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 PETITIONER

Team Number P. 36
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether 11 U.S.C. § 365(c)(1) prohibits a debtor in possession from assuming a non-exclusive licensing agreement to continue performance as if no petition had been filed when anti-assignment provisions in applicable IP law prohibits the debtor from assigning the agreement without the consent of the non-debtor party.

II. Whether, in the context of a jointly administered multi-debtor reorganizational plan, 11 U.S.C. § 1129(a)(10) requires one accepting class of impaired creditors for each individual debtor involved or for the jointly administered plan as a whole.

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The bankruptcy court answered both questions presented in favor of the Debtors and confirmed the proposed reorganization plan. The bankruptcy court joined the majority of its sister courts by adopting the "actual test," and, determined that a debtor in possession is not prohibited from assuming an executory contract when it seeks only to continue performance as if no petition had been filed regardless of anti-assignment provisions in applicable law and the objection of the non-debtor party. The bankruptcy court also held that section 1129(a)(10) only requires the approval from one impaired class of creditors under a joint, multi-debtor plan. The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed these holdings in favor of Petitioner. On appeal, the U.S. Court of Appeals for the Thirteenth Circuit reversed on both issues. The Supreme Court of the United States granted the Petitioner's petition for writ of certiorari.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

11 U.S.C. § 102 Rules of construction

In this title—

(1) – (6) [omitted]

(7) the singular includes the plural;

(8) – (9) [omitted]

11 U.S.C. § 363 – Automatic Stay

(a) (Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

> **(1)—(2)** [omitted]
>
> **(3)** any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> **(4)—(5)** [omitted]
>
> **(6)** any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
>
> **(7)—(8)** [omitted]

(b) – (n) [omitted]

11 U.S.C. § 365 – Executory Contracts and Unexpired Leases

(a) – (b) [omitted]

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

(1)

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

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

(2) – (3) [omitted]

(d) [omitted]

(e)

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

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

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

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

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

(A)

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

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

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

(f)

(1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if—

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) – (p) [omitted]

11 U.S.C. § 541 – Property of the Estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) – (5) [omitted]

(b) – (f) [omitted]

11 U.S.C. § 1101 – Definitions for this Chapter

(1) "debtor in possession" means debtor except when a person that has qualified under section 322 of this title is serving as trustee in the case;

(2) [omitted]

11 U.S.C. § 1107 – Rights, Powers, and Duties of Debtor In Possession

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

(b) [omitted]

11 U.S.C. § 1108 – Authorization to Operate Business

Unless the court, on request of a party in interest and after notice and a hearing, orders otherwise, the trustee may operate the debtor's business.

11. U.S.C. § 1123 Contents of a plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—

(1) – (4) [omitted]

(5) provide adequate means for the plan's implementation, such as—

(A) – (B) [omitted]

(C) merger or consolidation of the debtor with one or more persons;

(D) – (J) [omitted]

(6) – (8) [omitted]

(b) – (d) [omitted]

11 U.S.C. § 1129 Confirmation of plan

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

(1) [omitted]

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) – (9) [omitted]

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

(b) – (d) [omitted]

STATEMENT OF THE CASE

For over thirty years, Tumbling Dice, Inc. ("TDI"), has operated one of the nation's largest gaming operations. R. 4. TDI runs casinos and resorts across the country through seven subsidiaries acting as the owners and operators at different locations (collectively, the "Operating Debtors"). Along with these entities, a final subsidiary, Tumbling Dice Development, LLC ("Development") manages a particularly important license agreement for TDI (collectively, the "Debtors"). R. 4.

One important way that the Debtors attract customers and sustain coordinated operations is through their casino loyalty program, Club Satisfaction. *Id.* In 2008, Development contracted with a software designer, Under My Thumb, Inc. ("Under My Thumb"), to build a new platform that would modernize Club Satisfaction. *Id.* Development agreed to pay $10 million for the software using a $7 million promissory note (the "R&D Note") and monthly payments based on the spending activity of Club Satisfaction members. *Id.*

When the software was completed a year later, the parties entered into a non-exclusive licensing agreement (the "Agreement"). The Agreement allowed Development to extend the benefits of the software to its "affiliated entities" and, in exchange, Under My Thumb was allowed to license the software to other companies despite building it using money from the Debtors. R. 5.

The project was a huge success for both parties. *Id*. Under My Thumb found third parties to purchase to license for software that it designed for Development. *Id*. Additionally, since the Debtors saw total membership and spending per member increase, Under My Thumb consistently received higher monthly payments than it had anticipated. *Id.* With the success of the software, it became an "essential part" of the Debtor's ongoing business model. *Id.*

In 2011, a hedge fund, Start Me Up, Inc. ("Start Me Up"), acquired 100% of TDI's stock through a leveraged buy-out. R. 6. As part of the debt financing, Start Me Up put up the Debtor's $3 billion in assets as collateral for the required loans to complete the acquisition. *Id*. Following this transaction, nothing in the record indicates that the Debtors were mis-managed or unable to pay their creditors. R. 6-9. In fact, Development never missed a monthly payment to Under My Thumb in full satisfaction of their obligations under the Agreement. R. 6. Nonetheless, the Debtors voluntarily filed for chapter 11 whereby its lenders consensually agreed in a Joint Plan for Reorganization (the "Plan") to restructure their secured debt, lower interest rates, and extend payment periods. R. 3, 7.

The Plan also called for the Start Me Up to inject new capital to fund a $66 million pro-rata payout to its unsecured creditors, including $3.3 million to Under My Thumb as holder of the R&D Note. R. 6. Additionally, the Plan called for Development to assume the Agreement and continue making monthly payments to Under My Thumb pursuant to the obligations of the Agreement. R. 7. The Plan originally received "near universal support" from all creditors, including Under My Thumb. R. 8.

However, Under My Thumb soon brought the entire reorganization to a screeching halt even though it only represents just $6 million out of $2.8 billion outstanding. R. 8. In order to satisfy the Plan's requirement for new capital, a private equity firm, Sympathy for the Devil, LP ("SFD"), provided $35 million to Start Me Up. *Id*. In exchange, SFD received 51% of voting shares of the Debtors while Start Me Up retained the other 49%. *Id*. Despite not participating in negotiations until this point, Start Me Up refused to vote for the Plan because it was "suspicious" of SFD's involvement. R. 6-9. Although SFD's portfolio of companies that it owned included a competitor of Under My Thumb, there is nothing on the record that indicates it posed any threat to Under My Thumb. R. 8. Still, without the vote of Under My Thumb, the bankruptcy proceedings could result in liquidation, or worse, could cause the collapse of the Debtors' entire business. R. 32.

STATEMENT OF THE STANDARD OF REVIEW

In this case, the only issues are questions of law because the facts are undisputed. R. 9. For this reason, the standard of review is de novo. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014). This Court must decide these issues as though it was the original court assigned to the case. *Razavi v. Comm'r of Internal Revenue*, 74 F.3d 125, 127 (6th Cir. 1996).

SUMMARY OF THE ARGUMENT

This Court should reverse the decision of the Thirteenth Circuit Court of Appeals by holding for the Petitioner on both issues presented.

The exception listed in section 365(c) does not apply in situations where a debtor in possession seeks only to assume a prepetition executory contract and continue performance as if no petition had been filed. The purpose of section 365 is to empower the bankruptcy estate to affirm or reject prepetition executory contracts during reorganization. A debtor's assumption of a valuable prepetition executory contract promotes their "fresh start" by forcing nondebtor parties to uphold existing contractual obligations. By preventing Development from assuming the Agreement, Under My Thumb attempts to take advantage of the Debtor's bankruptcy filing and secure a set of rights it would not have had otherwise.

The plain language and the legislative history of section 365 make clear that cases of assumption are to be treated differently than cases of assignment. Here, Development seeks only to assume the Agreement so that it can continue performance as if no petition had been filed. The Thirteenth Circuit's decision to prevent such assumption is based on a limited reading of section 365(c) that ignores its plain language, legislative history, and consequences outside of bankruptcy. This Court should instead adopt the "actual test" because it follows a statutory interpretation that comports better with bankruptcy principles, adheres to the explicit intentions of Congress, and does not conflict with other areas of the law.

Additionally, the bankruptcy court properly found that section 1129(a)(10) is satisfied upon the acceptance of only one impaired class of creditors under a jointly administered plan. This lower court properly adopted the *per plan* approach to be applied to all multi-debtor plans alike, irrespective of the number of debtors involved or the structure by which the plan is facilitated. The alternative *per debtor* approach misconstrues section 1129(a)(10) by imposing an unfair burden on debtors within a jointly administered plan. This approach has transformed Under My Thumb's voting right into a veto power, which has halted the entire reorganization process and threatened the survival of the Debtors' business.

This Court should apply the *per plan* approach, first and foremost, because the plain language of section 1129(a)(10) is unambiguous in not requiring varied treatment of different types of multi-debtor plans. This plain meaning holds true as well when viewed in the context of the Code, in which the provision's straightforward requirements refer only to a plan, not a debtor, thus supporting the *per plan* approach. The legislative history further confirms that section 1129(a)(10) was intended to be a minimum requirement to be fulfilled by a plan, which aligns the *per plan* approach most closely with Congress' intent. Finally, this Court should adopt a *per plan* approach because it fulfills the policy goals and purpose of chapter 11 reorganization.

ARGUMENT

I. Section 365(c)(1) does not apply when a debtor in possession seeks only to assume a prepetition executory contract and continue performance as if no petition had been filed.

This Court should reverse the decision of the Thirteenth Circuit and hold that section 365(c)(1) does not apply to the facts of this case because Development seeks only to assume the Agreement and continue performance as if no petition had been filed.

The purpose of chapter 11 reorganization is to restructure a business's finances so that it may continue operations, provide employment, pay creditors, and generate returns for stockholders. *National Labor Relations Board v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). When a debtor voluntarily files a petition with the bankruptcy courts, an estate is created under section 541 to consolidate all of the debtor's property, including its executory contracts. *Cinicola v. Scharffenberger*, 248 F.3d 110, 121 (3d Cir. 2001). In this case, the Agreement is an executory contract because it's a non-exclusive intellectual property ("IP") license. *In re Kmart Corp.*, 290 B.R. 614, 618 (Bankr. N.D. Ill. 2003).

Section 365 broadly enables a debtor to affirm or reject executory contracts and unexpired leases during bankruptcy so as to provide the debtor full flexibility in its reorganization efforts. *Chateaugay Corp. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944 (2d Cir. 1993); R. 15. Section 365(c)(1) provides a limited exception to the general rule, permitting assumption where "applicable law" prohibits a contracting party from subsequently assigning its contractual obligations to a third party. 11 U.S.C. § 365(c)(1).

A majority of bankruptcy courts plus the First and Fifth Circuits have applied the "actual test" to section 365(c)(1) and interpret that it is not triggered when the debtor seeks only to assume an executory contract and continue performance as if no petition had been filed. *Institut*

Pasteur v. Cambridge Biotech Corp., 104 F.3d 489 (1st Cir. 1997); *Bonneville Power Administration v. Mirant Corp. (In re Mirant Corp.)*, 440 F.3d 238 (5th Cir. 2006); *In re Cajun Elec. Power Coop.*, 230 B.R. 693 (Bankr. M.D. La. 1999). On the other hand, the Third, Fourth, Ninth, and Eleventh Circuits have adopted a "hypothetical test" based on a hypertechnical inquiry into whether "applicable law" would prohibit a hypothetical assignment to a hypothetical third party which would therefore prohibit the debtor's assumption in all cases. *In re West Elec.*, Inc., 852 F.2d 79 (3d Cir. 1988); *RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257 (4th Cir. 2004); *Perlman v. Catapult Entm't, Inc. (In re Catapult Entm't, Inc.)*, 165 F.3d 747 (9th Cir. 1999); *City of Jamestown v. James Cable Partners, L.P. (In re James Cable Partners, L.P.)*, 27 F.3d 534 (11th Cir. 1994).

Deciding this first issue relies solely on this Court's judgement of whether to apply the "actual test" or "hypothetical test." R. 11. The "hypothetical test" should be avoided because it yields absurd results that violate common sense bankruptcy principles. *See Crooks v. Harrelson*, 282 U.S. 55, 59-60 (1930) (explaining statutory interpretation is absurd if it is "so gross as to shock the general moral or common sense"); *Sullivan v. CIA*, 992 F.2d 1249, 1252 (1st Cir. 1993) (concluding statutory interpretations leading to absurd results should be avoided).

On the other hand, the "actual test" does not violate the provisions of the Bankruptcy Code (the "Code"), it aligns with the stated intentions of Congress, and it does not conflict with other areas of the law. *See In re GP Express Airlines, Inc.*, 200 B.R. 222, 231 (Bankr. D. Neb. 1996); *In re Cardinal Indus. Inc.*, 116 B.R. 964, 978 (Bankr. S.D. Ohio 1990); *Institut Pasteur*, 104 F.3d at 494. This Court should employ the "actual test" and hold that Section 365(c)(1) does not apply to the facts of this case because Development seeks only to assume its prepetition executory contract and continue performance as if no petition had been filed.

A. Section 365(c)(1) does not apply when a debtor in possession only seeks to assume a prepetition executory contract because blocking it from doing so violates bankruptcy principles.

Although the "actual test" comports better with the plain meaning of section 365(c), the fact that multiple courts have accepted differing "literal interpretations" of this provision indicates that other interpretive tools are necessary to discern the meaning of the text in section 365(c). *Summit Inv. & Dev. Corp. v. Leroux*, 69 F.3d 608, 612-613 (1st Cir. 1995). When a plain language interpretation of the Code is inconclusive, the Supreme Court and principles of bankruptcy mandate additional textual analysis through the provision's context in the Code and an understanding of pre-Code practices that the provision seeks to solve. *See Toibb v. Radloff*, 501 U.S. 157, 163-64 (1991); *Owen v. Owen*, 111 S. Ct. 1833, 1836 (1991); *Johnson v. Home State Bank*, 111 S. Ct. 2150, 2155 (1991).

1. Blocking a debtor in possession from assuming a prepetition executory contract violates bankruptcy principles because it conflicts with the plain language of section 365.

All cases of statutory interpretation involving the Code must begin with the language itself. *Toibb*, 501 U.S. at 160-161. The Thirteenth Circuit justified its adoption of the "hypothetical test" by explaining that it favored a literal interpretation of the phrase "assume or assign" and a technical reconciliation of conflicting references to "applicable law" in sections 365(c) and 365(f). R. 12-14; 11 U.S.C. § 365(c); 11 U.S.C. § 365(f). This analysis, however, was completed without acknowledging that it both created and ignored other ambiguities in the text of the Code. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (courts should refrain from interpretations that render statutory language as "insignificant, if not wholly superfluous").

A hypertechnical reading of a statute should be avoided if it creates surplusage and inconsistencies in the text of the Code. *In re Cardinal Indus. Inc.*, 116 B.R. at 977. In *Cardinal*, the court engaged in the same "assume or assign" debate as the Thirteenth Circuit. *Id*; R. 10-13. The issue at hand is whether the "or" in "assume or assign" in section 365(c)(1) should be read as a disjunctive "or" or a conjunctive "and." *In re Cardinal Indus. Inc.*, 116 B.R. at 977. The court in *Cardinal*, however, took into account that, practically speaking, a contract must be assumed before it is assigned. *Id*. If Congress intended for anti-assignment provisions in "applicable law" to apply to assumptions, it need not have included the words "or assign." *Id*. To avoid rendering their statutory language as surplusage, the court found that Congress included "or assign" to clarify different instances of when a debtor may be able to assume but not assign an executory contract. *Id*. The court applied the "actual test" and held that non-assignability in "applicable law" was not sufficient to preclude assumption. *Id*.

The "hypothetical test" as employed by the Thirteenth Circuit should be avoided because it creates surplusage and inconsistencies in the text of the Code. R. 12-14. The Thirteenth Circuit's analysis favoring the "hypothetical test" focuses on the "assume or assign" issue to the near exclusion of all other textual ambiguities. R. 12-13.; *see also Duncan v. Walker*, 533 U.S. 167, 174 (2001) (explaining a court has a duty to "give effect, if possible, to every clause and word" of a statute). For example, the Thirteenth Circuit doesn't acknowledge that Congress notably included "or debtor in possession" when listing the parties to whom the prohibition on the nondebtor party's acceptance of performance does not apply. 11 U.S.C. § 365(c); *see In re Hartec Enters., Inc.*, 117 B.R. 865, 8782 (Bankr. W.D. Tex. 1990). Similarly, the Thirteenth Circuit ignores the argument that by stating "applicable law excuses a party," Congress intended to tether "applicable law" to "excuses a party" and thereby mandated that "applicable law" be applied specifically to a set of circumstances. *In re Mirant Corp.*, 440 F.3d 238, 249. Although the Thirteenth Circuit may have successfully performed the necessary mental gymnastics to seemingly reconcile the different meanings of "applicable law" in section 365(c) and 365(f), that alone does not justify using the "hypothetical test." *E.g. In re Lil' Things, Inc.*, 220 B.R. 583, 591 (Bankr. N.D. Tex. 1998). While the "actual test" leads to results that more comprehensively address literal text of section 365, the mere fact that so many courts continue to disagree over its interpretation warrants moving to other tools of statutory analysis to clarify the text. *In re Cardinal Indus. Inc.*, 116 B.R. at 977.

2. Blocking a debtor in possession from assuming a prepetition executory contract violates bankruptcy principles because it conflicts with other provisions in the Bankruptcy Code.

To aid in clarifying the text of a statute, courts should look to the context of the provision within the framework of the Code. *Owen*, 111 S. Ct. at 1836 (changing its stance on a provision because of the impact it will have on exceptions listed in different section). This Court should not use the "hypothetical test" because it is based on a premise that renders all of 365 meaningless and conflicts with the role of the debtor in possession as manager of the bankruptcy estate. *In re Fastrax, Inc.*, 129 B.R. 274, 276 (Bankr. M.D. Fla. 1991); *In re GP Express Airlines, Inc.*, 200 B.R. at 231.

A postpetition debtor is the same entity as the prepetition solvent corporation. *In re Cajun Elec. Power Coop.,* 230 B.R. at 705. In *Cajun*, the debtor provided energy to the non-debtor parties through supply contracts. *Id.* at 699-700. Upon filing for bankruptcy, the debtor stated it would "continue to exist as a viable Louisiana Cooperative which supplies power to its Members." *Id.* at 700. In their opposition to the reorganization Plan, the non-debtor parties argued against the debtor's assumption of the supply contracts by claiming it became a new entity upon filing for bankruptcy. *Id.* at 704. The court in Cajun dismissed the "separate-entity" theory and held that the debtor was not precluded from assumption. *Id.* at 705.

In this case, Development as a debtor in possession is the same entity as Development when the Debtors were solvent. The Thirteenth Circuit relies on the "hypothetical test" to block Development from assuming the Agreement. R. 12-14. However, when the court in *West* first established the "hypothetical test", it justified its reasoning by interpreting the Code to mean that Congress viewed a solvent contractor and an insolvent debtor in possession as "materially distinct entities." *In re West Elec., Inc.,* 852 F. 2d at 83. This conclusion is in direct conflict with the Supreme Court's prior ruling in *Bildisco* where it clarified that a debtor in possession was the same "entity" that existed before the bankruptcy petition. *Bildisco*, 465 U.S. at 528 (1984). The court's interpretation in *Bildisco* aligns with sections 1101(1), 1107 and 1108 of the Code which collectively establish that a debtor in possession is functionally the same entity with a newfound set of rights. 11 U.S.C. § 1101(1); 11 U.S.C. § 1107; 11 U.S.C. § 1108. The court in *Texaco* decried the opinion in *West* for failing to even acknowledge the *Bildisco* ruling. *Texaco Inc. v. a. Land & Exploration Co.*, 136 B.R. 658, 670 (Bankr. M.D. La. 1992). If the separate-entity theory from *West* was correct, then all of section 365 would be meaningless because no debtor could ever assume a contract, absent the contracting party's consent. *In re Fastrax, Inc.*, 129 B.R at 276. For this reason, much of the "hypothetical test" is built on a "legal fiction" which conflicts with other provisions in the Code. *Summit Inv. & Dev. Corp.*, 69 F.3d at 614.

A debtor in possession 's assumption of a prepetition executory contract is permitted when it is crucial to the bankruptcy estate and the debtor in possession seeks only to resume its prepetition obligations. *In re GP Express Airlines, Inc.*, 200 B.R. at 231. In *GP Express Airlines*, the debtor and nondebtor party were both passenger airlines. *Id.* at 224. When the nondebtor attempted to block the debtor's bankruptcy plan, the court concluded that the debtor would not be able to successfully reorganize without continuing its executory contracts with the nondebtor party. *Id.* at 230. The court looked to the "best business judgement test" which gives full force to a debtor in possession 's decision to pursue assumption when the contracts are of a crucial importance to the debtor's estate. *Id*. The court held that in the context of a debtor in possession retaining a valuable prepetition executory contract to continue performance as if no petition had been filed, assumption is permitted regardless of the applicable anti-assignment law. *Id.* at 232.

Here, Development's assumption of the Agreement is not prohibited because it is crucial to TDI's ongoing business model and Development only seeks to resume its prepetition obligations. R. 5. Under My Thumb's software is an "essential part" of TDI's ongoing business model because it has led to an increase in membership and spending for its Club Satisfaction members. *Id*. For these reasons, the Agreement is a crucial part of TDI's bankruptcy estate. The bankruptcy estate as outlined in section 541 encompasses a debtor's contractual rights and section 363 permits the debtor in possession to use the property of the bankruptcy estate. 11 U.S.C. § 541; 11 U.S.C. § 363. In *GP Express Airlines*, the court cited these two provisions as provisions clearly conveying Congressional intent to protect the decisions of the debtor in possession while managing the bankruptcy estate. *In re GP Express Airlines, Inc.*, 200 B.R. at 232; *see also In re Mirant Corp.*, 440 F.3d at 251 (stating that a comprehensive administration of the bankruptcy estate prevents the harassment of debtors). The "hypothetical test" should therefore not be used because it prohibits a debtor in possession from using its discretion to assume valuable prepetition executory contracts reduces its role in managing the bankruptcy estate as in the Code. U.S.C. § 541; 11 U.S.C. § 363.

This Court should apply the "actual test" to the facts of this case because it better comports with other provisions in the Code by both recognizing the debtor in possession as a separate entity and protecting its role in the management of the bankruptcy estate.

3. Blocking a debtor in possession from assuming a prepetition executory contract violates bankruptcy principles because it has the same effect of enforcing an ipso facto clause.

Another tool of statutory interpretation that can reveal the meaning of a statute's text is understanding the pre-Code practices that the Code seeks to solve. *Johnson*, 111 S. Ct. at 2155 (analyzing the term "claim" as it was understood before and after the passage of the Code). Prior to the enactment of the Code, bankruptcy law had enforced "ipso facto" clauses in contracts that automatically terminated an agreement upon the insolvency of one party. *Mims v. Fid. Funding, Inc.*, 307 B.R. 849, 858 (Bankr. N.D. Tex. 2002). That changed, however, in 1978 when Congress included multiple provisions in the Code, including sections 365(e) and 365(f), to invalidate ipso facto clauses. *Id.*; 11 U.S.C. § 365(e); 11 U.S.C. § 365(f). Congress did this because the automatic termination of a debtor's contractual rights "frequently hamper[ed] rehabilitation efforts." S. Rep. No. 989, 95th Cong., 2d Sess. § 59 (1978).

Applying anti-assignment provisions in "applicable law" to cases of assumption will have the same results as enforcing ipso facto clauses because it will nullify entire classes of executory contracts upon a debtor's filing for bankruptcy. *In re Mirant Corp.*, 440 F.3d at 248-249. In Mirant, the debtor entered into two executory agreements containing ipso facto clauses with the non-debtor party. *Id.* at 241-242. The court in *Mirant* looked both to 365(c)(1) and 365(e) in holding that "applicable law" could not overcome Congress' prohibition on ipso facto clauses. *Id.* at 247-248.

In this case, applying anti-assignment provisions in federal IP law when Development seeks only to assume the Agreement will have the same results as enforcing ipso facto clauses because it will nullify every copyright and patent licenses when future debtors file for bankruptcy. If this Court employs the "hypothetical test" and holds for Under My Thumb, it will have grave consequences for every technology-related business agreement. *See In re Mirant Corp.*, 440 F.3d at 248-249. It will also set a precedent that will unnecessarily impair, if not destroy, future debtor's opportunities to reorganize under chapter 11. *Id*. Finally, it will invalidate the purpose of the Code which seeks to prohibit the enforcement of automatic termination of valid contractual agreements. *Mims,* 307 B.R. at 858.

The application of the plain meaning of section 365(c) in the context of bankruptcy principles that require analyzing the whole provision, the context of the provision in the Code, and pre-Code practices that the Code seeks to solve makes clear that the text does not intend to prohibit assumption by a debtor in possession that seeks only to assume the executory agreement and continue performance as if no petition had been filed. However, in the event that there is still ambiguity in the text, this Court should turn to the legislative history of 365(c) which explicitly reinforces this point. *See Toibb*, 501 U.S. at 162.

B. Section 365(c)(1) does not apply when a debtor in possession only seeks to assume a prepetition executory contract because blocking the debtor in possession from doing so disregards the stated intention of Congress.

When a statute's text remains contested after analyzing the plain meaning and context of the underlying principles of the law, courts should turn to the legislative history to determine the intention of Congress in drafting the statute. *Id*. In this case, Congress has repeatedly signaled and stated its intention that the exception in section 365(c)(1) does not apply to when the debtor in possession seeks only to continue performance under a pre-petition executory contract. H.R. Rep. No. 1195, 96th Cong., 2d Sess. § 27(b) (1980).

Congress overhauled the Bankruptcy Code in 1978 to ensure that every financial issue of a debtor, no matter how remote or contingent, could be addressed in one forum through bankruptcy. H.R. Rep. No. 95-595, 96th Cong., 1st Sess. 309 (1977); S. Rep. No. 95-989, at 21–22 (1978). The text of 365(c)(1) when it was originally enacted included additional language stating that *the trustee* also could assume or assign any contract if applicable law excuses a party from rendering performance *to the trustee.* 11 U.S.C. § 365(c)(1) (1982) (emphasis added). Courts favoring the "actual test" have taken this to reinforce that Congress did not intend an inquiry into any hypothetical assignees but rather intended a fact-specific specific analysis about to whom performance could be rendered. *In re Cardinal Indus. Inc.*, 116 B.R. at 977.

Only two years later, Congress proposed the Technical Amendments Act of 1980 with a series of changes to "correct technical errors" in the Bankruptcy Reform Act of 1978. H.R. Rep. No. 96-1195, at 1 (1980). Among those revisions was a proposed change of 365(c)(1)(A) to replace "the trustee" with "an entity other than the debtor or debtor in possession." 11 U.S.C. § 365(c)(1)(A). Congress clarified their intent with the change:

> 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.

H.R. Rep. No. 1195, 96th Cong., 2d Sess. § 27(b) (1980). Congress makes it abundantly clear that the exception listed in 365(c)(1) does not apply in situations where the debtor in possession seeks only to assume a prepetition executory contract and continue performance "as if no petition had been filed." *Id.*; *see also In re Cardinal Indus. Inc.*, 116 B.R. at 978. In their adoption of the "actual test," courts often cite this quote as determinative of Congress' intent to make clear that courts should apply a case-by-case analysis as to whether the debtor actually seeks to assign the executory contract. *Summit Inv. & Dev. Corp.*, 69 F.3d at 613.

The exact language in the 1980 proposal was enacted just four years later in the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"). *Id*. BAFJA was passed partly in response to a constitutional crisis elsewhere in bankruptcy law, so the Senate hastily enacted it without any of its own legislative history. *Id*. However, the Senate's approval of the language proposed verbatim by the House in the Technical Amendments Act of 1980 in BAFJA demonstrate its acceptance and approval of the House's reasoning for the adopted changes. *Id*.

Here, Development seeks only to assume the Agreement with Under My Thumb so that it can continue its performance as if no petition had been filed. R. 7-8. This is precisely the situation that Congress had in mind when it stated its intention in revising the language of 365(c)(1)(A). H.R. Rep. No. 1195, 96th Cong., 2d Sess. § 27(b) (1980). Nowhere in the legislative history did Congress indicate that it envisioned anything resembling the "hypothetical test" which is likely why the Thirteenth Circuit's opinion did not acknowledge this issue. R. 12-14. On the other hand, Congress made abundantly clear in both its passing and revising of section 365(c)(1) that it intended for something akin to the "actual test" whereby a debtor in possession seeks only to assume an executory contract and continue performance as if no petition had been filed. H.R. Rep. No. 1195, 96th Cong., 2d Sess. § 27(b) (1980).

C. Section 365(c)(1) does not apply when a debtor in possession only seeks to assume a prepetition executory contract because blocking the debtor in possession from doing so endows the nondebtor party with a windfall of rights not envisioned elsewhere in the law.

During bankruptcy, section 365 is meant to act as a shield for the debtor, not a sword for nondebtor parties. *In re Mirant Corp.*, 303 B.R. 319, 333 (Bankr. N.D. Tex. 2003). The application of the "hypothetical test" allows a nondebtor to take advantage of the debtor's bankruptcy filing and effectively breach an otherwise valid agreement. *In re Mirant Corp.*, 303 B.R. at 331. This provides the nondebtor with a windfall of rights both inconsistent with Congress' intention for chapter 11 bankruptcy and unfounded elsewhere in relevant law. *Id*. Absent provisions in an agreement to the contrary, contract law does not permit a party to legally breach when it is still being offered the benefit of its bargain and IP law does not permit a licensor to terminate a license after the licensee's sale of stock. *See Summit Inv. & Dev. Corp.*, 69 F.3d at 612; *Institut Pasteur*, 104 F.3d at 494. This Court should not provide these rights to Under My Thumb simply because the Debtors filed for bankruptcy. R. 5.

1. Blocking a debtor in possession from assuming a prepetition executory contract permits a contracting party to breach a valid agreement.

Allowing Under My Thumb to terminate the Agreement simply because the Debtors filed for bankruptcy provides it with rights not envisioned elsewhere in contract law. *See Summit Inv. & Dev. Corp.*, 69 F.3d at 612; *Institut Pasteur*, 104 F.3d at 494.

A nondebtor party cannot legally breach a valid agreement with a corporate debtor because it sold a majority of its stock to a third party during reorganization. *Institut Pasteur*, 104 F.3d at 495. In *Institut Pasteur*, a debtor filing for bankruptcy sought to assume multiple cross-licenses with its creditor during reorganization. *Id.* at 490. However, the debtor's reorganization plan also included selling all of its stock to a direct competitor of the creditor. *Id*. Objecting to the reorganization plan, the Creditor argued that the assumption constituted a de facto assignment and that it was being forced to accept performance from a third party. *Id*. at 490-491. The court disagreed, noting that a corporation is a legal entity distinct from its shareholders. *Id.* at 494. Unlike a merger whereby the target company ends its corporate existence, a majority stock sale does not change a corporation's legal identity. *Id*. Recognizing this, the court in *Institut Pasteur* held the creditor must continue to uphold its contractual obligations with the debtor because it was still the same legal entity with which it originally contracted. *Id*. at 494.

In this case, Under My Thumb cannot legally breach the Agreement with Development because TDI sold 51% of its stock to SFD during reorganization. R. 8. Under My Thumb's opposition to Development's assumption of the Agreement is rooted in their suspicions relating to SFD's ownership of a competitor in their portfolio. R. 8. However, there is nothing on the record that indicates that SFD poses any threat to Under My Thumb's business. *Institut Pasteur*, 104 F.3d at 495; R. 7-8. As the court demonstrated in *Institut Pasteur*, the TDI's majority stock sale does not change the corporate structure of Development as the contracting party in the Agreement. R. 8. Development is still the same corporate entity that Under My Thumb contracted with in 2008 with the same corporate relationship with TDI and its "affiliated entities." R. 4. For that reason, this Court should follow *Institut Pasteur* by holding that Under My Thumb is not permitted to break its contractual obligations with Development just because the Debtors filed for bankruptcy.

A nondebtor party cannot legally breach a valid agreement with a corporate debtor when it is still being offered the full "benefit of the bargain." *Summit Inv. & Dev. Corp.*, 69 F.3d at 612. In *Summit*, a Limited Partnership agreement contained an ipso facto clause which converted a general partner's interest into a limited partner interest upon filing for bankruptcy. *Id.* at 609. When one partner tried to enforce the clause on two bankrupt partners, the court stated that its mandate in determining this issue was to analyze whether the nondebtor partner could still receive the "full benefit of his bargain." *Id.* at 612-613. Additionally, the court noted that the burden of proof on this point rested with the nondebtor party. *Id.* at 612. Holding that the debtor parties could assume the partnership agreement and continue performance as if no petition had been filed, the court said that the nondebtor partners did not meet their burden of proof in showing any material change to the existing benefit of their bargain. *Id.* at 614.

Here, Under My Thumb cannot legally breach the Agreement with Development because Under My Thumb is still being offered the full benefit of their bargain. R. 7-8. When Development entered into the Agreement with Under My Thumb, it was given the flexibility to extend the benefits to its "affiliated entities." R. 5. In exchange, Under My Thumb was allowed to leverage the knowledge it gained in building the software for Development and license the technology to third parties. *Id*. During the subsequent years, the software was a success for Development, leading to additional profits for Under My Thumb, and Under My Thumb did indeed license the software for a profit to other companies. *Id*. In this regard, both contracting parties clearly reaped the benefit of their respective bargains. *Id*. Upon filing for bankruptcy, Development seeks only to assume the Agreement so that it could continue using and paying for the software as if no petition had been filed. R. 7-8. Although Under My Thumb will likely argue the benefit of their bargain has changed because of SFD's involvement in the reorganization, Development is still original contracting entity seeking to perform the same services as if the petition had not been filed. R. 7-8. At best, SFD's stock ownership is legally irrelevant to Under My Thumb's argument. *Id*. At worst, it makes them an "affiliated entity" of Development. *Id*.

For these reasons, Under My Thumb does not meet its burden of proof in showing that Development's assumption of the Agreement materially changes the benefit of Under My Thumb's bargain.

This Court should apply the "actual test" and allow Development to assume the Agreement so as not to provide Under My Thumb with a set of rights not envisioned elsewhere in contract law.

2. Blocking a debtor in possession from assuming a prepetition executory contract conflicts with the purpose of federal IP anti-assignment provisions.

Although federal IP law with respects to licensing generally prohibits assignment because the identity of a licensee is material to the agreement, this case is not a situation in which the identity of the licensee is changing. *See In re Catapult Entm't, Inc.*, 165 F.3d at 754-755; R. 7-9. Permitting Under My Thumb to terminate the Agreement simply because the Debtors filed for bankruptcy is unfounded in "applicable law" for IP. *Institut Pasteur*, 104 F.3d at 494.

A debtor in possession that has sold a majority of its stock during reorganization can assume an IP licensing agreement because its corporate identity has not changed. *Id*. In *Institut Pasteur*, the debtor entered into mutual cross-licensing agreements with a creditor whereby each party received a nonexclusive license to use certain patented and licensed technologies belonging to the other. *Id.* at 490. The licensing agreements prohibited assignment but permitted benefits extending to the "affiliated companies" of each party. *Id.* at 494. As part of the debtor's reorganization plan, the debtor sought to both assume the cross-licenses and sell all of its stock to a direct competitor of creditor. *Id*. When the creditor opposed the reorganization plan, the Court held that a debtor in possession 's assumption of an IP licensing agreement does not constitute a de facto assignment even when it sells a majority of its stock to a competitor of the creditor. *Id.*

Here, Development can assume the Agreement because its corporate identity did not change when the Debtors sold 51% of their stock to SFD. R. 8. Development proposes to continue as the same corporate entity which functioned prepetition while using the licensed technology in the same prepetition endeavor. R. 7-8. As noted by the court in *Institut Pasteur*, a stock sale does not alter a corporation's legal identity or the ownership of its assts, including its licenses. *See Institut Pasteur*, 104 F.3d at 493. Although the creditor in Institut Pasteur argued it was now having to license with a different party than whom it originally contracted, the court applied the "actual test" and disagreed. *Id*. The Court in this Case should recognize the similarity of these facts with those in *Institut Pasteur* and hold that Development's assumption of the Agreement is not forcing Under My Thumb to license with a new entity nor does it impose an insurmountable risk to Under My Thumb's business. R. 7-8.

Any counterargument exaggerating the consequences of this Court holding for Development that evokes some sort of slippery slope towards a free-assignability regime for intellectual property licenses misconstrues the limiting facts of this case. *See In re CFLC, Inc*., 89 F.3d 673 at 679. Development is the same entity post-petition, the Debtor's stock sale also does not change Development's corporate form, and all Development seeks to do is continue its performance as if no petition had been filed. R. 7-9.

This Court should recognize the "actual test" should be favored over the "hypothetical test" in interpreting 365(c) because, unlike the "hypothetical test," the "actual test" does not violate the provisions of the Code, it aligns with the stated intentions of Congress, and it does not conflict with other areas of the law. In this case, since Development seeks only to assume the Agreement and continue as if no petition had been filed, this Court should hold for the Debtors and reverse the decision of the Thirteenth Circuit.

II. Section 1129(a)(10) requires a jointly administered plan to obtain acceptance from just one impaired class of creditors under the multi-debtor plan.

The ultimate goal of chapter 11 of the Code is to allow debtors to reorganize such that a business may continue to operate. *Toibb,* 501 U.S. at 163-64. The Code requires a court to confirm a plan of reorganization which satisfies the requirements under section 1129. 11 U.S.C. § 1129. If a plan impairs a class of creditors, the plan must be accepted by "at least one class of claims that is impaired under the plan." 11 U.S.C. § 1129(a)(10).

Since the creation of this provision in the Bankruptcy overhaul of 1978, a majority of jurisdictions have adopted the *per plan* approach to section 1129(a)(10) and require acceptance from one class of impaired creditors under a plan. *See JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props. (In re Transwest Resort Props., Inc.)*, 881 F.3d 724, 730 (9th Cir. 2018). Until the Thirteenth Circuit's decision in this case, one jurisdiction had applied section 1129(a)(10) on a *per debtor* basis, which requires each debtor in a jointly administered plan to satisfy the provision. *In re Tribune Co.*, 464 B.R. 126, 180-183 (Bankr. D. Del. 2011).

The *per debtor* approach overly burdens debtors in a jointly administered plan and, in many cases, may render reorganization entirely ineffective. *See In re Transwest Resort Props., Inc.*, 881 F.3d at 732. While there is a need to balance the conflicting interests in any given bankruptcy case, the *per plan* approach maintains the balance of power established by Congress without altering the statute "based on [the court's] own policy views." *See SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods.*, LLC, 137 S. Ct. 954, 967 (2017).

This Court should affirm the bankruptcy court's ruling and adopt the *per plan* approach for all multi-debtor cases, including those which are jointly administered. In the context of section 1129(a)(10)'s plain language, construction, and legislative history, this Court should recognize that the *per plan* approach best serves the purpose of chapter 11 and reverse the decision of the Thirteenth Circuit. *Farrey v. Sanderfoot*, 500 U.S. 291, 298 (1991).

A. Section 1129(a)(10) requires that a *per plan* approach be applied to all multi-debtor reorganization plans alike because this approach complies with the statute's plain language and rules of statutory construction.

Statutory interpretation of the Code requires a court to begin with the text itself. *Toibb*, 501 U.S. at 160. This analysis requires understanding both the language in the provision, as well as the provision within the context of the Code. *United States v. Noland*, 517 U.S. 535, 536 (1996).

1. Applying the *per plan* approach preserves the clear and unambiguous plain meaning of section 1129(a)(10), requiring just one approving class of creditors under a jointly administered plan.

Where the plain language of a statutory provision is clear, it is the "sole function of the courts . . . to enforce it according to its terms." *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989). Since the plain meaning of section 1129(a)(10) does not distinguish between different multi-debtor reorganization plans, it is clear that Congress intended the provision to be applied to all multi-debtor plans on a *per plan* basis. *In re Transwest Resort Props., Inc.*, 881 F.3d at 729; R. 28.

Section 1129(a)(10) requires that "if a class of claims is impaired under the plan, at least *one class* of claims that is impaired under *the plan* has accepted *the plan*." 11 U.S.C. § 1129(a)(10) (emphasis added). This provision is "clear and unambiguous" and is thus satisfied where "a single impaired class accepts a plan." R. 27; *In re Transwest Resort Props., Inc.*, 881 F.3d at 729. The *per plan* approach is not only entirely consistent with the language of this provision, but it also simultaneously preserves its plain meaning.

Out of respect for the separation of powers, it is the court's role to "apply, not *amend*, the work of" Congress. *Henson v. Santander Consumer USA Inc*., 137 S. Ct. 1718, 1726 (2017) (emphasis added). This Court held true to this principle in *Toibb*, when it declined to "infer the exclusion of certain classes of debtors from the protections of chapter 11." 501 U.S. at 160-63. This Court correctly recognized that the Code did not expressly exclude nonbusiness individual debtors, and therefore did not provide for such an exception. *Id.*

Similarly, bankruptcy courts preserve the plain reading of the Code by refusing to insert additional requirements into provisions, including section 1129(a)(10). *See In re Columbia Falls, Special Improv. Dist. No. 25,* 143 B.R. 750, 766 (Bankr. D. Mont. 1992). For example, the court in *Columbia Falls* rejected the argument that section 1129(a)(10) included an exception for fully disclosed insiders, because no exception for disclosed insiders was made in the provision's text. *Id. See also In re S. Beach Sec., Inc.*, 376 B.R. 881, 892 (Bankr. N.D. Ill. 2007) (refusing to read an exemption into section 1129(a)(10) where all creditors were insiders).

In contrast, the Delaware bankruptcy court and the Thirteenth Circuit of Appeals in deciding this case have chosen to alter the plain meaning of section 1129(a)(10) by adopting the *per debtor* approach. *In re Tribune Co.*, 464 B.R. at 183; R. 15-19. These courts read section 1129(a)(10) to require each individual debtor under a multi-debtor plan to satisfy section 1129(a)(10), "absent substantive consolidation." *In re Tribune Co.*, 464 B.R. at 183; R. 15-19. This interpretation effectively re-writes section 1129(a)(10) to read "at least one class of claims that is impaired under the plan [of each debtor] has accepted the plan." U.S.C. § 1129(a)(10). This strained reading "cuts against the plain reading of the statute" as it inserts additional requirements which must be fulfilled by all debtors within a jointly administered plan. R. 18-19.

The plain reading of section 1129(a)(10) doesn't distinguish between "creditors of different debtors under 'the plan,' nor does it distinguish between single-debtor and multi-debtor plans." *In re Transwest Resort Props., Inc.*, 881 F.3d at 729; R. 28. The provision is void of any particular requirements for a jointly administered plan, and yet the *per debtor* approach thrusts a more substantial burden on debtors involved in these commonly organized plans. *See id.*

In this case, this heightened debtor burden could stifle the confirmation of the Plan and thus eliminate the Debtors' chance of a successful reorganization. *See id.* at 732; R. 32. While the Thirteenth Circuit's majority recognized that Congress specifically limited requirements for chapter 11 plans in order to ensure maximum debtor flexibility, their *per debtor* approach misconstrues this provision's meaning and counteracts the exact flexibility intended by Congress to benefit all debtors alike. R. 15.

This Court should be dissuaded from altering a "straightforward provision" by adding requirements that are not explicitly stated in the statute itself. *See In re S. Beach Sec., Inc.*, 376 B.R. at 892. Because the plain language of section 1129(a)(10) does not require "an impaired class of creditors of each Debtor to vote to accept" a jointly administered plan, this Court should adopt the *per plan* approach and apply this provision indiscriminately to all multi-debtor plans. *In re SGPA*, Inc., 2001 Bankr. LEXIS 2291, at *21 (Bankr. M.D. Pa. Sept. 28, 2001).

2. Applying the *per plan* approach is consistent within the context of section 1129(a) and complies with the Bankruptcy Code's applicable rule of statutory construction, section 102(7).

This Court frequently turns to statutory construction to resolve ambiguities, if any, in a given provision. *See United Sav. Ass'n of Tex v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). Statutory construction "is a holistic endeavor" which requires analyzing "the remainder of the statutory scheme" to clarify the meaning of the text. *Id.* In the context of the

Code, a *per plan* approach is consistent with the requirements listed under 1129(a) and with the rule of statutory construction in section 102(7).

The first applicable rule of statutory construction is that the Code must "be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991). The most applicable context of section 1129(a)(10) in the Code is section 1129(a), which lists sixteen requirements for confirmation of a plan. 11 U.S.C. § 1129(a). Each unique provision specifies exactly who or what can satisfy that particular requirement. 11 U.S.C. § 1129(a). For example, section 1129(a)(2) requires the "proponent of the plan" to comply with all applicable provisions of the Code. 11 U.S.C. § 1129(a)(2). The requirements listed in section 1129(a)(10), by comparison, must only be satisfied by "the plan." 11 U.S.C. § 1129(a)(2). The Code is otherwise void of any requirement that a plan must have one sole debtor, contrary to the "erroneous assumption" that the Thirteenth Circuit used to justify adopting the *per debtor* approach. R. 20. By imposing the requirements of section 1129(a)(10) on each debtor, the *per debtor* approach contradicts the very context in which section 1129(a)(10) is found. What's more, a *per debtor* reading of this provision could have lasting implications on statutory construction, for it raises the question as to whether the "plan," referenced elsewhere in the Code, also applies to every debtor in a plan. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) (noting a "basic canon of statutory construction [is] that identical terms within an Act bear the same meaning.").

Secondly, the rule of statutory construction in section 102(7) clarifies that "the singular includes the plural." 11 U.S.C. § 102(7). Applying section 102(7) to section 1129(a)(10), the statute reads: "at least one class of claims that is impaired under the plan [or plans] has accepted the plan [or plans]." 11 U.S.C. § 1129(a)(10); *see also In re Phillips*, 485 B.R. 53, 57 (Bankr.

E.D.N.Y. 2012) (applying section 102(7) to another provision to read "payment [or payments] . . . on account of personal bodily injury [or injuries]."). Even if section 1129(a)(10) is read in its plural form, it still only requires one class of impaired claims to satisfy the requirements for either a plan or multiple plans. R. 28. Thus, the *per plan* approach is consistent with and required by section 102(7). *In re Transwest Resort Props., Inc*., 881 F.3d at 730.

The *per plan* approach best aligns with the "statutory scheme" of the Code when viewed in light of sections 1129(a) and 102(7). R. 29. This fact further supports that Congress meant what it said in requiring support from just one impaired creditor affected by a given plan. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004).

B. Section 1129(a)(10) requires that a *per plan* approach be applied to all multi-debtor reorganization plans alike because it reinforces Congress' intent for section 1129(a)(10) to serve as a minimum requirement for confirmation of a plan.

In determining the meaning of a statute, a court must "look first to the statutory language and then to the legislative history if the statutory language is unclear." *Toibb*, 501 U.S. at 162. The legislative history behind section 1129(a)(10) is scant, further suggesting that Congress' intent is clearly written within the plain language of the Code. *See In re S. Beach Sec., Inc.*, 376 B.R. at 892. From the available legislative history, however, Congress' emphasis on a minimum requirement for the satisfaction of section 1129(a)(10) is unambiguous. *See In re Rhead*, 179 B.R. 169, 177 (Bankr. D. Ariz. 1994). This Congressional intent supports the adoption of the *per plan* approach for all multi-debtor reorganization proceedings.

Section 1129(a)(10) was first proposed in response to plan confirmations which lacked any creditor approval. *See In re Loop 76, Ltd. Liab. Co.*, 442 B.R. 713, 721-22 (Bankr. D. Ariz. 2010). The accompanying Senate report to the Bankruptcy Reform Act of 1978 explained that "one 'real' class of creditors must vote for a plan of reorganization." *In re Polytherm Indus., Inc.*, 1983 U.S. Dist. LEXIS 12704, at *32-33 (W.D. Wis. Oct. 17, 1983) (citing S. Rep. No. 96-305, 96th Cong., 1st Sess. 15 (1979)). By requiring just "one class" of accepting creditors, Congress established a bare minimum threshold for confirmation of a reorganization plan. 11 U.S.C. § 1129(a)(10). Although Congress was aware of joint administration and consolidation at the Code's creation, the legislative history is void of any further considerations for applying this provision differently in a particular multi-debtor context. *See* Fed. R. Bank. P. 1015 and section 1123(a)(5)(c). The inherent uniform treatment of all multi-debtor plans further stifles the Thirteenth Circuit's rationale for applying the *per debtor* approach solely to jointly administered plans.

While courts do agree that the purpose of section 1129(a)(10) is to garner "some indicia of support by affected creditors," this protection is minimal. *See In re Windsor on the River Assoc., Ltd.*, 7 F.3d 127, 131 (8th Cir. 1993). It is in no way an automatic, substantive right owed to each creditor involved in a plan. *In re Rhead*, 179 B.R. at 177. The *per plan* approach respects section 1129(a)(10) as a "technical requirement for confirmation." *Id.* Far from a substantive creditor protection, section 1129(a)(10) requires a mere "modicum of support from adversely affected creditors." *In re Gregory Rockhouse Ranch*, 2007 Bankr. LEXIS 4343, at *12 (Bankr. D.N.M. Dec. 21, 2007). Surely, in a case such as this where support for the reorganization plan is overwhelmingly positive, this plan has far surpassed the minimum requirement under section 1129(a)(10). R. 8.

This Court recognizes that courts are "necessarily entrusted with broad equitable powers to balance the interests of the affected parties, guided by the overriding goal of ensuring the success of the reorganization." *Pioneer Inv. Servs. V. Brunswick Assocs. Ltd. P'ship*, 507 U.S.

380, 389 (1993). Both the court in *Tribune* and the Thirteenth Circuit here have abused this power and disturbed the delicate balance of interests established by Congress by applying the *per debtor* approach. *In re Tribune Co.*, 464 B.R. at 183; R. 21. This approach inappropriately bolsters the rights of impaired creditors and unnecessarily burdens the obligations of debtors, overstepping Congress' mandate and losing sight of the ultimate goal of reorganization. For these reasons, requiring just one impaired class of creditors for a joint plan via the *per plan* approach prevents "a result demonstrably at odds with the intentions of" Congress. *Ron Pair*, 489 U.S. at 242-43.

C. Section 1129(a)(10) requires that a *per plan* approach be applied to all multi-debtor plans alike because this approach best facilitates reorganization and therefore closely aligns with the ultimate goal of chapter 11.

To interpret a statutory provision, a court "must not be guided by a single sentence or member of a sentences, but [must] look to the provisions of the whole law, and to its object and policy." *Maestro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956). The main goal of a chapter 11 bankruptcy proceeding is to promote the efficient reorganization of a business over liquidation, since that generally will be more lucrative for the parties involved. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc*., 554 U.S 33, 56 (2008). Applying this policy to section 1129(a)(10) shows that the *per plan* approach aligns most closely with the purpose of chapter 11 because it "paves a clearer path forward for confirmation" than does the *per debtor* approach. R. 20.

1. Applying the *per plan* approach facilitates the desired goal of reorganization by allowing all multi-debtor plans the same access to chapter 11 relief.

The purpose of a reorganization plan is to restructure a business so it can "continue to provide jobs, to satisfy creditors' claims, and to produce a return for its owners." *United States v. Whiting Pools*, 462 U.S. 198, 203 (1983) (citing H. R. Rep. No. 95-595, p. 220 (1977)). In multi-debtor cases, continued operation of the business is often coordinated through one jointly administered plan which preserves the corporate form for operational purposes. *See In re Enron Corp.*, 2004 Bankr. LEXIS 2549, at *235-36 (Bankr. S.D.N.Y. July 15, 2004). A jointly administered plan "is justified by the laudable desire to avoid the wasting of resources… [from] the duplication of effort if cases involving related debtors were to proceed entirely separately." *In re Steury*, 94 B.R. 553, 553-54 (Bankr. N.D. Ind. 1988); R. 3.

The *per plan* approach best aligns with the purpose of chapter 11 as it fosters reorganization of multi-debtor plans. This approach affirms that section 1129(a)(10) sets a minimum threshold as it requires the approval of only one class of impaired creditors within a given plan. *See In re Transwest Resort Props., Inc.*, 881 F.3d at 729. This low threshold is particularly important in jointly administered multi-debtor reorganization plans, where debtors often operate in an "integrated enterprise," depending on one another for successful reorganization. *See JPMorgan Chase Bank, N.A. v. Charter Communs. Operating, LLC (In re Charter Communs.)*, 419 B.R. 221, 251 (Bankr. S.D.N.Y. 2009).

On the other hand, the *per debtor* approach allows one single creditor to halt or destroy the entire reorganization process where all other creditors have accepted a plan. *See In re Transwest Resort Props., Inc.*, 881 F.3d at 732 (refusing to adopt the *per debtor* approach in part because one debtor's sole creditor would have prevented confirmation). The *per debtor* approach effectively separates each debtor as having a completely independent plan from the jointly administered plan. *In re Tribune Co.*, 464 B.R. at 184; R. 20. This means that "a plan proponent could . . . drop from a proposed joint plan those debtors that do not or cannot meet the § 1129(a)(10) requirement." *Id.*

Improperly applying the *per debtor* approach, the Thirteenth Circuit glossed over the fact that in many jointly administered multi-debtor plans, eliminating debtors from a reorganization plan could "deprive the bankruptcy estate of the assets and property essential to its rehabilitation effort," giving the reorganization plan "little chance of success." *See Whiting Pools*, 462 U.S. at 198. In this regard, the *per debtor* approach transforms section 1129(a)(10) into a powerful creditor veto power which "obstruct[s] a fair and reasonable reorganization," even when the plan garners near unanimous creditor support. *Young v. Higbee Co.*, 324 U.S. 204, 211 (1945).

In this case, Development's sole creditor, Under My Thumb, has single-handedly halted the entire reorganization process, frustrating "the congressional purpose behind the reorganization provisions." *Whiting Pools*, 462 U.S. at 208. Under My Thumb holds the Debtors hostage and threatens the plan's chances of success. R. 31; *In re Transwest Resort Props., Inc.*, 881 F.3d at 732. The *per debtor* approach would force the Debtors and all other creditors to choose between liquidation or elimination of an essential asset for their ongoing, integrated business model, otherwise making their "reorganization efforts impossible." R. 5, 32. Turning Under My Thumb's voting bargaining chip into an incontestable trump card "cannot be what Congress had in mind when it enacted section 1129(a)(10)." R. 16, 19.

2. Applying the *Per plan* approach furthers the chapter 11 goal of continuing the business operations in order to maximize debtors' ability to pay off creditors.

Another "basic objective" of chapter 11 is "maximizing property available to satisfy creditors." *Piccadilly*, 554 U.S. at 56. To achieve this, multi-debtor reorganization plans allow a business to continue to operate and utilize their assets "in the industry for which they were designed." H. R. Rep. No. 95-595, p. 220 (1977).

The *per plan* approach considers all debtors to be part of one jointly administered plan which preserves the unity of debtors' assets within the integrated business scheme. *Contra In re Tribune Co.*, 464 B.R. at 184. By allowing the corporate form to operate at its maximum capacity, the *per plan* approach results in the best chance of fully paying creditors. *See Whiting Pools*, 462 U.S. at 203.

In this case, the Debtors' continued operations is the best way to maximize profit and improve creditors' hope for eventual payout. Under My thumb has been promised a 55% distribution, which significantly exceeds the liquidation value of Development's assets. R. 7, 31. The reorganization plan also enables the Debtors to pay Under My Thumb its monthly fees under the Agreement. R. 31. In contrast, the *per debtor* approach would result in either liquidation of the entire enterprise or elimination of Development from the reorganization plan, jeopardizing the Debtors' current operations and future success of the business. R. 32. In either case, the Debtors will be unable to maximize their ability to repay creditors, including Under My Thumb.

Despite this optimal prospect of payout, Under My Thumb still voted against the plan, arguably with "circumspect motives." R. 31. Under My Thumb does not appear to be concerned about maximizing its payout, but instead disapproves of new company leadership. R. 8. It is this exact leadership, SFD, which has made reorganization possible. R. 8. Without such investment by SFD, there is nothing in the record to suggest that the parties would have been saved from liquidation. SFD's involvement has put all parties, debtors and creditors alike, in a much better financial position than they would have been otherwise. R. 8. This Court should apply the *per plan* approach to fulfill the goals of chapter 11 reorganization and facilitate the success of this overwhelmingly supported reorganization plan. R. 8.

CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Appeals for the Thirteenth Circuit and find in favor of Petitioner.

Respectfully Submitted,

Team P. 36
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