Team 39

No. 19–1004

IN THE

Supreme Court of the United States

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

Debtors,

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

Petitioner,

—v.—

UNDER MY THUMB, INC.,

Respondent.

On Petition for A Writ of Certiorari
To The United States Court of Appeals
For The Thirteenth Circuit

BRIEF FOR RESPONDENT

Team 39

Counsel for Petitioner

QUESTIONS PRESENTED

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

2. Whether, 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.

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The opinion of the Court of Appeals for the Thirteenth Circuit, R. at 2–32, is unreported but appears as No. 18-0805 (13th Cir. Mar. 4, 2019). The opinions of the Bankruptcy Appellate Panel for the Thirteenth Circuit and of the bankruptcy court are unreported and have not been reproduced in the record.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS INVOLVED

Section 365(c)(1) of the Bankruptcy Code, 11 U.S.C. § 365(c)(1), provides, in relevant part:

> 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 . . . .

Section 365(f)(1) of the Bankruptcy Code, 11 U.S.C. § 365(f)(1), provides, in relevant part: "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 . . . ."

Section 1129(a)(10) of the Bankruptcy Code, 11 U.S.C. § 1129(a)(10), provides, as a requirement that must be met for a court to confirm a plan: “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.”

STATEMENT OF THE CASE

At the core of the Bankruptcy Code is a nuanced balancing act. On the one hand, the Code's provisions, and in particular those of Chapter 11, encourage debtors to restructure and reorganize their corporations. But equally importantly, Chapter 11 protects creditors and seeks to maximize the value of the bankruptcy estate that can be used to satisfy their claims without infringing on these protections.

Two of the provisions that Congress specifically implemented to protect creditors are before the Court in this case. First, § 365(c)(1) forbids assuming or assigning an executory contract if applicable non-bankruptcy excuses the non-debtor party to the agreement from accepting performance from or rendering performance to a party other than the debtor, absent the non-debtor party's consent. This Court should adopt the view held by the majority of the circuit courts of appeals and bar assumption if, outside of bankruptcy, the non-debtor party to the agreement does not have to provide performance to or receive performance from anyone other than the debtor. That is, the debtor in possession cannot assume the contract if the governing non-bankruptcy law forbids the debtor from handing off its obligations under the deal to another entity unilaterally. To hold otherwise, as Petitioner seeks, would allow the debtor in possession to pass off its obligations and benefits under the agreement to a new, significantly restructured post-bankruptcy entity, imposing onto the non-debtor party a situation for which it had not bargained while failing to give it a say in the outcome.

Meanwhile, § 1129(a)(10) requires that in order for a court to confirm a reorganization plan, at least one impaired class of creditors accept the plan. This provision forces debtors to actively work with their creditors to negotiate a mutually beneficial restructuring deal and ensures at least some creditors that will be impaired by the deal support it. When multiple debtors file together, that imperative is not lessened; each debtor needs to put in just as much work to win creditor support as it would have had to do if it filed on its own. Petitioner's view of the statute contravenes both the meaning and the spirit of this provision, incentivizing related entities to file jointly by making it easier for them to impose a plan onto unsatisfied creditors—all they would need is one impaired class of creditors somewhere in the plan, belonging to any of the debtors, to sign on, and they could get the plan confirmed. Instead, requiring acceptance from one impaired class of each debtor in the joint plan honors Congress's effort to protect the power of creditors' votes and ensure that multi- and single-debtor plans equally obtain creditor support.

I. Factual History

Under My Thumb, Inc. ("Under My Thumb") is a leading software designer specializing in customer loyalty and reservations programs for the hospitality industry. (R. at 4.) In 2008, it entered into an agreement with Tumbling Dice Development, LLC ("Development") to produce and license a comprehensive, integrated software system to modernize Development's loyalty program, Club Satisfaction. (R. at 4.)

Development comprised one of nine wholly-owned subsidiary companies of Tumbling Dice, Inc. ("TDI"), a holding company. (R. at 4.) TDI's subsidiaries consisted of Development and eight other entities, each of which operated a luxury casino and resort and which together constitute "one of the largest gaming operations in the country." (R. at 4.) Development served as the licensee in the license agreement with Under My Thumb. (R. at 4.)

Under a Research and Development Agreement between the parties, Under My Thumb spent roughly $10 million in costs to create the Club Satisfaction software over the course of nearly a year. (R. at 4.) Development agreed to reimburse Under My Thumb for part of these costs as part of an unsecured $7 million promissory note, on which it remained current until June 2015. (R. at 4, 6.) After Under My Thumb completed the software, the parties entered into a license agreement (the "Agreement") granting Development a non-exclusive license to use its copyrighted and patented software in exchange for a monthly fee calculated based on the amount of spending activity by Club Satisfaction members. (R. at 5.) While the Agreement banned Development and its affiliated entities from assigning or sublicensing their rights to others without Under My Thumb's consent, it permitted Development to "extend the benefits of the Agreement" to the affiliated entities. (R. at 5.) It also authorized Under My Thumb to license similar versions of the software to third parties, which it did. (R. at 5.)

The new version of Club Satisfaction was a "tremendous success" for Tumbling Dice, resulting in tripled membership and increased spending by each member. (R. at 5.) Given the growth of casino loyalty reward programs in the industry, the software became an "essential part" of Tumbling Dice's business model. (R. at 5.) Meanwhile, Under My Thumb received higher than expected payments due to the program's popularity. (R. at 5–6.)

In December 2011, a hedge fund, Start Me Up, Inc. ("Start Me Up"), acquired 100% of TDI's stock in a leveraged buy-out deal. (R. at 6.) The acquisition imposed a "significant and unserviceable debt load" of approximately $2.8 billion onto TDI and its subsidiaries (collectively, the "Debtors"). (R. at 6.) Ultimately, the Debtors commenced Chapter 11 cases in January 2016. (R. at 6.) At the time, the Debtors owed $120 million to their unsecured creditors, including $6 million to Under My Thumb under the promissory note, but they remained current on the payments due under the Agreement. (R. at 6.)

After lengthy negotiations and mediation, the Debtors reached a plan support agreement (the "Plan"), which they filed in August 2016. (R. at 6–7.) The Plan was a joint plan, but it expressly stated that the Debtors' estates were "not being substantively consolidated and no Debtor [was] to become liable for the obligations of another." (R. at 7.) The Plan proposed to assume the Agreement with Under My Thumb and maintain the monthly payments in exchange for using the software. (R. at 7.) It also provided for a pro rata distribution of 55% to unsecured creditors, including about $3.3 million to Under My Thumb on Development's roughly $6 million debt to it under the note. (R. at 7.) Start Me Up provided $31 million of the funds for this, in exchange for 49% of the voting shares of the restructured TDI. (R. at 7.) The remaining $35 million came from Sympathy for the Devil ("SFD"), a private equity group that received 51% of TDI's voting shares. (R. at 7.) Although Under My Thumb initially supported the plan, it turned against it after discovering SFD's role in the deal. (R. at 7–8.) SFD's portfolio included a direct competitor of Under My Thumb that had tried to replicate its software for several years. (R. at 8.) Under My Thumb was thus "immediately suspicious" of SFD's involvement. (R. at 8.)

The Plan obtained "near universal support" from creditors. (R. at 8.) All of the debtors except Development each had at least one impaired accepting creditor class. (R. at 8.) However, Development's sole class of impaired creditors consisted solely of Development, which voted against the Plan, leaving Development without an accepting impaired creditor class. (R. at 8.)

II. Procedural Background

Under My Thumb objected to the Plan on multiple grounds, including that the debtors' assumption of the Agreement was impermissible under § 365(c)(1), since it did not consent to the assumption and applicable non-bankruptcy law excused Under My Thumb's performance absent its consent. (R. at 8.) It also argued that, under § 1129(a)(10), the court could not confirm the Plan because no impaired class of creditors of Development voted to accept it. (R. at 8.)

The bankruptcy court overruled these objections and confirmed the plan. (R. at 8.) It allowed Development to assume the Agreement, since in its view § 365(c)(1) forbids assumption only when the debtor actually seeks to assign the executory contract to a non-debtor party, which did not occur here. (R. at 8–9.) In addition, the court held that § 1129(a)(10) only requires that a minimum of one impaired class across the whole of a joint, multi-debtor plan accepts the plan, a condition that the plan here satisfied. (R. at 9.) On appeal, the Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court's rulings on both issues. (R. at 3, 8.)

Under My Thumb timely appealed, and the Court of Appeals for the Thirteenth Circuit reversed on both issues. (R. at 3.) First, the court held that § 365(c)(1) lays out a "hypothetical test," prohibiting a debtor from assuming an executory contract if, under applicable non-bankruptcy law, it could not hypothetically assign that contract. (R. at 12.) Looking to the text, the court relied on disjunctive language in the statute prohibiting "assuming *or* assigning" a contract. (R. at 12.) The court found no inconsistency between § 365(c)(1) and the broad grant of assignment power in § 365(f)(1), since in its view § 365(c)(1) only limits § 365(f)(1) when applicable law provides excuses for refusing to render or accept performance from someone other than the debtor, regardless of whether the contract is assignable. (R. at 13–14.) The court noted that despite the Bankruptcy Code's policy of encouraging reorganization, many provisions in the Code protect non-debtors' rights, including § 365(c)(1). (R. at 14–15.) Looking at the present case, the court determined that since intellectual property law generally excuses licensors from rendering performance to entities different from their original licensees, Development could not assign the Agreement absent Under My Thumb's consent. (R. at 11–12, 15.)

Turning to § 1129(a)(10), the court held that the provision requires that at least one impaired class of creditors for each debtor must accept a joint, multi-debtor plan, adopting what is known as the "per debtor" approach. (R. at 15–17.) First, the court noted that under the Code's rule of construction that the "singular includes the plural," the singular "plan" in the text actually encompasses the plural "plans." (R. at 19.) Furthermore, it contended that in absent substantive consolidation, a joint, multi-debtor plan actually consists of one plan for each debtor; therefore, each debtor must still satisfy § 1129(a)(10) as to its own creditors. (R. at 19–20.) The court also noted that since several other provisions in § 1129(a) can only be satisfied under a per debtor approach, § 1129(a)(10) must be as well. (R. at 19–20.) It further contended that § 1129(a)(10) was designed to protect creditors' voting power, an aim that "[c]onvenience and broad policy considerations" could not override. (R. at 20–21.) Thus, since none of Development's impaired creditor classes accepted the Plan, the court reversed the confirmation of the Plan. (R. at 21.)

Judge Jones dissented on both issues. (R. at 21.) First, he argued that § 365(c)(1) compels use of the "actual test," allowing assumption of an executory contract unless the debtor actually intends to assign it. (R. at 22.) He argued that the majority's interpretation would "produc[e] an absurd result" by erasing the distinction between a trustee and a debtor in possession. (R. at 22–23.) He also contended that the "applicable law" referenced in the statute does not become relevant when the debtor in possession seeks to assume, but not assign, an executory contract; in that case, the non-debtor continues to deal with the same entity with which it initially contracted. (R. at 23–24.) Judge Jones further argued that the hypothetical test renders § 365(f)(1) surplusage by eliminating a debtor's ability to ever assume, and thus assign, a contract, an outcome contrary to his view that Congress intended to allow a debtor in possession to assume an executory contract, even absent consent from the non-debtor party. (R. at 24–25.) Finally, he contended that Chapter 11's "goal of reorganization" supports adoption of the actual test. (R. at 25–27.)

Judge Jones also argued for the "per plan" interpretation of § 1129(a)(10), under which a joint plan only needs acceptance from one impaired creditor class across the entire plan. (R. at 27.) Turning to the statutory text, he claimed that the majority's position would in practice add the prepositional phrase "of each debtor" to the statute and that turning the singular "plan" into the plural "plans" does not change the statute's meaning. (R. at 27–28.) He dismissed the relevance of the other subsections of § 1129(a), since each one is phrased differently and they do not conflict with § 1129(a)(10). (R. at 29.) Judge Jones also contended that the per plan approach furthered Congress's desire to facilitate debtor reorganization rather than enable creditors to "hold the [d]ebtors and their stakeholders hostage." (R. at 29–32.) Finally, he argued that the doctrine of substantive consolidation was irrelevant to the analysis of a joint plan. (R. at 30.)

Under My Thumb timely filed a petition for a writ of certiorari in this Court. (R. at 1.) This Court granted the petition, limited to the two questions presented above. (R. at 1.)

SUMMARY OF ARGUMENT

This Court should adopt the "hypothetical test" interpretation of § 365(c)(1), allowing a debtor in possession to assume an executory contract only if applicable non-bankruptcy law allows it to assign the contract. The plain meaning of the text clearly indicates that, in light of the disjunctive "or," as opposed to the conjunctive "and," the statute prohibits either assumption *or* assignment of an executory contract if its conditions are met. The provision also does not conflict with § 365(f)(1), as § 365(f)(1) states a general rule that otherwise non-assignable executory contracts may be assigned in bankruptcy, while § 365(c)(1) bans assignment or assumption of contracts as required by applicable law to which the identity of the contracting parties is material. Finally, the hypothetical test does not contravene any clear congressional intent, as a significant number of provisions in the Bankruptcy Code limit the debtor's rights in favor of protecting those of non-debtors and nothing in the legislative history of § 365(c)(1) clearly establishes that Congress intended a different interpretation of the provision.

Furthermore, this Court should hold that a multi-debtor plan must satisfy § 1129(a)(10) on a "per debtor basis," such that at least one class of impaired creditors for each debtor accepts the plan. First, under the Bankruptcy Code rule of construction providing that "the singular includes the plural," § 102(7), the singular "plan" in the statute includes the plural "plans." Since a jointly administered petition actually consists of one plan for each debtor, each plan must satisfy the requirement of § 1129(a)(10). In addition, § 1129(a)(10) should be interpreted in the same way as the other provisions in § 1129(a), which only make sense as applied to a joint plan under the per debtor approach. Moreover, the per debtor approach reflects the purely procedural nature of joint administration and does not impact creditors' rights, which may only be done under substantive consolidation. Finally, Congress's aim in implementing § 1129(a)(10) was to protect creditors by forcing debtors to work together with their creditors in crafting restructuring plans that at least some impaired creditor classes accept. The per debtor interpretation requires each creditor in a joint plan to cooperate with its own impaired creditors to obtaining at least some support for the plan, and thus it more faithfully honors the policy motivating the provision.

ARGUMENT

I. Section 365(c) Allows a Debtor to Assume an Executory Contract if Applicable Non-Bankruptcy Law Permits It to Hypothetically Assign the Contract.

The ability to assume, assign, or reject executory contracts is a broad power delegated to the debtor in possession in chapter 11 bankruptcy proceedings. 11 U.S.C. § 365(a); *see also In re Magness*, 972 F.2d 689, 695 (6th Cir. 1992). This power, however, is subject to § 365(c)(1)'s limitation. In interpreting that limit, courts have adopted one of two frameworks to determine in what circumstances a debtor in possession may assume an executory contract. *See In re Footstar, Inc.*, 323 B.R. 566, 569–70 (Bankr. S.D.N.Y. 2005) (collecting cases).

Most circuit courts of appeals have adopted a "hypothetical test," under which a debtor in possession may not assume an executory contract absent the consent of the non-debtor party if applicable law would bar its assignment to a hypothetical third party. *See, e.g.*, *RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)* 361 F.3d 257, 271 (4th Cir. 2004); *In re W. Elecs. Inc.*, 852 F.2d 79, 83 (3d Cir. 1988). One circuit court of appeal and a number of lower courts, on the other hand, favor an "actual test," which allows assumption as long as the debtor does not actually intend to assign the contract to a third party. *See, e.g.*, *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 492–93 (1st Cir. 1997), *abrogated on other grounds by Hardemon v. City of Bos.*, No. 97-2010, 1998 WL 148382 (1st Cir. Apr. 6, 1998); *In re Footstar*, 323 B.R. at 569. This Court should follow the majority of the courts of appeals and adopt the hypothetical test because it falls in accordance with the literal, plain meaning of § 365(c)(1), is consistent with the power to assign contracts in § 365(f)(1), and does not conflict with the aims of the Bankruptcy Code.

A. The plain meaning of § 365(c)(1), in light of the use of the disjunctive "or" rather than the conjunctive "and," prohibits a debtor in possession from either assuming or assigning an executory contract if applicable law prohibits its assignment.

It is axiomatic that "[t]he starting point in every case involving construction of a statute is the language itself." *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985). When the language of the text is unambiguous, as here, "this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (citation omitted). The hypothetical test view of § 365(c)(1) reflects the plain meaning of the provision, evidenced in part by the fact that some courts refer to this interpretation as the "literal test," since it is "premised on a literal interpretation of the [s]tatute." *In re Sunterra*, 361 F.3d at 262 n.8. In fact, some courts adopting the actual test admit that the hypothetical test "has the obvious virtue of being consistent with the dictate of the Supreme Court that the plain meaning of a statute must be enforced when its terms are unambiguous." *RCC Tech. Corp. v. Sunterra Corp.*, 287 B.R. 864, 865 (D. Md. 2003), *rev'd and remanded sub nom. In re Sunterra Corp.*, 361 F.3d 257 (4th Cir. 2004); *cf. N.C.P. Mktg. Grp., Inc. v. BG Star Prods., Inc.*, 556 U.S. 1145, 1145 (2009) (mem.) (opinion of Kennedy, J., joined by Breyer, J., respecting the denial of certiorari) (noting that even critics of the hypothetical test acknowledge its "fidelity to the Bankruptcy Code's text").

Although the statute's text expressly governs the power of the "trustee" to assume or assign an executory contract, "it is well-established that § 365(c)'s use of the term 'trustee' includes Chapter 11 debtors in possession." *Perlman v. Catapult Entm't, Inc. (In re Catapult Entm't, Inc.)*, 165 F.3d 747, 750 (9th Cir. 1999); *accord In re West Electronics*, 852 F.2d at 82 & n.1; *cf. Institut Pasteur*, 104 F.3d at 492 n.7 (adopting the actual test but nonetheless acknowledging that a debtor in possession "has substantially the same rights and powers as a chapter 11 trustee"). More generally, the Bankruptcy Code provides that, subject to some exceptions not relevant here, the debtor in possession "shall have all the rights . . . and powers, and shall perform all the functions and duties . . . of a trustee serving in a case under this chapter." 11 U.S.C. § 1107; *see also* H.R. Rep. No. 95-595, 95th Cong., at 404 (1978) (describing this provision as placing the debtor in possession "in the shoes of a trustee in every way"). As a result, this Court can freely substitute in "debtor in possession" for "trustee" in its interpretation of the plain meaning of § 365(c)(1).

Section 365(c)(1) states that a trustee (and therefore, a debtor in possession), may not "assume or assign" an executory contract when its conditions are met. When "operative terms are connected by the conjunctive 'or,'" the term's "ordinary use is almost always disjunctive." *United States v. Woods*, 571 U.S. 31, 45 (2013). Because § 365(c)(1) bans "assumption *or* assignment," those two words must be "given separate meanings," since, "of course, there is no way that [assumption] could be regarded as synonymous with [assignment]." *Id*. (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)).

With this principle in mind, the "literal meaning" of § 365(c)(1) reveals itself to be "straightforward." *See In re Sunterra*, 361 F.3d at 265; *In re Catapult*, 165 F.3d at 750. The provision, at its core, reads as follows (substituting in "debtor in possession" for "trustee"): "The debtor in possession may not assume . . . any executory contract . . . if applicable law excuses a [non-debtor party] from accepting performance from or rendering performance to an entity other than . . . the debtor in possession . . . ; and such party does not consent to such assumption." *See In re Catapult*, 165 F.3d at 750. Thus, under the "literal" reading of this provision, *see In re Sunterra*, 361 F.3d at 262 n.8, a debtor in possession cannot assume a contract the non-debtor party does not consent to the assumption and applicable law prohibits assignment to a hypothetical third party—the exact formulation of the hypothetical test.

Adopting the actual test, on the other hand, would in practice transform the disjunctive "or" in "assume or assign" into the conjunctive "and." Under that view, a debtor in possession may assume an executory contract over the objection of the non-debtor party even if applicable law prohibits assignment, but may not assign the contract. *See Institut Pasteur*, 104 F.3d at 492. Thus, under the actual test, § 365(c)(1) only prohibits the collective act of first assuming the executory contract and then assigning it—that is, "assuming *and* assigning" is forbidden, but solely "assuming" is allowed. This approach flies in the fact of the provision's express language, which uses the disjunctive "or," which is why the majority of the courts of appeals have been "unable to so construe § 365(c)." *In re Sunterra*, 361 F.3d at 260. Section 365(c)(1), by its plain meaning, does not allow a debtor in possession *either* to assume *or* to assign an executory contract, absent consent from the non-debtor party, if the applicable non-bankruptcy law does not allow the debtor in possession to assign it. *Cf. RCC Tech. Corp.*, 287 B.R. at 866 ("The [actual] test has the weakness of reading the statutory language 'assume or assign' to mean 'assume and assign.'"). Since this Court presumes "that a legislature says in a statute what it means and means in a statute what it says there," *Connecticut National Bank*, 503 U.S. at 253–

54, it should adopt the hypothetical test, the only interpretation of § 365(c) that accurately reflects the plain meaning of the text.

B. The hypothetical test for § 365(c)(1) does not render § 365(f)(1) surplusage, since the two provisions deal with different types of applicable law, and thus it conforms with the statute's plain meaning.

This Court is "reluctant to treat statutory terms as surplusage in any setting," in light of its desire "give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks and citations omitted). Relying on this interpretative canon, some lower courts adopting the actual test have erroneously argued that the hypothetical test renders § 365(f)(1) surplusage. *See, e.g.*, *In re Hartec Enters., Inc.*, 117 B.R. 865, 872 (Bankr. W.D. Tex. 1990), *vacated on other grounds sub nom. United States v. Hartec Enterprises, Inc.*, 130 B.R. 929 (W.D. Tex. 1991). That provision provides that a trustee (and thus a debtor in possession) may assign an executory contract, "contrary provisions in applicable law notwithstanding." 11 U.S.C. § 365(f)(1). Since assumption is a prerequisite to assignment, *see* 11 U.S.C. § 365(f)(2)(A), these courts claim that this grant of assignment power seems to conflict with § 365(c)(1)'s prohibition on assuming an executory contract if applicable law forbids it (and the non-debtor does not consent). *See, e.g.*, *In re Catapult*, 165 F.3d at 751 (laying out and refuting this argument).

However, this alleged "conflict" is illusory, and concluding that the two provisions cannot be reconciled is "unduly pessimistic." *Id.* at 752. Rather, "a careful reading reveals that each subsection recognizes an 'applicable law' of markedly different scope." *In re Magness*, 972 F.2d at 695. The statutes exist in harmony when § 365(c)(1) is read as the narrow exception to the more general principle in § 365(f)(1). Section 365(f)(1) lays out a broad principle favoring the assignment of executory contracts. *In re Magness*, 972 F.2d at 695. As a result, even if the applicable law, as a general matter, "prohibits, restricts, or conditions the assignment" of executory contracts, § 365(f)(1) trumps that categorical anti-assignment law. *In re Catapult*, 165 F.3d at 752; *City of Jamestown v. James Cable Partners, L.P. (In re James Cable Partners)*, 27 F.3d 534, 538 (11th Cir. 1994).

Meanwhile, § 365(c)(1) "contains a carefully crafted exception to the broad rule," underlined by the fact that § 365(f)(1) explicitly subjects its terms to the limitations of § 365(c). *In re Magness*, 972 F.2d at 695. Section 365(c)(1) provides that when applicable law, rather than generally banning assignment, more narrowly "excuses a party from accepting performance from or rendering performance to an entity" other than the one with which it originally contracted, the debtor in possession cannot assign the contract (or assume it). *Id.* That is, if the assignment will "impact upon the rights of a non-debtor third party, then any applicable law protecting the right of such party to refuse to accept from or render performance to an assignee will prohibit" assignment or assumption by the debtor in possession. *Id.* The two provisions thus address two different categories of "applicable law": § 365(f)(1) overrides applicable law generally prohibiting or restricting assignments, while § 365(c)(1) preserves applicable law more narrowly providing "legal excuses for refusing to render or accept performance, regardless of the contract's status as 'assignable.'" *In re Sunterra*, 361 F.3d 266.

To parse out whether an applicable law is rendered irrelevant under § 365(f)(1) or bars assumption under § 365(c)(1), "a court must ask *why* the 'applicable law' prohibits assignment." *Id.* (citing *In re Magness*, 972 F.2d at 700 (Guy, J., concurring)). In particular, only applicable anti-assignment law "predicated on the rationale that the identity of the contracting party is material to the agreement" prohibits assumption under § 365(c)(1). *Id.*; *accord In re Sunterra*, 361 F.3d at 267; *cf., e.g., In re Bronx-Westchester Mack Corp.*, 20 B.R. 139, 143 (Bankr. S.D.N.Y. 1982) (arguing that § 365(c) targets "executory contracts that are personal in nature" but does not affect agreements that do not "depend upon a special relationship between the parties"). Therefore, a law that renders performance under the particular agreement between the two parties "nondelegable," as opposed to a statute laying out a "general prohibition against assignment," triggers § 365(c)(1)'s prohibition on assumption and assignment. *In re James Cable*, 27 F.3d at 538. This distinction is "one which the language of Section 365(f) and 365(c) itself suggests, and it is one which . . . opens the way to a thoughtful and just resolution of the issues." *In re Antonelli*, 148 B.R. 443, 448 (D. Md. 1992), *aff'd*, 4 F.3d 984 (4th Cir. 1993).

For instance, a debtor could, under § 365(f)(1), override a law banning assignment of any lease and assign the contract anyway, as long as the debtor complied with § 365(f)(1)'s other requirements. *See, e.g.*, *In re Federated Dep't Stores*, 126 B.R. 516, 519 (Bankr. S.D. Ohio 1990). This is because "the payment of rent pursuant to a lease is hardly the type of performance that depends upon the identity of the party that is to perform, i.e., the lessee." *In re Midway Airlines,* 6 F.3d 492, 495 (7th Cir. 1993).

In contrast, federal intellectual property law bans assignment of a non-exclusive license of intellectual property without licensor consent due to the personal nature of such agreements and would thus ban assumption under § 365(c)(1). *See Troy Iron & Nail Factory v. Corning,* 55 U.S. (14 How.) 193, 194 (1852) (holding that longstanding federal policy treats license agreements as personal to the licensee and not assignable unless expressly made so in the agreement). The reasoning for such a ban is that the specific licensee with whom the licensor licenses matters to the licensor. *Everex Sys. v. Cadtrak Corp. (In re CFLC, Inc.)*, 89 F.3d 673, 679 (9th Cir. 1996). Without requiring a licensee to seek consent from the licensor before sharing the license, a licensor "would lose the very important ability to control the *identity* of its licensees. Thus, any license a patent holder granted . . . would be fraught with the danger that the licensee would assign it to the patent holder's most serious competitor, a party whom the patent holder itself might be absolutely unwilling to license." *Id.*

For instance, here, Development could not assign the software license outside of bankruptcy under intellectual property law, because the fact that Development in particular was the licensee in the Agreement with Under My Thumb was "material to the agreement." *See In re Sunterra*, 361 F.3d 266. Thus, this Court should hold that Development, in its role as debtor in possession, cannot assume the Agreement absent Under My Thumb's consent under § 365(c)(1).

The hypothetical test, far from rendering § 365(f)(1) surplusage, gives full effect to the rest of the statute; it "does not inevitably set [the two provisions] at odds." *In re Catapult*, 165 F.3d at 752. Since the interpretation adheres to the literal meaning of § 365(c)(1) while also preserving the role of § 365(f)(1), this Court should adopt it.

C. The plain meaning of § 365(c)(1), which favors the hypothetical test, does not conflict with any clearly expressed congressional intent or with the Bankruptcy Code's purpose.

The plain meaning of statutory text is "conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (citation omitted). This Court only "adopts a restricted rather than a literal or usual meaning" of text when the plain meaning "would thwart the obvious purpose of the statute." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). Here, "the clarity of the statutory language at issue in this case obviates the need" for further inquiry. *See Patterson v. Shumate*, 504 U.S. 753, 761 (1992). But even if this Court determines that the text of § 365(c)(1) is ambiguous, no "clearly expressed legislative intention" prevents adoption of the hypothetical test. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 433 n.12 (1987); *cf. In re Sunterra*, 361 F.3d at 269 (noting that under *Ron Pair*, a statute's plain meaning governs unless the party contending otherwise meets its "stringent mandate" to prove that the result directly contravenes Congress's intent in drafting the statute).

While the general goal of bankruptcy policy is admittedly to successfully facilitate a reorganization and maximize the value of the debtor's assets, the Code balances this goal against protections for creditors and other non-debtors that may be adversely impacted by the restructuring. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 37 n.2 (2008) (noting that "this Court has rejected the argument that Congress had a single purpose in enacting Chapter 11" and that Chapter 11 strikes a balance between debtors' and non-debtors' interests). The Code accordingly contains a significant number of protections put in place to protect the rights of creditors and other non-debtors and limit the debtor's otherwise broad ability to restructure its affairs, *see In re Sunterra*, 361 F.3d at 268, so it is far from clear that policy implications favor the actual test, *see Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 12 (2000). Rather, the "existence of the [provisions favoring non-debtors] makes it plausible that Congress meant what it said in the Statute" and that the hypothetical test is consistent with Congress's intent behind § 365(c). *In re Sunterra*, 361 F.3d at 268.

Therefore, adopting the hypothetical test would not produce an "absurd and unjust result" or contravene any "obvious" congressional purpose. *Griffin*, 458 U.S. at 571, 574. But even if the actual test more closely aligns with the statutory purpose, "[a]chieving a better policy outcome . . . is a task for Congress, not the courts," *Hartford Underwriters*, 540 U.S. at 13, and so this Court should faithfully adhere to the plain meaning of § 365(c)(1), which squarely favors the hypothetical test.

Legislative history also fails to justify deviating from the text of § 365(c)(1). The strongest indication of any congressional intent regarding § 365(c)(1) is a single passage in a legislative material. *See In re Cardinal Indus., Inc.*, 116 B.R. 964, 978–80 (Bankr. S.D. Ohio 1990) (thoroughly chronicling § 365's legislative history); *see also In re Catapult*, 165 F.3d at 754 (same). Section 365(c)'s present form originated as part of the Bankruptcy Amendments and Federal Judgeship Act (BAFJA) of 1984, which was primarily designed to address an unrelated constitutional issue but also incorporated several other revisions to the Code. *See In re Cardinal*, 116 B.R. at 978. Among these was Technical Amendments Act of 1980, which had not been passed but contained the provision that became the present § 365(c). *Id.*

It is "clear that there exists no contemporaneous legislative history regarding the current formulation" of § 365(c). *In re Catapult*, 165 F.3d at 754. Nonetheless, proponents of the actual test point to a "relatively obscure committee report" accompanying a House amendment to a Senate version of the Technical Amendments Act, which stated that "[t]his 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." *Id.* (quoting H.R. Rep. No. 96-1195, 96th Cong., at § 27(b) (1980)).

Even acknowledging that this language somewhat favors the actual test, it fails to present any "obvious" purpose of the statute or an indication of "clearly expressed legislative intent," and thus it cannot overcome the plain meaning of the text of § 365(c)(1). *Cardoza-Fonseca*, 480 U.S. at 433 n.12; *Griffin*, 458 U.S. at 571. This passage never made its way into the report of the Senate Judiciary Committee, much less into any documents surrounding the development of BAJFA several years later. *In re Sunterra*, 361 F.3d at 270; *In re Cardinal*, 116 B.R. at 979–80. The interpretative language in the House report "relates to a different proposed bill, predates enactment of § 365(c)(1) by several years, and expresses at most the thoughts of only one committee in the House." *In re Catapult*, 165 F.3d at 754; *accord In re Sunterra*, 361 F.3d at 270. This Court is "not free to replace" the plain meaning of a statute with "an unenacted legislative intent," *see Cardoza-Fonseca*, 480 U.S. at 452–53 (Scalia, J., concurring). Therefore, there is insufficient legislative history here to overcome the "strong presumption that Congress expresses its intent through the language it chooses," *id.* at 433 n.12 (majority opinion), and so this Court should adhere to the clear plain meaning of § 365(c)(1) and hold that a debtor in possession cannot assume an executory contract over the objections of the non-debtor party if applicable law prohibits its assignment to a hypothetical third party.

II. Section 1129(a)(10) Requires That At Least One Impaired Class for Each Debtor in a Multi-Debtor Plan Must Accept the Plan.

Section 1129(a)(10) requires that, as one of the conditions that a reorganization plan under Chapter 11 must meet for a court to confirm it, at least one impaired class of creditors accept the plan. 11 U.S.C. § 1129(a)(10). Courts have diverged in determining the applicability of this provision to joint plans by multiple, related debtors.

Under the Bankruptcy Rules, a bankruptcy court may group together and jointly administer joint or multiple petitions by related debtors. Fed. R. Bankr. P. 1015(b). Joint administration is purely a procedural device that serves as a tool of convenience for the parties, preventing duplicate costs and filings and wasted time and resources. *Reider v. Fed. Deposit Ins. Corp. (In re Reider)*, 31 F.3d 1102, 1109 (11th Cir. 1994); *In re Las Torres Dev., L.L.C.*, 413 B.R. 687, 693 (Bankr. S.D. Tex. 2009); Fed. R. Bankr. P. 1015 advisory committee's note. Given its procedural nature, "joint administration does not affect the substantive rights of either the debtor or his or her creditors." *Bunker v. Peyton (In re Bunker)*, 312 F.3d 145, 153 (4th Cir. 2002); *accord Unsecured Creditors Comm. v. Leavitt Structural Tubing Co.*, 55 B.R. 710, 712

(N.D. Ill. 1985) (describing joint administration as "merely a matter of convenience and cost saving" that "does not create substantive rights"), *aff'd*, 796 F.2d 477 (7th Cir. 1986).

Some courts interpreting § 1129(a)(10) in the joint administration context have held that in a joint, multi-debtor plan, at least one impaired class for each debtor must accept the joint plan in order to satisfy § 1129(a)(10), a view known as the "per debtor" interpretation. *See, e.g.*, *In re Tribune Co.*, 464 B.R. 126, 182–83 (Bankr. D. Del. 2011), *aff'd in part*, 2014 WL 2797042 (D. Del. June 18, 2014), *aff'd in part*, 799 F.3d 272 (3d Cir. 2015). By contrast, those courts taking the "per plan" view of the statute have argued that only one class of impaired creditors in the joint plan needs to accept it. *See, e.g.*, *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (In re Transwest Resort Props., Inc.)*, 554 B.R. 894, 901 (D. Ariz. 2016), *aff'd*, 881 F.3d 724 (9th Cir. 2018). This Court should adopt the per debtor interpretation, because it aligns with the plain meaning of the statute, accurately reflects the purely procedural nature of a joint reorganization plan, and fulfills the statute's purpose of ensuring a minimum level of creditor buy-in to a plan.

A. <u>The plain meaning of § 1129(a)(10) indicates that at least one impaired class of creditors per debtor must accept a joint multi-debtor plan.</u>

This Court's "interpretation of the Bankruptcy Code starts where all such inquiries must begin: with the language of the statute itself." *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1759 (2018) (quoting *Ransom v. FIA Card Servs., N.A.*, 562 U. S. 61, 69 (2011)) (internal quotation marks omitted). Where, as here, "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms,'" and so the Court does not need to go any further beyond the plain meaning of the text. *Ransom*, 562 U.S. at 69 (citation omitted). As the text of both § 1129(a)(10) and the other subsections of § 1129(a) makes clear, §

1129(a)(10) requires each debtor to obtain acceptance from at least one of its own impaired creditor classes.

1. The Language of § 1129(a)(10) Requires That at Least One Impaired Class of Creditors for Each Debtor in a Joint Plan Accept the Plan.

A Bankruptcy Code-specific tool of statutory interpretation favors the per debtor approach to § 1129(a)(10). The Bankruptcy Code's built-in rules of construction indicate that "the singular includes the plural." 11 U.S.C. § 102(7); *cf.* 1 U.S.C. § 1 (providing that, as a broadly applicable rule of statutory interpretation, "words importing the singular include and apply to several . . . things"). As a result, the use of the singular "plan" in § 1129(a)(10) is far from dispositive, as some courts have argued. *See In re Transwest Resort Props.*, 554 B.R. at 901. To the contrary, the statute does not permit debtors to simply obtain acceptance from one impaired class of debtors across the entire, singular joint "plan" to satisfy the provision.

In fact, in light of this interpretive tool, the plain meaning of "plan" in § 1129(a)(10) actually encompasses the plural "plans." This understanding of the provision "is entirely logical and consistent" with the nature of a jointly administered, multi-debtor plan. *In re Tribune*, 464 B.R. at 182. A joint plan "actually consists of a separate plan for each Debtor." *In re Tribune*, 464 B.R. at 182. That is, each debtor's plan must satisfy the claims of its creditors using solely that debtor's assets, and its financial obligations remain distinct from those of the other debtors. *Id.* Therefore, in the multi-debtor plan context, the word "plan" actually takes on a plural meaning, requiring each individual debtor to obtain acceptance from at least one of its impaired creditor classes in order to confirm its own plan. The per debtor understanding is thus consistent with the plain meaning of the language of § 1129(a)(10).

2. The Remainder of § 1129 Confirms That § 1129(a)(10) Only Allows Confirmation of a Multi-Debtor Plan When At Least One Impaired Class Per Creditor Accepts the Plan.

It is a "cardinal rule" of statutory construction that "a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991); *cf. Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1722 (2017) ("tak[ing] in the larger statutory landscape" and "[l]ooking to other neighboring provisions" to interpret a statute). In addition, under the interpretive canon of *in pari materia*, statutes that address the same subject matter should generally be read the same way. *See Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995). The per debtor approach conforms with not only § 1129(a)(10)'s plain meaning, but also the remaining subsections of § 1129, which would be rendered "incoherent" under a per plan approach. *See Appling*, 138 S. Ct. at 1761. Since those subsections must be read under a per debtor understanding, so must § 1129(a)(10), as these provisions together lay out the requirements for plan confirmation.

In the context of a joint, multi-debtor plan, multiple other provisions in § 1129 only take on a coherent meaning when interpreted under a per debtor approach. *See In re Tribune*, 464 B.R. at 183. Under § 1129(a)(1), the "plan" must comply with applicable provisions of the Bankruptcy Code, and § 1129(a)(3) requires that the "plan" be proposed in good faith and not by "any means forbidden by law." In a joint plan, every debtor must fulfill these obligations—no bankruptcy court would confirm a plan in which some (but not all) of the debtors do not comply with the Bankruptcy Code or act in bad faith. *See In re Tribune*, 464 B.R. at 183. As a result, these provisions only make sense if they apply to each debtor. Thus, as with § 1129(a)(10), the singular "plan" includes the plural "plans," *see* § 102(7), and so every one of the debtors' plans in the joint plan must satisfy § 1129(a).

Furthermore, § 1129(a)(7) sets out a test to protect the best interest of the creditors, *see id.*, and indicates that it must be satisfied for "each impaired class" (the same language used in § 1129(a)(10)). In addition, § 1129(a)(8) requires that in order to confirm a reorganization plan, "each class of claims or interests" must either accept the plan or be unimpaired by it.[1] These provisions would similarly be rendered impotent if a joint plan could satisfy their requirements as to just all of the impaired creditors of one of the debtors in the plan. *See In re Tribune*, 464 B.R. at 183. Similarly, § 1129(a)(11) requires that confirmation of the plan is not likely "to be followed by the liquidation, or the need for further financial reorganization, of the debtor." If only one debtor needed to satisfy this per plan, multiple related debtors, all but one of whom are likely to collapse quickly after reorganization, could push through a plan that would ultimately leave most of their creditors without any meaningful compensation for their claims, an outcome that plainly contradicts the statute's meaning. *Cf., e.g.*, *In re S. Canaan Cellular Invs., Inc.*, 427 B.R. 44, 61 (Bankr. E.D. Pa. 2010) (analyzing whether a joint plan met this provision by looking collectively at all of the debtors that make up the plan); *In re Griswold Bldg., LLC*, 420 B.R. 666, 696–99 (Bankr. E.D. Mich. 2009) (same).

When this Court seeks to interpret the meaning of a statutory provision, it is not solely "guided by a single sentence or member of a sentence, but look[s] to the provisions of the whole law." *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 985 (2017) (citation omitted); *see also United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (describing statutory construction as a "holistic endeavor" and holding that courts should select a "meanin[g that] produces a substantive effect that is compatible with the rest of the law"). In the

[1] This provision, admittedly, does not apply in a nonconsensual "cram down" plan under § 1129(b), which relieves the debtor of this requirement when the plan "does not discriminate unfairly, and is fair and equitable" with respect to each impaired, non-accepting class of claims or interests, and satisfies all of the other provisions in § 1129(a). 11 U.S.C. § 1129(b). However, § 1129(b) does not waive the debtor's obligation to meet § 1129(a)(10).

joint petition context, the plain meaning of the other requirements needed in order to confirm a plan under § 1129(a) squarely aligns with the per debtor approach. In fact, Judge Jones's dissent below did not point to any subsections of § 1129(a) that could be satisfied as to only one of the debtors in a jointly administered plan. (*See* R. at 28–29.) Thus, the whole of the statute must be satisfied by each debtor and cannot be met merely by one debtor in the entire plan. Since the other provisions that must be met in order to confirm a joint reorganization plan must be satisfied on a per debtor basis, so must § 1129(a)(10).

B. Since a joint plan only entails administrative, not substantive, consolidation of multiple Chapter 11 plans, § 1129(a)(10) must be satisfied on a per-debtor basis.

Here, the bankruptcy court jointly administered the Debtors' petitions and the Debtors filed one joint plan, but the Plan expressly did not seek substantive consolidation of the Debtors' estates. (R. at 7.) Since not all of the debtors obtained acceptance from at least one impaired class of their own creditors, the bankruptcy court's confirmation of the plan was erroneous, as it failed to recognize the important substantive difference between these two forms tools of handling multi-debtor filings. Instead, under § 1129(a)(10), a joint, multi-debtor plan must obtain acceptance from at least one impaired class of creditors for each debtor; to hold otherwise would erase the significant distinction between joint administration and substantive consolidation.

Joint administration of multiple bankruptcy debtors' petitions does not impact the substantive rights of creditors, since it is merely a means of more efficiently managing multiple petitions of related debtors at once. *In re Bunker*, 312 F.3d at 153; *Leavitt Structural Tubing*, 55 B.R. at 712; *see also* Suzanne T. Brindise, Note, *Choosing the 'Per-Debtor' Approach to Plan Confirmation in Multi-Debtor Chapter 11 Proceedings*, 108 Nw. U. L. Rev. 1355, 1365–66 (2014) ("[Joint administration] does not substantively abridge the requirements of the Bankruptcy Code in any way, meaning it does not alter creditors' rights or the bankruptcy estate of each debtor.”). In order to conform with the purely procedural nature of this tool and maintain its distinction from the rights-altering doctrine of substantive consolidation, each debtor in a joint, multi-debtor Chapter 11 plan must individually satisfy the requirements of § 1129(a)(10)—just as it would have had to do had it filed a petition alone. Therefore, at least one impaired class of creditors for *each debtor* must accept the joint plan.

Substantive consolidation, on the other hand, provides an alternative form of managing multiple bankruptcy petitions jointly that does impact the parties’ rights and obligations. Under this court-made doctrine, the bankruptcy court combines all of the debtors’ assets into one consolidated estate and converts the creditors’ claims from claims against the individual debtors to ones against the combined estate. *Official Comm. of Unsecured Creditors v. Archdiocese of Saint Paul & Minneapolis (In re Archdiocese of Saint Paul & Minneapolis)*, 888 F.3d 944, 951 (8th Cir. 2018); *Clyde Bergemann, Inc. v. Babcock & Wilcox Co. (In re Babcock & Wilcox Co.)*, 250 F.3d 955, 958 & n.5 (5th Cir. 2001). The process treats debtors “as if they were merged into a single survivor left with all the cumulative assets and liabilities” of the group. *In re Owens Corning*, 419 F.3d 195, 205 (3d Cir. 2005). Unlike joint administration, substantive consolidation “restructures and substantively abridges the requirements of the Bankruptcy Code and creditors’ rights.” Brindise, *supra*, at 1366; *accord In re Reider*, 31 F.3d at 1109 (describing the doctrine as “a measure vitally affecting substantial rights” (quoting *In re Flora Mir Candy Corp.*, 432 F.2d 1060, 1062 (2d Cir. 1970)); Fed. R. Bankr. P. 1015 advisory committee’s note (“Consolidation, as distinguished from joint administration, . . . affects the substantive rights of the creditors of the different estates.”).

The distinction between these two forms of jointly handling multiple debtors’ bankruptcy petitions is crucial for interpreting § 1129(a)(10). Under substantive consolidation, each debtor’s creditors all become creditors of the newly-formed single combined estate. *In re Owens Corning*, 419 F.3d at 205. As a result, it is undisputed that under either the per debtor or per plan approach, only one impaired class of creditors across all of the debtors needs to accept the plan to satisfy § 1129(a)(10), since the consolidation eliminates any distinction between creditors of different debtors. *In re Woodbridge Grp. of Cos., LLC*, 592 B.R. 761, 778 (Bankr. D. Del. 2018); *In re ADPT DFW Holdings, LLC*, 574 B.R. 87, 104–07 (Bankr. N.D. Tex. 2017).

By contrast, under joint administration, "entity separateness is fundamental," *In re Tribune*, 464 B.R. at 182, which favors the per debtor interpretation of § 1129(a)(10). Each debtor and its creditors remain distinct from the other debtors' estates, so each debtor's plan must, on its own, comply with the substantive requirements of the Bankruptcy Code. *In re Reider*, 31 F.3d at 1109. The per debtor understanding of § 1129(a)(10) honors the purely procedural nature of joint administration, since under it each debtor must win acceptance of the plan from at least one impaired class of its own creditors, just as it would be required to do if it was the sole debtor forming a reorganization plan. This interpretation upholds the undisputed view of joint administration as a mere procedural mechanism, as it leaves both the debtors' and the creditors' substantive rights under the Code unaffected.

Adopting the per plan view of § 1129(a)(10), meanwhile, would render the distinction between the two doctrines meaningless and impermissibly "yield incoherent results," *Appling*, 138 S. Ct. at 1761, an outcome inconsistent with the plain meaning of the statutory text. Under the per plan view, a debtor who cannot win acceptance of the joint plan from any of its own impaired classes of creditors can satisfy § 1129(a)(10) by obtaining that acceptance from a class of creditors of another debtor. This solution would be valid under substantive consolidation, as the doctrine converts all of the creditors into creditors of the one conglomerate estate. But absent that, this approach would improperly impact the substantive rights of the parties. *See In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293, 302–03 (Bankr. D. Del. 2011) (relying on "the "absence of substantive consolidation" in adopting the per debtor approach). Interpreting the text this way would expand the rights of the debtor, granting it the power to enact a plan that it would not be able to get confirmed if it filed alone, and contract those of the creditors, who would find themselves bound to a plan that they would have been able to block in a single-debtor bankruptcy and whose voting power would be diminished. Such an outcome is patently inconsistent with the requirement that joint administration "not affect the substantive rights" of the parties, *see In re Bunker*, 312 F.3d at 153, and would convert joint administration into a *de facto* substantive consolidation. Therefore, the per plan view does not reflect the plain meaning of § 1129(a)(10); rather, a multi-debtor reorganization must obtain acceptance from at least one impaired class of creditors of each debtor in order to satisfy § 1129(a)(10).

C. <u>The Bankruptcy Code's purpose of ensuring broad creditor support for a consensual reorganization plan favors interpreting § 1129(a)(10) to require that at least one impaired class of creditors for each debtor accept the joint confirmation plan.</u>

In its efforts to determine the meaning of statutory text, this Court examines statutes "[i]n the light of the[ir] congressional philosophy and purpose." *Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 202 (1979); *cf. Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 192 (1995) (adopting "the only reading [of the text] that comports with the statutory purpose"). Even if the text of § 1129(a)(10) is ambiguous, this Court should adopt the per debtor approach, since it honors the provision's purpose of ensuring at least some degree of support for a debtor's plan from classes of its creditors that are impaired. *Cf. Toibb v. Radloff*, 501 U.S. 157, 166 (1991) (evaluating a provision's legislative history and purpose in interpreting Chapter 11).

Congress added § 1129(a)(10)'s requirement to the Bankruptcy Code in 1978 in order to "mak[e] it harder to confirm a plan only supported by the debtor." Michael Chaisanguanthum, Charter*: The Most Important Recent Bankruptcy Decision for Secured Creditors*, 27 Emory Bankr. Devs. J. 9, 18 (2010). The motivation for the provision was the idea that, "since chapter 11 is intended to foster plans of reorganization which are consensual to the greatest possible extent, a proposed plan which has no support at all from noninsider impaired creditors has failed in this purpose." Peter E. Meltzer, *Disenfranchising the Dissenting Creditor Through Artificial Classification or Artificial Impairment*, 66 Am. Bankr. L.J. 281, 312 (1992); *see also* S. Rep. No. 95–989, 95th Cong., at 128 (1978) (describing the law as requiring that "at least one class must accept the plan"). Although § 1129(a)(10)'s requirement can frustrate a debtor's efforts to reorganize, the lack of acceptance by any impaired class of creditors shows that "the debtor has failed to negotiate effectively with its creditors in devising a reorganization plan." *In re Polytherm Indus., Inc.*, 33 B.R. 823, 835 (W.D. Wis. 1983). Even before Congress amended the provision to clarify that it had to be satisfied by an *impaired* class of creditors, courts read in such a requirement in light of the policy of protecting creditors that is "inherent" in the Bankruptcy Code. *See, e.g.*, *id.* In 1984, Congress made explicit the requirement that at least one impaired class of the debtor accept the plan, further fortifying a "protective measure for creditors" in light of the debtor's "tremendous advantages of exclusivity and control in pushing forward" a plan. Chaisanguanthum, *supra*, at 14. This desire to protect creditors even extended to the Code's broad definition of what makes a class of creditors impaired (and thus potentially able to block confirmation). *In re Vill. at Camp Bowie I, L.P.*, 710 F.3d 239, 247 (5th Cir. 2013).

The requirement laid out in § 1129(a)(10) also intentionally makes it more difficult for debtors to pursue a "cram down" reorganization. This strategy allows a debtor that cannot win acceptance from all of its impaired creditor classes (as required by § 1129(a)(8)) to nonetheless impose a plan on its creditors, as long as it complies with the rest of § 1129(a). *See* 11 U.S.C. §

1129(b). However, § 1129(a)(10) functions as a "statutory gatekeeper," preventing a debtor from "embarking upon the tortuous path of cram down" when none of its impaired creditor classes accept its plan. *In re 266 Washington Assocs.*, 141 B.R. 275, 287 (Bankr. E.D.N.Y.), *aff'd sub nom. In re Washington Assocs.*, 147 B.R. 827 (E.D.N.Y. 1992). In fact, part of Congress's motivation in enacting the provision was a desire to protect creditors from potential "inequities" in cram downs and encourage the use of consensual reorganization plans. *In re Windsor on the River Assocs., Ltd.*, 7 F.3d 127, 131 (8th Cir. 1993). As part of this goal, Congress barred debtors from imposing a cram down onto their creditors without first obtaining an "indicia" of support from the creditors that will be adversely impacted by its plan. *In re Polytherm*, 33 B.R. at 836.

In light of this statutory purpose and legislative history, the per debtor approach more faithfully comports with the goal Congress had in enacting § 1129(a)(10). This comparatively demanding interpretation more fully requires the debtors to win support from their creditors that will be impaired by the plan, even if that may "frustrate" their efforts to reorganize. *See In re Polytherm Indus.*, 33 B.R. at 835. Obtaining acceptance from one impaired class of creditors per debtor is especially important given that a jointly administered plan actually consists of a separate plan for each debtor. *See In re Tribune*, 464 B.R. at 182. Requiring every debtor to win acceptance from at least one of its impaired creditor classes ensures that each plan, and thus each debtor, respects creditors' rights, as Congress intended. A joint, multi-debtor plan in which the debtors only obtain acceptance from the impaired creditor classes of one of the debtors, on the other hand, suggests a failure by the debtors to "negotiate effectively with [their] debtors" in developing the plan, *In re Polytherm Indus.*, 33 B.R. at 835, and thus fails to honor the statute's purpose. Allowing debtors who file jointly to push through a plan that lacks support from any of the impaired creditor classes of some of the debtors "would produce absurd results [that] are to be avoided," since the per debtor approach provides an "alternative interpretation[] consistent with the legislative purpose." *Griffin*, 458 U.S. at 575.

Admittedly, Chapter 11's overall aim is to promote reorganization in order to allow businesses to recover from financial adversity. *See, e.g.*, *Piccadilly Cafeterias*, 554 U.S. at 37 n.2; H.R. Rep. No. 95-595, at 5 (1978). However, "broad 'policy' considerations cannot override specific Chapter 11 statutory provisions." *In re 266 Washington Assocs.*, 141 B.R. at 287; *cf. Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) (in interpreting a single section of a wide-reaching statute, refusing to rely on "generalized references" to the whole statute's overall purpose). To argue that the per plan approach best aligns with the purpose of § 1129(a)(10) because it makes it easier for debtors to reorganize "assumes that Congress had a single purpose in enacting Chapter 11." *Toibb*, 501 U.S. at 163. To the contrary, while the Code does indeed seek to promote successful corporate restructuring, it nonetheless "strikes a balance" between debtors' and creditors' interests, *Piccadilly Cafeterias*, 554 U.S. at 51, aided in part by the requirements of § 1129(a)(10), *see In re Polytherm Indus.*, 33 B.R. at 835. The provision's particular objective is to make sure that the debtor's solution to its insolvency results from cooperation with its creditors and protects their rights, while at the same time allowing the debtor to obtain relief. *Id.*; Meltzer, *supra*, at 312.

The per debtor approach more faithfully honors the specific purpose of § 1129(a)(10), as it ensures that *each* of the debtors works with its creditors that will be impaired by the plan to develop a reorganization that wins support from at least some of them. As a result, this Court should hold that § 1129(a)(10) requires acceptance from at least one impaired class of claims of each debtor in a joint, multi-debtor plan, since that interpretation furthers the purpose behind Congress's enactment of the provision.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Thirteenth Circuit Court of Appeals.

Respectfully submitted,

Team 39
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