transwest* held that, because 1129(a)(10) does not explicitly distinguish between single-debtor and multi-debtor plans, the plain meaning of "plan" includes both types. *Id.* at *730. Without additional context, this analysis is unconvincing. *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991).

For example, if the approval of only one class of creditors across a joint plan of reorganization is needed, the right to vote on a plan under section 1126 becomes much less meaningful. "An impaired creditor's right to vote is [. . .] in effect, its bargaining chip at the table." R. at 16. Under a "per plan" approach, management merely needs to "shop" a joint plan around until it can satisfy a single impaired class of creditors and the rest are left holding the bag. The plain meaning of section 1126 is designed to give impaired creditors the ability to negotiate – is it reasonable that the plain meaning of section 1129(a)(10) takes the teeth out of section 1126?

Further, section 1129(a)(10) applies even in a "cram down" scenario. 11 U.S.C. §1129(b). The provision ensures that "each debtor obtains at least a minimal level of support from its impaired creditors through the negotiation process before its plan can be confirmed." R. at 16; *see, e.g., In re Combustion Eng'g, Inc.,* 391 F.3d 190, 243-44 (3d Cir. 2004). A "per plan" approach would undermine these creditor protections in "cram down," but the Ninth Circuit and Debtors adopt the "per plan" approach anyways.

It isn't hard to imagine a large corporation—like General Electric, Amazon, General Motors, or Proctor & Gamble—filing a joint plan of reorganization under chapter 11. Debtors would allow such entities to skip negotiations with most of their impaired creditors, which might reasonably number in the hundreds, but nonetheless obtain court approval of their joint plan so long as at least one impaired creditor is negotiated with. Such a result is undesirable, to say the least.

A better precedent for the Court's analysis is a series of opinions from the District of Delaware, which have adopted the "per debtor" approach in line with the Thirteenth Circuit. *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). These cases have held that, in the context of jointly administered cases, each debtor must be able to meet the requirements of section 1129(a), including those of section 1129(a)(10). *Id.*

Chapter 11 is designed to be flexible in order to foster meaningful negotiations between management, creditors, and shareholders regarding the terms of any plan. R. at 15. TDI only consists of nine subsidiaries. *Id.* at 4. Under My Thumb has a reasonable fear that their intellectual property will be given to a competitor despite explicit contract language that would protect it in any other situation. Development has several viable options to safeguard this intellectual property, alleviate the concerns of Under My Thumb, and obtain their consent to the chapter 11 plan. Section 1129(a)(10) exists to protect entities like Under My Thumb and should not be abrogated by adopting the "per plan" approach. Instead, this Court should adopt the "per debtor" approach in order to protect intellectual property like Under My Thumb's Software.

B. <u>The goals of the "per plan" interpretation are already accomplished through substantive consolidation, which the Debtors did not pursue.</u>

A "per plan" approach to section 1129(a)(10) is only appropriate in the case of substantive consolidation. Substantive consolidation is a judicially created equitable remedy in bankruptcy where the assets and liabilities of technically distinct corporate entities are pooled together and such entities are treated as if they were, in fact, one single entity. R. at 18. In such a situation, a single class of impaired debtors might be enough to approve a reorganization plan.

Substantive consolidation "enables a bankruptcy court to disregard corporate entities, piercing their corporate veils in a sense, in order to reach assets for the satisfaction of debts of a related corporation." *James Talcott, Inc. v. Wharton (In re Continential Vending Machine Corp.)*, 517 F.2d 997, 1000 (2d Cir. 1975). Because of this, courts agree that the doctrine should be applied sparingly. R. at 18; *See, e.g., Alexander v. Compton (In re Bonham)*, 229 F.3d 750, 767 (9th Cir. 2000).

In this case, however, the Debtors have pursued a joint reorganization and not substantive consolidation. As a result, each debtor may reorganize only the assets and liabilities of its own bankruptcy estate. *See In re Tribune Co.*, 464 B.R. at 181. The corporate veils remain intact, and as such, must be respected by declining to adopt a "per plan" approach.

A "per plan" approach is distasteful for the same reasons that substantive consolidation is narrowly applied. *See, e.g., Skidmore, Owings & Merrill v. Canada Life Assurance Co.*, 907 F.2d 1026, 1027 (10^{th} Cir. 1990). Disregard of the corporate form creates substantive issues for business owners and those that advise them. In addition, it raises risk for those that do business with corporate entities. Potentially, a non-uniform respect for corporate form undermines confidence in the various corporate codes more generally. Contracting, especially for intellectual property, becomes a lot riskier if this Court adopts the "per plan" approach, which empowers lower courts to ignore explicit contractual terms. This instability undermines the confidence with which companies and inventors can contract with respect to their intellectual property rights.

Because the Debtors were not substantively consolidated, the Plan actually consists of ten different plans, one for each of the Debtors. R. at 19. To hold differently would create a bypass for the rigorous requirements for substantive consolidation. *See Reider v. Fed. Deposit Ins. Corp.* (*In re Reider*), 31 F.3d 1102, 1109 (11th Cir. 1994).

The goals of the "per plan" approach are effectively accomplished by substantive consolidation, an avenue which has not been pursued by the Debtors. It is unnecessary and perhaps even harmful to create another variation of substantive consolidation in the "per plan" variation of section 1129(a)(10). If consolidated, the Debtors could have their Plan approved with the consent of a single creditor. However, without consolidation, the Debtors cannot bypass Under My Thumb because Development is a separate corporate entity. Certainly, the Debtors have used the respect for the corporate form to their advantage in the past – they cannot now selectively ignore it.

C. A "per debtor" interpretation of section 1129(a)(10) prevents unique and important features of each debtor from being overlooked – like the inadvertent infringement of intellectual property rights.

In addition to the plain meaning, it is important to note that "courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity." *Pepper v. Litton*, 308 U.S. 295, 304, 60 S.Ct. 238, 84 L.Ed. 281 (1939). Generally, the nature of equity in bankruptcy is pecuniary – not every creditor will be happy with their slice of the financial pie and the bankruptcy court must adjudicate the portions. However, in this case the efficacy of copyright protection through limited licenses is also at issue. A "per plan" interpretation would allow protected works to be transferred and sold despite the protestations of their authors in the name of efficiency and flexibility. The Court should avoid this outcome and affirm the "per debtor" interpretation of section 1129(a)(10).

By its nature, Development is a substantially different entity from the Operating Debtors. When TDI was acquired by Start Me Up, Inc. in 2011, Development was not required to act as a borrower or as a guarantor under the credit facility. R. at 6. This was precisely because Development lacked the assets of the Operating Debtors – it had no hotels, no casino, and no equipment. Development exists for one purpose – to act as a vehicle for the Software license. *Id.* at 4.

Indeed, it is telling that the syndicated group of lenders involved in the 2011 acquisition did not seek a first priority lien from Development as they did from the Operating Developers. *Id.* at 6. It is likely that the lenders thought the Software license would be unrecoverable in bankruptcy and thus would not be helpful to secure the loan. Those same lenders would likely be surprised to learn that an express limitation on license transfer may be ignored as an irrelevant feature under a "per plan" interpretation of section 1129(a)(10).

If the Court were to find a "per plan" interpretation of section 1129(a)(10) to be appropriate, it would create the impression that intellectual property rights are no longer protected by contracts like the Agreement. Enterprising corporations could acquire access to a variety of patents and copyrights merely through targeted acquisition of distressed companies. Further, the rights of inventors, authors, and software developers to be masters of their creations is not statutory, but Constitutional. *See* U.S. Const. Art I. § 8. The Founders intended to encourage innovation and creativity through intellectual property laws, and these protections should not be infringed.

In summary, Under My Thumb is not withholding its approval of the Plan irrationally. SFD, which is the majority shareholder in its competitor, will become the effective owner of its Software license. R at 8. Notwithstanding the preceding facts, Under My Thumb views the rest of the Plan favorably. *Id.* at 7. TDI and Development could alleviate Under My Thumb's concern in several ways. For example, SFD could make a contractual promise to screen Under My Thumb's competitor from the Software and include a provision for liquidated damages if it fails to do so.

However, there are no facts that support any attempt by the Debtors to negotiate or to attempt to alleviate Under My Thumb's concerns.

Under My Thumb was certainly not consulted when TDI took on $3 billion of debt in its acquisition in 2011. Then, as here, Under My Thumb stood to lose a client and any return on its unsecured $7 million promissory note. However, in the instant action, there is additional skin in the game. Should the Plan be adopted, Under My Thumb's competitor will potentially come into possession of its proprietary Software, which it has used to obtain several customers. Such an event would threaten Under My Thumb's entire customer base.

For chapter 11 debtors who hope to emerge from bankruptcy, the ultimate goal is confirmation of a plan of reorganization. *Id.* at 15. The statute sets forth relatively few requirements for chapter 11 plans. *Id.* However, meaningful negotiation between management, creditors, and shareholders is one such requirement. *Id.* TDI and its subsidiaries must make a good faith attempt to negotiate with their creditors, including Under My Thumb.

CONCLUSION

For the foregoing reasons, the Court should affirm the holding of the Thirteenth Circuit and adopt the "hypothetical test." Doing so would prevent Tumbling Dice Development, LLC from assuming the Software license without the express consent of Under My Thumb. In addition, the Court should affirm the Thirteenth Circuit in holding that section1129(a)(10) requires an impaired class of Tumbling Dice Development, LLC to vote in favor of the Plan.

APPENDIX A

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

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

(1)

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

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

. . . .

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

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

. . . .

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

. . . .