
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

ORAL ARGUMENT REQUESTED

Team Number P. 40
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether 11 U.S.C. § 365(c)(1) permits a non-debtor party to inhibit a debtor's Chapter 11 reorganization efforts from proceeding when the debtor in possession seeks to assume, but not assign, an executory contract for the benefit of the estate.
2. Whether, under a joint multi-debtor plan, the plain language of 11 U.S.C. § 1129(a)(10), requiring the acceptance by at least one class of impaired claims per plan, should be ignored in favor of an overly broad interpretation which would require acceptance by at least one class of impaired claims per debtor within the overall plan.

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The District Bankruptcy Court ruled in favor of Tumbling Dice, Inc. and its affiliated debtors, confirming their joint plan of reorganization. R. at 3. In doing so, the court held that (1) a debtor in possession may assume an executory contract over the objection of the non-debtor party, and (2) a joint plan of reorganization is confirmable as long as at least one class of impaired claims under the plan has accepted the plan. The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the ruling of the district court. R. at 3. Under My Thumb, Inc. timely appealed the ruling of the Appellate Panel, and The Thirteenth Circuit Court of Appeals reversed. The Supreme Court of the United States has granted the writ of certiorari to hear the case.

STATEMENT OF JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant statutory provisions involved in this case are listed below and are reproduced in Appendices A through M.

11 U.S.C. § 102. Rules of construction
11 U.S.C. § 323. Role and capacity of trustee
11 U.S.C. § 365. Executory contracts and unexpired leases
11 U.S.C. § 1101. Definitions for this chapter
11 U.S.C. § 1104. Appointment of trustee or examiner
11 U.S.C. § 1107. Rights, powers and duties of debtor in possession
11 U.S.C. § 1123. Contents of plan
11 U.S.C. § 1124. Impairment of claims or interests
11 U.S.C. § 1126. Acceptance of plan
11 U.S.C. § 1129. Confirmation of plan
U.S. CONST. art. I, § 1. Legislative powers vested in Congress.
U.S. CONST. art. I, § 7, cl. 2. Approval or veto of bills—Passage over veto
U.S. CONST. art. III, § 1. Supreme Court and inferior courts—Judges and compensation

STATEMENT OF THE CASE

Tumbling Dice, Inc. ("TDI") and eight of its wholly owned subsidiaries are operators of luxury casino and resorts. R. at 4. TDI has one other subsidiary, Tumbling Dice Development, LLC ("Development") which operates as the licensee of a non-exclusive license software agreement with Under My Thumb, Inc. ("Under My Thumb"). R. at 4. TDI and its subsidiaries launched their casino loyalty program, Club Satisfaction, nearly thirty years ago. R. at 4. Sensing the importance of casino loyalty programs in the modern casino and resort model, TDI sought to revamp its program in recent years. R. at 4. In 2008, Development entered into the aforementioned license software agreement ("Agreement") with Under My Thumb. R. at 4.

The logistics of the Agreement provided for Development to reimburse Under My Thumb for research and development costs; ultimately, the two parties agreed upon an unsecured promissory note worth $7 million (the "R&D Note"). R. at 4. In turn, Under My Thumb granted Development a non-exclusive license to use its software (the "Software"). While the Agreement permitted Development to share the benefits with its affiliates, it also prohibited any sublicensing or assignment of the rights without Under My Thumb's express written consent. R. at 5.

The Agreement was a resounding success for both parties. R. at 5. Membership in Club Satisfaction tripled, and the benefits to Under My Thumb were immediate. R. at 5. Development had agreed to pay a monthly fee which was calculated based on the amount of spending activity by Club Satisfaction members. R. at 5. As a result of the increased membership, Under My Thumb received greater than expected payments each month. R. at 5-6. The revamped program allowed Development to capture the preferences of the Club members, in order to entice them to return frequently, play for longer, and most importantly to both parties: spend more. R. at 5.

In December 2011, the stock of TDI was acquired through a leveraged buy-out by Start Me Up, Inc. R. at 6. The transaction with Start Me Up provided a group of lenders (the "Lenders") with first priority liens on their assets in exchange for a $3 billion loan. R. at 6. Development and its Software license with Under My Thumb were secure, as Development was not a borrower nor a guarantor under the new agreement. R. at 6.

The debt incurred through this transaction forced TDI and its subsidiaries (hereinafter, "Debtors") to commence voluntary cases under Chapter 11 of the Bankruptcy Code. R. at 3, 6. Debtors, while current on payments under the Agreement, had to restructure or refinance its other outstanding debt in order to maintain operations. R. at 6. To do so, Debtors had to negotiate the $2.8 billion still owed to the Lenders, and the $120 million owed to their unsecured creditors. R. at 6. For its part, Under My Thumb was still owed $6 million on the R&D Note, which the Debtors had ceased payment on approximately six months prior. R. at 6.

After lengthy negotiations, the Debtors announced a deal that would be memorialized in a plan support agreement. R. at 6-7. The agreement terms provided that secured debt would be restructured, allowing a lower interest rate and extension of payments over twenty years, and Start Me Up would inject new capital to fund a 55% distribution to the unsecured creditors. R. at 7. The plan agreement required cancellation of existing shares, and issuance of new shares and membership interests. R. at 7.

In August of 2016, the Debtors filed the plan and disclosure statement. R. at 7. The plan proposed assumption of the Agreement with Under My Thumb pursuant to sections 365 and 1123(b)(2) of the Code. R. at 7. The terms of the plan were extremely favorable to Under My Thumb: they would continue to receive monthly payments, and they would also receive the remaining obligation of the R&D Note as a result of the 55% distribution. R. at 7. Under My

Thumb justifiably supported the terms of the plan to this point. R. at 7. This support was crucial for Development, because the value added by the Software was a necessity of Development's plan for continuation of its enterprise. R. at 5.

Much to the chagrin of Under My Thumb, the injection of capital by Start Me Up was being partially supplied by Sympathy for the Devil, LP ("SFD") and as a result, SFD would receive a simple majority of voting shares in reorganized TDI, and seats on the new Board of Directors. R. at 7-8. The corporate structure of Debtors' enterprise, however, remained unchanged. R. at 7. Since SFD's portfolio of companies included a competitor of Under My Thumb, and despite the plan's numerous benefits, Under My Thumb inexplicably reversed course and rejected the plan for suspicion of SFD's involvement. R. at 8.

Aside from Under My Thumb's objection, the plan received nearly universal support from all creditor groups. R. at 8. Further, there was no indication that Development had missed a payment or otherwise breached the Agreement in any manner at the time of the bankruptcy filing. R. at 6-7. Despite Debtors' diligence in negotiations with its other creditors, Under My Thumb's decision to reject the plan was in effect the sole reason Debtors' reorganization efforts were halted. R. at 8.

The bankruptcy court overruled Under My Thumb's objections to the plan under sections 365(c)(1) and 1129(a)(10), taking note of the overwhelming support the plan received. R. at 8. The bankruptcy court concluded that Under My Thumb was simply being asked to honor its contractual obligations and nothing more; therefore, Development could assume the Agreement notwithstanding applicable non-bankruptcy law or Under My Thumb's lack of consent. R. at 9. The bankruptcy court further rejected Under My Thumb's position that the plan was not confirmable because no impaired class of Development voted in favor. R. at 9.

The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court's ruling on both issues. R. at 9. The Thirteenth Circuit, reviewing the bankruptcy court directly, reversed on both issues. R. at 9. Debtors now appeal to this Honorable Court as a final effort to pursue successful reorganization of its business.

SUMMARY OF THE ARGUMENT

The present appeal concerns the following issues: (1) whether a debtor in possession may assume an executory contract over the object of the non-debtor party, and (2) whether, under a cram-down scenario, the acceptance of the reorganization plan by at least one class of impaired claims *per plan*, and not *per debtor*, is sufficient to allow for confirmation.

When a debtor in possession seeks to assume, but not assign, an executory contract, a plain language reading of 11 U.S.C. § 365(c)(1) indicates that the actual test—not the hypothetical test—is the proper method of interpretation. The legislative history of the statute supports application of the actual test in lieu of the hypothetical test. It is clear that Congress intended to permit a debtor in possession to assume an executory contract without further consideration of applicable non-bankruptcy law or the lack of consent from the non-debtor party. The Circuit Court's application of the hypothetical test places the result directly at odds with the purposes of Chapter 11. Rather than permitting the debtor to restructure and reorganize, the Thirteenth Circuit's conclusion strengthens the position of non-debtor parties at the expense of the debtor's ability to fulfill these goals.

With respect to the second issue on appeal, all that is required under a plain language reading of 11 U.S.C. § 1129(a)(10) is the acceptance of the plan by any single impaired class within the overall plan. The plain language does not require an accepting impaired class per each individual debtor within the joint multi-debtor plan. Aside from the clear statutory construction, the per plan approach is wholly consistent with the overall purpose of § 1129(a)(10) to secure "some indicia" of support for the overall plan. The scant legislative history provides the proper evidence to support this approach, while giving none to support the opposing interpretation. With the already numerous requirements and considerable security built into the Code, this technical

requirement was never intended to provide full veto power to any individual impaired class. Abiding by textualist values in situations such as this and giving deference to the plain language is the only way to preserve the true intended meaning of the statute. Doing the opposite will only negatively impact efficiency in the legal system, and in the worst case, lead to possible violations of the U.S. Constitution.

For the foregoing reasons, this Court should reverse the ruling by the Thirteenth Circuit Court of Appeals and hold that a debtor in possession may, in fact, assume an executory contract over the objections of the non-debtor party, and that the acceptance by at least one class of impaired claims per the overall plan is sufficient to allow for confirmation.

ARGUMENT

On appeal, a bankruptcy court's findings of fact will be reviewed for clear error, while conclusions of law will be subject to a de novo standard of review. *United Sur. & Indem. Co. v. López-Muñoz (In re López-Muñoz)*, 866 F.3d 487, 495 (1st Cir. 2017). The facts in the present matter are not disputed. R. at 9. The present appeal only concerns conclusions of law. R. at 9. Accordingly, the decisions by the Thirteenth Circuit Court of Appeals are subject to de novo review. *See id.*

I. THE THIRTEENTH CIRCUIT INCORRECTLY HELD THAT 11 U.S.C. § 365(C)(1) PRECLUDES ASSUMPTION OF A NON-EXCLUSIVE LICENSE OF INTELLECTUAL PROPERTY OVER THE OBJECTION OF THE LICENSOR.

In a Chapter 11 bankruptcy case, the debtor in possession is authorized to assume or reject executory contracts and unexpired leases pursuant to 11 U.S.C. § 365 and § 1107(a). *TreeSource Indus. v. Midway Engineered Wood Prods. (In re TreeSource Indus.)*, 363 F.3d 994, 997 (9th Cir. 2004). The purpose of § 365 is to provide the debtor the opportunity to reject executory contracts as a means of discharging itself of burdensome obligations, while also providing a means by which the debtor can force the party to a prepetition contract to honor its commitment "'when the bankruptcy filing might otherwise make them reluctant to do so.'" *Chateaugay Corp. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 954-55 (2d Cir. 1993) (quoting *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1310 (5th Cir. 1985) (per curiam)). There is considerable authority holding that intellectual property licensing agreements, such as the one at issue here, are executory contracts. *See, e.g., Everex Sys. v. Cadtrak Corp. (In re CFLC, Inc.)*, 89 F.3d 673, 677 (9th Cir. 1996); *RCC Tech. Corp. v. Sunterra Corp.*, 287 B.R. 864, 865 (D. Md. 2003); *In re Access Beyond Techs., Inc.*, 237 B.R. 32, 43-44 (Bankr. D. Del. 1999).

In trying to resolve the diverging interpretations caused by the phrasing of § 365(c)(1), two tests have developed: the "actual test" and the "hypothetical test." Under the actual test, the disjunctive "or" in § 365(c) of the Bankruptcy Code is construed instead as the conjunctive "and." Further, the actual test requires a court to make a case-by-case inquiry as to whether the non-debtor party would be compelled to accept performance from someone other than the party with whom it originally contracted. R. at 10; *Summit Invest. & Dev. Corp. v. Leroux*, 69 F.3d 608, 612 (1st Cir. 1995). The actual test provides that "a debtor would not be precluded from assuming a contract unless it *actually* intended to assign the contract to a third party." *RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257, 272 (4th Cir. 2004) (citing *In re Leroux*, 69 F.3d at 612).

By comparison, the hypothetical test compels a literal interpretative reading of § 365(c). The disjunctive "or" in the statute is construed to mean precisely what it says, which requires that "a debtor in possession may not assume an executory contract over the non-debtor's objection if applicable law would bar assignment to a hypothetical third party, even where the debtor in possession has no intention of assigning the contract in question to any such third party." *In re Access*, 237 B.R. at 48. (original emphasis omitted) (citing *In re James Cable Partners*, 27 F.3d 534, 537 (11th Cir. 1994); *In re West Elecs., Inc.*, 852 F.2d 79, 83 (3d Cir. 1988)). Under principles of plain language statutory interpretation, the hypothetical test is hailed by some courts as the proper reflection of § 365(c)(1). See, *e.g.*, *In re Sunterra Corp.*, 361 F.3d at 267; *Perlman v. Catapult Entm't, Inc. (In re Catapult Entm't, Inc.)*, 165 F.3d 747 (9th Cir. 1999); *In re West Elecs., Inc.*, 852 F.2d at 83. *See also, In re Catron*, 158 B.R. 629 (E.D. Va. 1993); *aff'd without op.*, 25 F.3d 1038 (4th Cir. 1994).

The nature of the executory contract in this matter is such that resolution of the issue "turns squarely on whether the 'hypothetical test' or the 'actual test' applies." R. at 12. Rather than the hypothetical test favored by the Thirteenth Circuit, it is the actual test that presents the proper method of resolution. The application of the actual test to § 365(c) fulfills three fundamental principles: the case-by-case analysis required by the actual test complies with canons of statutory interpretation, the test more accurately reflects the legislative history of the statute, and the test advances the underlying reorganization purpose of Chapter 11 while maintaining the contractual balance between debtor and non-debtor parties.

A. The "actual test" closely aligns with the principles of statutory interpretation and provides a more accurate understanding of § 365(c)(1).

The argument advanced by the majority that the hypothetical test accurately reflects the plain language of the text is logically inconsistent, and it produces a result not in accordance with the purpose of the section. The relevant section prescribes that "the *trustee* may not assume or assign any executory contract … if such party does not consent to such assumption or assignment." 11 U.S.C. § 365(c)(1) (2019) (emphasis added). Admittedly, a plain language reading of the statute *does* imply that the disjunctive "or" means a trustee can neither assume nor assign an executory contract under applicable law, absent consent from the non-debtor party. However, a vigilant reading of the statute recognizes that the ambiguity is not limited to the dispute between the use of disjunctive "or" versus the conjunctive "and": the prefatory phrase of the statute clearly indicates the *trustee* is the party to whom the section applies, without reference to the debtor in possession. The Thirteenth Circuit's application of the hypothetical test does not include this additional, necessary consideration as to *whom* the statute applies.

In support of this position, the dissent correctly points out that the Bankruptcy Code ascribes different meanings to the representatives of the estate when they are referenced in the

same section, as they are in sections 365(c)(1), (e)(1) and (f). R. at 23 (citing *In re Footstar, Inc.*, 323 B.R. 566, 571 (Bankr. S.D.N.Y. 2005) ("…when the Bankruptcy Code refers to both "trustee" and "debtor" (or 'debtor in possession') in the same statutory provisions, the two terms are invariably invested with quite different meanings")). For bankruptcy matters arising under Chapter 11, the debtor remains in possession of the estate unless a trustee is appointed by the court pursuant to § 1104. *Id.* The appointment of a trustee detaches the debtor's status as a debtor in possession, and the trustee becomes the possessor of all rights and properties of the debtor. *Id.* (referring to 11 U.S.C. § 323(a) (2019)). This appointment effectuates a statutory transfer of the debtor's property to the trustee. *Id*.

The careful separation of debtor (or debtor in possession) and trustee within the Bankruptcy Code signifies that the two are entirely different parties for purposes of Chapter 11. *Id*. An expansive application of this interpretation creates the plausible inference that debtor and the debtor in possession are distinct parties for purposes of Chapter 11. *Hays v. Cummins (In re Cummins)*, 174 B.R. 1005, 1009 (Bankr. W.D. Ark. 1994). However, this Court has already highlighted the insignificance of any such distinction:

> For our purposes, it is sensible to view the debtor-in-possession as the same 'entity' which existed before the filing of the bankruptcy petition, but empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have employed absent the bankruptcy filing.

NLRB v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984); *see also In re Cummins*, 174 B.R. at 1009 ("While for Chapter 11 bankruptcy purposes there exists a distinction between an individual in bankruptcy and the 'debtor-in-possession,' there is no good faith basis for arguing that the distinction makes a difference for *res judicata* purposes"); *In re Footstar*, 323 B.R. at 571. ("Nowhere does the Bankruptcy Code define 'trustee' as synonymous with 'debtor' or

'debtor in possession'"). The Code also provides clear guidance on this point: "'debtor in possession' means debtor" for purposes of Chapter 11. 11 U.S.C. § 1101(1) (2019).

Notwithstanding the clear application to *trustees*, the next step is to determine whether the statute applies equally in force to a debtor or debtor in possession. Once again, a literal reading of the statute resolves this question: in simplest terms, a trustee constitutes a party *other than the debtor or the debtor in possession*. *Id*. As an extension of the plain language interpretation applied by the Thirteenth Circuit, it makes logical sense that the limitation set forth in § 365(c) should apply only to a trustee of the bankruptcy estate. *Id*. The same cannot be said when the term "debtor" or "debtor in possession" is substituted for the term "trustee," which is the result crafted by the hypothetical test. A commonsense interpretation of the statute reveals that the debtor or debtor in possession cannot constitute an entity "other than the debtor or the debtor in possession." 11 U.S.C. § 365(c)(1) (2019). As the *Footstar* majority correctly points out, "the basic objective of section 365(c)(1) -- to protect the contract counterparty from unlawful assignment of the contract -- simply is not implicated when a debtor in possession itself seeks to assume, but not assign, the contract." *In re Footstar, Inc.*, 323 B.R. at 573-74.

The conclusion reached by the court in *Footstar* aligns with the purpose of a plain language interpretation of the statute. Rather than entertaining the discussion of whether the prefatory clause involves the disjunctive "or" versus the conjunctive "and," the question is disposed of by utilizing the same interpretation method applied to a much more obvious distinction. The hypothetical test creates a reading of the statute which utilizes the terms 'trustee' and 'debtor' or 'debtor in possession' interchangeably, and thus produces an illogical result. The interchangeable usage of the two distinct terms also fails another basic principle of statutory interpretation: the duty to "give effect, if possible, to every clause and word" of the statute.

Duncan v. Walker, 533 U.S. 167, 174 (2001). The holding of the Thirteenth Circuit disregards this basic premise.

The objective of § 365(c) is to substantiate the applicable contract law which provides the counterparty's right to refuse to accept performance from—or render performance to—a party other than the party with whom the counterparty originally contracted. *In re Footstar*, 323 B.R. at 573. Since the primary aim of the statute is to protect non-debtor parties from being forced into contracts with parties other than those with whom they originally contracted, a fact intensive inquiry is appropriate to determine "whether the nondebtor party is *actually* being forced to accept performance under its executory contract from an entity other than the debtor." *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997) (citing *In re Leroux*, 69 F.3d at 612).

Where a debtor or debtor in possession seeks to assume—but not *assign*—the executory contract, the provision of § 365(c)(1) referencing the applicable law, which excuses the non-debtor party from performance, is not triggered. *Summit Inv. & Dev. Corp.*, 69 F.3d at 613. Recognizing the efficacy of the Agreement to its reorganization goals, Development seeks to assume the license without any intention of assigning it. Further, since there is no guidance which suggests that the debtor in possession in a Chapter 11 case constitutes an entity other than the debtor, it is clear that Under My Thumb is not being forced to accept performance from anyone other than the debtor. Even though Development is now a 'debtor in possession' rather than a debtor, the Code—as well as relevant case law—make clear that this distinction is insignificant for purposes of applying Chapter 11.

It is clear that Development's intention of assumption without assignment does not trigger the applicable non-bankruptcy law. Nonetheless, Under My Thumb rests its anti-

assignment concerns on Development's change in ownership as part of its reorganization. Undeniably, applicable non-bankruptcy law is triggered, and the bankruptcy estate cannot assume the contract "if there is a material change in the identity of the person rendering the performance under the contract, the identity of that person is an essential element of the contract, and the contract is nonassumable." *In re Cardinal Indus.*, 116 B.R. 964, 982 (Bankr. S.D. Ohio 1990). However, case law also indicates that a change in ownership of a Debtor does *not* function as a de facto violation of the anti-assignment clause of a contract for intellectual property. *See id.* ("Where the Trustee's assumption, as the representative of the estate, would not change the essential identity of the entity performing the services under the contract, the exception is not effective); *Ohio Skill Games Inc. v. Pace-O-Matic, Inc. (In re Ohio Skill Games Inc.)*, Nos. 08-60560, 08-6049, 2010 Bankr. LEXIS 2220, *20 (Bankr. N.D. Ohio July 8, 2010) ("The change of ownership of Debtor did not alter the Agreement, nor the identity of the parties to the Agreement … The court finds no foundation for the alleged breach. At a minimum, it is not a 'material' breach under the Agreement"). Thus, absent an intention to assign the Agreement, applicable non-bankruptcy law is simply not implicated by Development's proposed assumption in this matter.

B. The legislative history of § 365(c)(1) supports the conclusion that Congress intended to permit debtors in possession to assume executory contracts notwithstanding applicable laws or the consent of the non-debtor party.

The legislative history of § 365(c) indicates that congressional intent favors application of the actual test over the hypothetical test. A primary principle of statutory construction requires that the intentions of the legislature must be given force by the interpretive body. *In re Cardinal*, 116 B.R. at 978 (citing *In re Law*, 37 Bankr. 501, 511 (Bankr. S.D. Ohio 1984)). The Thirteenth Circuit reasons that this Court has previously instructed to "presume that a legislature says in a

statute what it means and means in a statute what it says there. … When the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete.'" R. at 12 (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). The majority concludes that the language of § 365(c)(1) "is unambiguous, and we are bound to follow it." R. at 12. Applying this unambiguity, the majority reasons that the use of "or" intends a disjunctive interpretation, thereby supporting application of the hypothetical test. R. at 12.

The majority's construction of the statute as "unambiguous" overlooks the apparent ambiguity presented by the use of the term "trustee" without any reference to the "debtor" or "debtor in possession." The statute very clearly provides that *the trustee* may not assume or assign the executory contract, as discussed at length above. 11 U.S.C. § 365(c) (2019) (emphasis added). If the majority had applied its own rationale to the entire statute, it would have reached the conclusion that the statute is unambiguous in another sense: § 365(c)(1) does not preclude a debtor or debtor in possession from assuming or assigning a prepetition executory contract.

Further, the majority's conclusion that § 365(c)(1) presents no ambiguity which requires an inquiry into legislative intent simply ignores reality. Courts are largely split on the issue of applying the hypothetical test versus the actual test. Even this Court has noted the circuit split on the issue, stating: "The division in the courts over the meaning of § 365(c)(1) is an important one to resolve for bankruptcy courts and for businesses that seek reorganization." *N.C.P. Marketing Grp., Inc. v. BG Star Prods., Inc.*, 129 S. Ct. 1577 (2009) (denying certiorari). It is true that the existence of a judiciary split on interpretation of a statute is not evidence in and of itself of an ambiguity. *See, e.g., Brown v. Ferroni (In re Brown)*, 505 B.R. 638, 646 (E.D. Pa. 2014) ("However, because courts interpret a statute differently does not create an ambiguity") (citing *In re Friedman's Inc.*, 738 F.3d 547, 554 (3d Cir. 2013)). Nevertheless, the same court notes that a

statute "is ambiguous when there is reasonable disagreement as to its meaning." *Id.* (citing *Dobrek v. Phelan*, 419 F.3d 259, 264 (3d Cir. 2005)).

The dissent points out that the divergence among courts as to the plain meaning of the statute lends itself to the conclusion that § 365(c)(1) is simply ambiguous in nature. R. at 24; *see* Michelle Morgan Harner, *et al., Debtors Beware: The Expanding Universe of Non-Assumable/Non-Assignable Contracts in Bankruptcy*, 13 AM. BANK. INST. L. REV. 187, 239 (Spring 2005). The conflict created by the statute's use of "trustee" rather than "debtor" or "debtor in possession" presents sufficient ambiguity in its construction to require a closer look at the legislative history of § 365(c)(1) to ascertain congressional intent. *See Summit Inv. & Dev. Corp.*, 69 F.3d at 62 ("…because the statutory language is ambiguous and open to more than one plausible interpretation, we look to its legislative history") (citing *O'Neill v. Nestle Libbys P.R., Inc.*, 729 F.2d 35, 36 (1st Cir. 1984)).

The hypothetical test violates a foundational principle of statutory interpretation, which requires that even where the language *seems* plain, an examination of the legislative history is vital in order to gather congressional intent. *In re Vause*, 886 F.2d 794, 801 n.11 (6th Cir. 1989) (citing *United States v. Stauffer Chemical Co.*, 684 F.2d 1174, 1183 (6th Cir. 1982), *aff'd*, 464 U.S. 165, 78 L. Ed. 2d 388, 104 S. Ct. 575 (1984)). Without performing any such inquiry, the Thirteenth Circuit applies the hypothetical test and emphatically concludes that the statute is "unambiguous." R. at 12. The majority posits that the judicial inquiry ends where the words are explicit, and as a result no consideration of legislative intent is necessary. R. at 12. However, this conclusion disregards numerous principles of statutory construction, as well the apparent ambiguity that exists in the majority's own interpretation.

The Thirteenth Circuit's reliance upon the hypothetical test also violates the rule against surplusage, an interpretation directive which has been followed continuously by this Court. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant'") (quoting *Duncan*, 533 U.S. at 174). The construction of § 365(c) produced by the hypothetical test creates surplusage in the latter sections of the statute; particularly, § 365(f), which provides that "[t]he trustee may *assign* an executory contract or unexpired lease of the debtor only if … the trustee *assumes* such contract or lease." 11 U.S.C. § 365(f)(2)(A) (2019) (emphasis added). Section 365(f) very clearly provides that assumption is a prerequisite to assignment. R. at 24. The plain language of § 365(f) begs the question of *why* Congress also included the phrase "or assign" as part of § 365(c), since 365(f) already appears to cover the trustee's ability to assign an executory contract. The interpretation of 365(c) compelled by the hypothetical test, which bars assumption *and* assignment, renders § 365(f)(2)(A) superfluous, a result entirely at odds with a central tenet of statutory construction. The perceived violation of numerous canons of statutory interpretation, coupled with the statute's apparent ambiguity, necessitates consideration of the legislative history.

The form of § 365(c)(1) in the initial enactment of the Code in 1978 provided that a trustee could not "assume or assign an executory contract" if "applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance *to the trustee* …" Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, § 365(c)(1) (1978) (emphasis added). In its legislative history inquiry, the First Circuit found:

> This section will require the courts to be sensitive to the rights of the non-debtor party to executory contracts and unexpired leases. If the trustee is to assume a contract or a lease, the court will have to ensure that the trustee's performance under the contract or lease gives the other contracting party the full benefit of his bargain.

Summit Inv. & Dev. Corp., 69 F.3d at 612-13 (citing S. Rep. No. 989, 95th Cong., 2d Sess. 59 (1978), *reprinted in* 1980 U.S.C.C.A.N. 5787, 5845). The court concluded that the legislature envisioned a case-by-case inquiry into the actual consequences—to the non-debtor party—of allowing assumption of executory contracts by the debtor party. *Id.* at 613. Stated summarily, the court held that "the nondebtor party to whom performance is due must make an individualized showing that it would not receive the "full benefit of [its] bargain" were an entity to be substituted for the debtor from whom performance is due." *Id.*

The investigation by the First Circuit is further supported by proposed revisions to § 365(c)(1) in 1980, followed by the implementation of these revisions in 1984. As part of the Bankruptcy Technical Correction Act of 1980, the Committee on the Judiciary published a report with proposed changes to the language of § 365(c)(1), altering the prior language from "applicable law excusing 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 …" for the emphasized section to read "*to an entity other than the debtor or the debtor in possession*." H.R. Rep. No. 96-1195, at 57 (1980). In its report, the Committee sought to:

> Make[] clear that the prohibition against the 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 nature of the contract.

Id. This change was later enacted as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984. Pub. L. No. 98-353, 98 Stat. 333, § 362(a) (1984). The dissent persuasively

articulates the value of this inquiry, noting that "[t]he legislative history thus confirms that Congress always intended to allow a debtor in possession to assume an executory contract, notwithstanding applicable law or the lack of consent from the non-debtor party." R. at 25. The *Footstar* majority supports the conclusion of the dissent, having held that "this legislative history does no more than confirm the conclusion which is compelled by both the plain meaning of the statute as it is written and its logic and purpose." *In re Footstar*, 323 B.R. at 575. It is apparent that Development fits squarely within the amended version of the statute, and a rational deduction concludes that § 365(c) presents no bar to Development's assumption of the Agreement in this matter.

C. The "actual test" more accurately reflects the purpose and policy of Chapter 11 because it balances the goal of reorganization with the rights of the non-debtor party under a contract.

A careful consideration of the purpose and policy underlying Chapter 11 compels application of the actual test rather than the hypothetical test. This Court previously highlighted that "[t]he fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." *Bildisco & Bildisco*, 465 U.S. at 528 (referring to H. R. Rep. No. 95-595, p. 220 (1977)). The successful reorganization efforts of Debtors in this case are unquestionably reliant upon Under My Thumb's continued performance of the Agreement and allowance of continued compliant usage of the software license. R. at 5 ("[t]he Software is an essential part of the Debtors' ongoing business model"). The Thirteenth Circuit's interpretation of § 365(c)(1) permits a non-debtor party to prevent a debtor's successful reorganization efforts by preventing assumption of a contract *by the same party*, a result which is simply not contemplated by the Bankruptcy Code. If the ultimate goal of Chapter 11 is to allow a debtor the opportunity to mend its enterprise, there are valid

concerns with the application of the hypothetical test, as it prevents the debtor from assuming an executory contract for the purpose of preserving an entirely hypothetical factual scenario. *In re Cardinal*, 116 B.R. at 981.

The dissent correctly points out that the majority's interpretation of § 365(c) produces an unprecedented result: it gives the non-debtor party control over the proceedings by granting the right to rescind the contract for no other reason than the bankruptcy filing. R. at 26. The Code supports the dissent on this point. Section 365(e)(1)(B) provides that:

> 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 … at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on … the commencement of a case under this title.

11 U.S.C. § 365(e)(1)(B) (2019). This provision of the Code plainly prohibits *ipso facto* clauses in prepetition contracts which result in the termination of a contract simply by virtue of the bankruptcy filing. *Id*.; *see also Lyons Sav. & Loan Ass'n v. Westside Bancorporation, Inc.*, 828 F.2d 387, 395 n.2 (7th Cir. 1987) ("Section 365(e) of the Bankruptcy Code invalidates *ipso facto* or bankruptcy termination clauses which permit one contracting party to terminate or even modify an executory contract or unexpired lease in the event of the bankruptcy of the other contracting party").

The record below indicates that Debtors had done nothing prepetition that could be considered a breach of the Agreement with Under My Thumb. R. at 6. Development was fully up to date on its payments and had not otherwise violated any of the covenants under the Agreement. R. at 6, 26. Although the Agreement at issue in this case does not have an *ipso facto* clause as contemplated by § 365(e), the majority's decision to apply the hypothetical test permits the non-debtor party to generate a putative version of such a clause. Based upon the assumption

that the job of the courts is to "interpret the statute as it *is* written, not as it perhaps *should* be written," the majority argues that application of the hypothetical test stems from a literal reading of the statute. R. at 14. However, the majority not only ignores the plain language of the statute in reaching this conclusion, it also ignores the absurdity of the result it produces. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004). Ultimately, the majority's application of the hypothetical test to factual scenarios like the one before this Court would create a judicial bypass to § 365(e) by allowing a non-debtor party to reject an executory contract by virtue of nothing other than the filing of the petition.

The dissent below fears that by virtue of the Thirteenth Circuit's decision broad decision, "the majority invites a non-debtor party like Under My Thumb to extort concessions in exchange for its consent to assumption." R. at 26-27. Even if the worst-case scenario is not realized, there is a legitimate basis for concern that the purpose and policy of Chapter 11 is defeated by the majority's interpretation of the statute. The majority favors the interests of one creditor over the debtor's interest in reorganizing its enterprise. R. at 26. This preference for the creditor has sweeping effects: it also disfavors the interests of employees, consumers and other parties with a financial interest in the future viability of the enterprise. R. at 26. Ultimately, a debtor's ability to reorganize will be greatly impaired by the majority's decision to apply the hypothetical test. Instead, the actual test presents a resolution that is logically consistent with principles of statutory interpretation, legislative intent and the overall policy objectives of Chapter 11.

II. THE THIRTEENTH CIRCUIT INCORRECTLY HELD THAT 11 U.S.C. § 1129(A)(10) REQUIRES THE ACCEPTANCE OF AT LEAST ONE CLASS OF IMPAIRED CLAIMS PER DEBTOR WITHIN A JOINT MULTI-DEBTOR PLAN.

When a Chapter 11 Bankruptcy is being organized, creditor claims are divided into classes, with these classes being comprised of "substantially similar" claims. 11 U.S.C. § 1122(a)

(2019). A class of claims is determined to be impaired when the plan alters the prepetition "legal, equitable, and contractual rights." 11 U.S.C. § 1124 (2019). With this classification comes the ability to vote, or proffer consent to the overall plan. 11 U.S.C. 1126(a), (f) (2019). When an entity and its subsidiaries file for bankruptcy jointly under a multi-debtor plan, the "bankruptcy court may confirm [the] plan only if each class of impaired creditors consents." *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props. (In re Transwest Resort Props.)*, 881 F.3d 724, 725 (9th Cir. 2018) (referring to 11 U.S.C. § 1129(a)(8) (2019)). Despite this seemingly hardline rule, 11 U.S.C. § 1129(b) allows for a "cramdown," whereby proponents can confirm the plan over the objections of other creditors. *Id.* at 729 (internal citations omitted). Section 1129 lays out the requirements in a scenario such as this, with § 1129(a)(10) requiring that "at least one class of claims that is impaired under the plan has accepted *the plan*." 11 U.S.C. § 1129(a) (2019) (emphasis added).

Currently, the compelling majority of courts have held that § 1129(a)(10) only requires the acceptance from one class of impaired clams *per plan,* and not *per debtor* within the overall plan. *See In re Transwest Resort Props.*, 881 F.3d at 729–30; *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props. (In re Transwest Resort Props.)*, 554 B.R. 894, 899–901 (D. Ariz. 2016), *aff'd*, 881 F.3d 724 (9th Cir. 2018); *JPMorgan Chase Bank, N.A. v. Charter Communs. Operating, LLC (In re Charter Communs.)*, 419 B.R. 221, 266 (Bankr. S.D.N.Y. November 17, 2009). ; *In re Station Casinos, Inc.*, Nos. BK-09-52477, BK 10-50381, BK 09-52470, BK 09-52487, 2010 Bankr. LEXIS 5380 at *81–82 (Bankr. D. Nev. Aug. 27, 2010); *In re Enron Corp.*, 2004 Bankr. LEXIS 2549, *235 (Bankr. S.D.N.Y. July 15, 2004); *In re SGPA, Inc.*, No. 1-01-02609, 2001 LEXIS 2291, at *21–22 (Bankr. M.D. Pa. Sep. 28, 2001). This majority includes the only Circuit Court of Appeals to have addressed the issue, with the court having

held unanimously in favor of the per plan approach. *See In re Transwest Resort Props.*, 881 F.3d at 729–30.

The Delaware bankruptcy courts are currently the only courts in the country to have held in favor of the per debtor approach, which requires acceptance from at least one class of impaired claims per debtor within the overall plan. *In re Tribune Co.*, 464 B.R. 126, 182–84 (Bankr. D. Del. 2011); *In re Woodbridge Grp. of Cos., LLC*, 592 B.R. 761, 778 (Bankr. D. Del. 2018); *In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293, 302–03 (Bankr. D. Del. 2011). Ultimately, the Thirteenth Circuit found the reasoning from the Delaware courts to be most persuasive. R. at 17.

Section 1129(a)(10) is clear in terms of statutory construction, and expressly supports the per plan approach. This interpretation of § 1129(a)(10) is also consistent with the purpose of the statute and societal values, creating no conflict with the Bankruptcy Code in any fashion.

A. The statutory construction of § 1129(a)(10) supports the interpretation requiring only the acceptance from at least one class of impaired claims per plan.

Section 1129(a)(10) states:

> 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.

(2019) (emphasis added). It is the court's responsibility "to interpret the Code clearly and predictably using well established principles of statutory construction." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 649 (2012). As noted previously, if the statute is unambiguous, the "judiciary inquiry is complete," and the express language of the statute will govern. *Germain*, 503 U.S. at 254 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). The majority in the lower court correctly pointed out that the statute should be read as a whole, with respect to the overall context. R. at 19. They allege that this context requires a per debtor

interpretation of § 1129(a)(10). R. at 19–21. It is important to clarify again, however, that simply "because courts interpret a statute differently does not create an ambiguity." *In re Brown*, 505 B.R. at 646 (internal citations omitted). Therefore, the majority's findings to the contrary are not dispositive.

Here, the statute's plain language, irrespective of context, is clear in stating a technical requirement of multi-debtor plans. *See* 11 U.S.C. § 1129(a)(10) (2019); *In re Rhead*, 179 B.R. 169, 177 (Bankr. D. Ariz. 1995). The majority in the lower court suggests that § 1129 must take into account the legislative force of 11 U.S.C. § 102(7), which states that "the singular includes the plural." R. at 19; *In re Tribune Co.*, 464 B.R. at 182. In the *Tribune* case, the court emphasized the concern that, absent substantive consolidation, § 102(7) requires that a joint plan be treated as separate individual plans for each debtor, individually subject to the requirements of § 1129(a)(10). *In re Tribune Co.*, 464 B.R. at 182. The end result in *Tribune* was an interpretation supporting the per debtor approach. *Id.* While the majority is correct that context is an important factor to consider during the interpretative process, they have largely overestimated the interpretive force of § 102(7).

The Ninth Circuit noted in *Transwest* that § 102(7), if determined to have contextual significance, simply amends § 1129(a)(10) to be read "at least one class of claims that is impaired under the *plans* has accepted the *plans*." *In re Transwest Resort Props.*, 881 F.3d at 730 (emphasis added). Thus, even taking into consideration the context of 102(7), the statue remains unambiguous, and the inquiry should end accordingly. *See Germain*, 503 U.S. at 254. Even acknowledging the existence of numerous plans, the statute still only requires one impaired class to consent to these multiple plans, creating no conflict with the per plan approach. Alexander J. Gacos, *Reconciling the "Per-Plan" Approach to 11 U.S.C. § 1129(a)(10) with Substantive*

Consolidation Principles Under In Re Owens Corning, 14 SETON HALL CIR. REV. 295, 312 (Spring 2018) [hereinafter *Reconciling the "Per Plan" Approach*]. The end result, "even when pluralized," is an interpretation in favor of the per plan approach. *Id.* at 315. Under such a reading, a single accepting creditor from *any* debtor will suffice.

The Ninth Circuit's decision to support the per plan reading of § 1129(a)(10) did not appear spontaneously but was instead the result of established precedent across numerous circuits. The various courts across the country all found that the plain language of § 1129(a)(10) required only one class of impaired creditors to consent to the plan to allow for confirmation. *In re Transwest Props.*, 554 B.R. at 899–901; *In re Charter Communs.*, 419 B.R. at 266; *In re Station Casinos, Inc.*, 2010 Bankr. LEXIS 5380, at * 23; *In re SGPA, Inc.*, 2001 Bankr. LEXIS 2291, at *21–22; *In re Enron*, 2004 Bankr. LEXIS 2549, at *235. This interpretation prevails notwithstanding the fact that the debtors were substantively consolidated in cases such as *In re Enron*, as the substantive consolidation in that case was not the dispositive factor in allowing the per plan approach interpretation to prevail. 2004 Bankr. LEXIS 2549, at *234–36. Further, § 1129(a)(10) itself does not denote a difference in treatment for the various types of plans. *In re Transwest Resort Props*., 881 F.3d at 729. Thus, whether the plan is the result of a joint multi-debtor plan or substantive consolidation, the result will inevitably be the same.

As the dissent indicates, there is nothing to suggest that the drafters were incapable of cross-referencing the code. R. at 29 As such, we can safely proceed on the premise that § 1129(a)(10) is a mutually exclusive requirement for confirmation. R. at 29. This supports the notion that if Congress had intended § 1129(a)(10) to apply on a per debtor basis, they would have made such intentions clear within the text of the statute. As it stands, without such clear intentions, we cannot conjure them into existence in order to create a differing interpretation.

Based on the facts before us, the plan had received acceptance from at least one class of impaired creditors. R. at 8. In fact, there was overwhelming support for the plan, with each debtor—with the exception of Development—having received consent from an impaired class of creditors. R. at 8. Thus, notwithstanding the lack of consent from Under My Thumb, the plan was still confirmable under the plain language of § 1129(a)(10), which only requires the acceptance by at least one class of impaired creditors per plan.

B. Adoption of the per plan approach is consistent with the overall purpose of § 1129(a)(10).

Courts have held that the plain language will be 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." *U.S. v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989) (internal citations omitted) (internal quotation marks omitted); *See also Lamie*, 540 U.S. at 534 (2004) (holding that the plain language of a statute should be enforced unless it produces an "absurd" result). Despite the clear language of § 1129(a)(10) rendering this inquiry needless, it is worth noting that these materials still support the per plan approach. In order to properly assess the purpose of § 1129(a)(10) based on these metrics, we must delve into its legislative history—as well as—the case law that preceded its adoption.

Despite the fact that case law had always stressed the importance of at least one class of accepting creditors, it was relatively late in the legislative process that § 1129(a)(10) was formulated and considered. *In re Loop 76, Ltd. Liab. Co.*, 442 B.R. 713, 721–22 (Bankr. D. Ariz. 2010). The modern version of § 1129(a)(10) is the result of multiple reforms that ultimately led to its current language. Anupama Yerramalli & Alexander Nicas, *First Glance, "Per Plan" or "Per Debtor"?:* Transwest *Reignites the § 1129(a)(10) Debate*, 39-4 ABIJ 30, 84 (April 2018) (internal quotation marks omitted). In 1978, the language "required that at least one [non-insider]

class of claims [had] accepted the plan.*" Id*. The choice to adopt this language was the result of a case where a plan was being "crammed down" onto a debtor's sole secured creditor. *Id.* Confusion thus resulted as to whether the accepting class needed to be impaired. *Id.* Ultimately, in 1984, the language was altered, establishing that at least one *impaired* class of creditors needed to consent to the plan. *Id.* Comments by Congressman Edwards suggest that the change was made because the requirement of one accepting impaired claim would "sufficiently protect" the claims of the creditors. *In re Bloomingdale Partners*, 170 B.R. 984, 994 n.15 (Bankr. N.D. Ill. 1994). Despite these comments, it is equally important to note that "there is no evidence of any legislative intent to confer on undersecured creditors a veto power." *In re Loop 76, Ltd. Liab. Co.*, 442 B.R. at 722.

With the legislative history offering useful, but minor help in establishing the intended goal of § 1129(a)(10), the clear precedent set by courts over time is even more valuable. Considering the fact that case law, even that which pre-dates the adoption of § 1129(a)(10), has always stressed the need for at least one accepting class, it is clear that the purpose of § 1129(a)(10) was simply to require some level of support for the overall plan. *Id.* at 721–22 (holding that the sole purpose of § 1129(a)(10) was to provide "some indicia of creditor support for the debtor's schemes") (internal citations omitted) (internal quotation marks omitted); *Windsor on the River Assocs. v. Balcor Real Estate Fin. (In re Windsor on the River Assocs.)*, 7 F.3d 127, 131 (8th Cir. 1993) (holding the same); *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 243–44 (3d Cir. 2004) (holding the same). Considering its history and the case law that preceded it, this is the only "conceivable explanation." *In re Polytherm Indus., Inc.*, No. 83-C-27-C, 1983 U.S. Dist. LEXIS 12704, at *40 (W.D. Wis. Oct. 17, 1983) (citing P. Murphy, Creditors' Rights in Bankruptcy, Section 16.11 at 16–20 (1980)); *See also id.*

Nearly every debtor in the current reorganization plan had at least one consenting impaired class. R. at 17. Development is the sole debtor without such a class. R. at 17. With such overwhelming support for the plan, confirming the plan would not go against the perceived purpose of § 1129(a)(10) to secure "some indicia" of support. *See In re Loop 76, Ltd. Liab. Co.*, 442 B.R. at 722. Thus, the plan in the present scenario is completely aligned with the only "conceivable purpose." *See In re Polytherm Indus., Inc.*, 1983 U.S. Dist. LEXIS 12704, at *40.

The Thirteenth Circuit majority claims that § 1129(a)(10) functions as a substantive right of creditors, serving to protect their interests. R. at 21. However, "[§] 1129(a)(10) is not an all-purpose creditor protection mechanism," as the overall plan must still abide by all other subsections of § 1129(a) in order to confirm the plan. *In re SGPA, Inc.*, 2001 Bankr. LEXIS 2291, at *19–20. It is instead simply a technical requirement. *Id.*; *In re Rhead*, 179 B.R. at 177 (holding that "1129(a)(10) provides no substantive rights to creditors"). The reorganization process as a whole is simply meant to "allow a financially troubled enterprise to rehabilitate its equity and debt and to continue operating." Jordan A. Smith, *Just Following Orders: The Fifth Circuit's Incomplete Analysis Of Chapter 11 Bankruptcy Cramdown In* In Re Village At Camp Bowie, 55 B.C. L. REV. E. SUPP. 153, 167 n.15 (2014). Looking at the situation logically, bankruptcies will inevitably result in the loss or altering of interests or financial rights. *Reconciling the "Per-Plan" Approach*, 14 SETON HALL CIR. REV. at 299. When viewing reorganization plans, "a bankruptcy court does not have to be convinced that the settlement is the best possible compromise, but only that the settlement falls within a reasonable range of litigation possibilities." *In re Tribune*, 464 B.R. at 158. It is perhaps then too ideal to view the process with the goal of perfection in mind. Section 1129 merely requires that the plan be "fair and equitable." 11 U.S.C. § 1129(b)(2) (2019). Having framed this simple requirement as

something more, the majority at the lower level runs the risk of embedding difficulty into the future of similarly structured corporate bankruptcies.

The majority has also painted this arrangement as de facto substantive consolidation, claiming that it goes against notions of corporate separateness. R. at 20. However, "§ 1129(a)(3) does not require that the [p]lan's contents comply in all respects with the provisions of all [non-bankruptcy] laws and regulations" because it "speaks only to the proposal of a plan." *In re Charter Communs.*, 419 B.R. at 261 (internal citations omitted) (internal quotation marks omitted). Therefore, simply because the plan goes against certain proposed tenets of corporate law does not condemn the plan outright. *See id.* To that end, the majority concedes that substantive consolidation is not even a function of the Bankruptcy Code itself and was never contemplated within it. R. at 18. The Code cannot be rewritten simply because a judicially created doctrine might complicate the matter.

Judge Friedland, writing his concurrence for the *Transwest* case, made the important distinction that multi-debtor plans themselves are to blame for any de facto substantive consolidation. *In re Transwest Resort Props.*, 881 F.3d at 732. If the debtors in the present matter had not chosen to proceed with an individual plan, then there would have been no reason to "invoke the per debtor approach." *See id.* Therefore, there is little reason to attack the validity of the overall plan and use of the per plan approach where the debtors themselves chose this course of action, as many others have in the past.

Understanding the overall purpose of § 1129(a)(10) —as well as its history—it is clear that the per plan approach would not create a result at odds with the intentions of the drafters. All worries relating to a perversion of the process through de facto substantive consolidation are

unwarranted and misplaced. In sum, the purpose of § 1129(a)(10) was to allow for confirmations according to the per plan approach, just as its plain language provides.

C. It is in the best interest of the public and the future of corporate bankruptcies to adopt the per plan approach.

If this Court is to adopt the "overly broad" interpretation of § 1129(a)(10) calling for the per debtor approach, then it will inevitably "complicate multi-debtor cases by exalting form over substance and would, in some cases, potentially make a negotiated plan unworkable." *See In re SGPA, Inc.*, 2001 Bankr. LEXIS 2291, at *20-22. The goal of a bankruptcy is not—and should not be—perfection. The Thirteenth Circuit majority even went as far as to concede that the plain language interpretation of § 1129(a)(10) is more in line with policy considerations. R. at 20-21. That court noted that this method will allow for the better preservation of jobs. R. at 20-21. By giving so much power to one class of claims, a single creditor can destroy an entity's chance of survival. Not only could this yield less agreement with confirmation plans, but these effects could trickle down and cause drastic negative consequences for those employed by the numerous entities. To that end, the numerous creditors caught in the middle will be severely disadvantaged. *In re SGPA, Inc.*, 2001 Bankr. LEXIS 2291, at *20–21 (holding that the goal should be to alleviate debtors with "too much debt on their balance sheets").

Considering the vast requirements of reorganization plans, it makes little sense to allow single impaired classes to have so much power over the process. During reorganization, the plan must still "satisfy the best interest of creditors" test under § 1129(a)(7), as well as "nondiscrimination, fairness and equity standards under § 1129(b)." *Reconciling the "Per-Plan" Approach*, 14 SETON HALL CIR. REV. at 300. In the present scenario, in order to pass this "best interest" test, Under My Thumb must receive at least as much under the plan as they would under Chapter 7 liquidation. *See* 11 U.S.C. § 1129(a)(7) (2019). Here, "it is undisputed that the

proposed 55% distribution greatly exceeds liquidation value." R. at 7. Beyond these safeguards, creditors may even appoint an independent trustee to investigate fraud or other suspect aspects of the overall plan. *Id.* Under My Thumb could have easily exercised any of these rights but chose not to simply because a competitor was involved in the reorganization plan. R. at 8. Therefore, any interpretation going against the per plan approach merely serves to hinder the process, making it harder for troubled companies to better their situations.

Aside from the needless nature of the per debtor approach, support for this doctrine goes against many of the safeguards afforded by plain language interpretations of clear statutes. The U.S. Constitution provides many protections, including that of bicameralism and presentment. U.S. CONST. art. I, § 7, cl. 2. While some may find solace in the practice of extrapolating various well-intentioned meanings from statutes, this practice can—in fact—prove dangerous. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 441 (2005) (stating that "smoothing over the rough edges in a statute threatens to upset whatever complicated bargaining led to its being cast in the terms that it was"). Scholar John F. Manning has argued that following the plain language of statutes "preserves the carefully designed process in which varied gatekeepers may block or slow legislation or exact a compromise as the price of assent." *Id.* at 441. Thus, Manning concludes that reading statutes in this fashion is the best "way to preserve the unknowable legislative bargains that produced the final text." *Id.* at 447. In sum, the only things that judges can know for certain is that everyone with authority to vote on the matter agreed to the specific text adopted into the given statute. Here, we simply have the plain language of § 1129(a)(10). To go beyond it could be unwise and create a meaning that was possibly never intended at all, especially in the present matter where the legislative history is so lacking.

In addition to preserving the integrity of the bicameral process, giving deference to the plain language helps guarantee the promise of a government that enforces a separation of powers. Robert J. Pushaw, Jr., *Talking Textualism, Practicing Pragmatism: Rethinking The Supreme Court's Approach To Statutory Interpretation*, 51 GA. L. REV. 121, 160 (Fall 2016) [hereinafter *Talking Textualism*] (stating that following the plain language under "[t]extualism…faithfully implements the Constitution, which creates a democratic government with separated powers to promote the rule of law). The Constitution only affords Congress the power to make laws. U.S. CONST. art. I, § 1. Judges are entrusted with the authority to interpret those laws. U.S. Const. art. III, § 1. By extrapolating unintended meanings from statutes, judges run the risk of rewriting statutes to better suit certain situations. Here, if this Court is to go against the plain language of § 1129(a)(10), the Court could potentially be stepping into the role of Congress, violating the Constitution of the United States. *See id.*

Beyond the irrefutable fact that courts were never intended to make *and* adjudicate laws, doing so can also negatively impact efficiency in the legal system. *Talking Textualism*, 51 GA. L. REV. at 160 (stating that "[t]extualism…yield[s] practical benefits such as efficiency and consistency"). With so many methods of interpretation, complete agreement amongst judges is a rarity. *Id.* at 133 (stating that with so many "different interpretive approaches and myriad canons….neither the Court nor any individual Justice has achieved perfect consistency"). Logically then, by enforcing the arguably best method of textualism, Courts can avoid the needless inconsistencies that plague their chambers without attempting to read differing, and possibly contradictory, interpretations into a given statute. While anecdotal evidence may exist to support the notion that judges could write *and* adjudicate laws efficiently, it is much more reasonable to believe that judges' expertise, built up from years in practice or on the bench, is

best geared toward their intended role prescribed by the Constitution. In sum, a plain language reading of § 1129(a)(10) would only aid in the efficiency of Chapter 11 bankruptcies.

Considering the already-present protections afforded by the bankruptcy process— as well as—the virtues of adhering to textualist values, it is clear that § 1129(a)(10) must be followed according to its plain language.

CONCLUSION

For the foregoing reasons, Tumbling Dice, Inc. et al. respectfully requests that this Court reverse the judgment of the Court of Appeals for the Thirteenth Circuit.

Respectfully submitted,

Team P. 40
Counsel for Petitioner
Date: January 21, 2020

APPENDIX A

11 U.S.C. § 102. Rules of construction

…

(7) the singular includes the plural;

…

APPENDIX B

11 U.S.C. § 323. Role and capacity of trustee

(a) The trustee in a case under this title is the representative of the estate.
…

APPENDIX C

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

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

…

(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

…

(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—

…

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

…

(f)

…

(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

APPENDIX D

11 U.S.C. § 1101. Definitions for this chapter

In 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;

APPENDIX E

11 U.S.C. § 1104. Appointment of trustee or examiner

(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee—
…

APPENDIX F

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.

APPENDIX G

11 U.S.C. § 1123. Contents of plan

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

…

(2) specify any class of claims or interests that is not impaired under the plan;

(3) specify the treatment of any class of claims or interests that is impaired under the plan;

…

APPENDIX H

11 U.S.C. § 1124. Impairment of claims or interests

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

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

(2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default—

(A) cures any such default that occurred before or after the commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title or of a kind that section 365(b)(2) expressly does not require to be cured;

(B) reinstates the maturity of such claim or interest as such maturity existed before such default;

(C) compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law;

(D) if such claim or such interest arises from any failure to perform a nonmonetary obligation, other than a default arising from failure to operate a nonresidential real property lease subject to section 365(b)(1)(A), compensates the holder of such claim or such interest (other than the debtor or an insider) for any actual pecuniary loss incurred by such holder as a result of such failure; and

(E) does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest.

APPENDIX I

11 U.S.C. § 1126. Acceptance of plan

(a) The holder of a claim or interest allowed under section 502 of this title may accept or reject a plan. If the United States is a creditor or equity security holder, the Secretary of the Treasury may accept or reject the plan on behalf of the United States.
…
(f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.
…

APPENDIX J

11 U.S.C. § 1129. Confirmation of plan

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

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

(A) each holder of a claim or interest of such class—

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan an account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

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

(A) such class has accepted the plan; or

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

…

(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)

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

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

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

(i)

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

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the

plan, of at least the value of such holder's interest in the estate's interest in such property;

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

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

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

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

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

(C) With respect to a class of interests—

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

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

APPENDIX K

U.S. CONST. art. I, § 1. Legislative powers vested in Congress.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

APPENDIX L

U.S. CONST. art. I, § 7, cl. 2. Approval or veto of bills—Passage over veto

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

APPENDIX M

U.S. CONST. art. III, § 1. Supreme Court and inferior courts—Judges and compensation

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.