No. 19-1004

IN THE

Supreme Court of the United States

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 THIRTEEN CIRCUIT

BRIEF FOR THE PETITIONER

Petitioner 44
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether 11 U.S.C. § 365(c)(1) permits a debtor in possession to assume an executory contract over the objection of the non-debtor party to such contract when applicable 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 any one debtor or, alternatively, acceptance from one impaired class of claims of each debtor.

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OPINIONS BELOW

The opinion of the bankruptcy district court is unreported. The opinion of the Bankruptcy Appellate Panel for the Thirteenth Circuit affirming the lower court's judgment on both issues is unreported. The opinion of the United States Court of Appeals for the Thirteenth Circuit (No. 18-0805) reversing the bankruptcy appellate panel's judgment on both issues is unreported.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

The pertinent provisions of the bankruptcy code are reprinted in the appendix to this brief.

STATEMENT OF FACTS

This case arises following the efforts of Tumbling Dice, Inc. ("TDI"), the owner of one of the largest gaming enterprises in the United States, to ensure its continued operation by restructuring its debts under Chapter 11 of the Bankruptcy Code. R. at 4. TDI is a holding company possessing nine wholly-owned subsidiaries; eight of these subsidiaries (the "Operating Debtors") own and operate luxury casinos and resorts around the country. R. at 4. The remaining subsidiary, Tumbling Dice Development, LLC ("Development"), facilitates the business of the Operating Debtors by providing access to software essential to running TDI's customer loyalty and rewards program. R. at 4. Like TDI, Development and each of the Operating Debtors commenced voluntary cases under Chapter 11 in January of 2016, and these cases were jointly administered for convenience of all parties pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure. R. at 3.

Like many operators in the gaming and hospitality industry, TDI maintains a rewards program, which incentivizes patrons to engage in gaming and other activities at its resorts by offering benefits such as complimentary meals and drinks, free stays at the company's hotels, VIP seating at the in-house concert venue, and other perks. R. at 4. Though this program, known as Club Satisfaction, has been operating for nearly thirty years, Development decided in 2008 to contract with Under My Thumb, Inc. ("Under My Thumb") to create software that would modernize the program by allowing TDI to track members' preferences for different games, food, and beverages. R. at 4-5. This, in turn, would allow TDI and the Operating Debtors to entice patrons to return frequently and spend longer periods and larger sums at their resorts. R. at 5.

Under the terms of a Research and Development Agreement, Development provided a $7 million unsecured promissory note to reimburse Under My Thumb for costs it incurred in developing the Club Satisfaction software. R. at 4. Under a separate license agreement (the "Agreement"), Under My Thumb granted to Development a non-exclusive license to use this software in its business. R. at 5. Though Development and Under My thumb were the only parties to the Agreement, the Agreement permitted Development to "extend the benefits of the Agreement to its affiliated entities," namely, TDI and the Operating Debtors. R. at 5. In exchange for the use of the software, Development agreed to make monthly payments to Under My Thumb proportional to spending by Club Satisfaction members. R. at 5. The Agreement requires Under My Thumb's consent prior to assignment or sublicensing of any rights. R. at 5.

The deal to modernize Club Satisfaction paid dividends for both TDI and Under My Thumb. R. at 5-6. Membership in the Club tripled, and member spending increased as well. R. at 5. Given the significant improvements effected through its use, the software became an essential part of the business model of TDI and its affiliates. R. at 5. Moreover, because of the remarkable success of the updated Club Satisfaction, the payments to Under My Thumb have been greater than expected. R. at 5. Under My Thumb was additionally allowed to license derivative iterations of the software to third parties and chose to do so in fact. R. at 5. Under My Thumb continued to receive the monthly payments due under the Agreement through the time of the filing of the bankruptcy petition. R. at 6. Payments due under the separate promissory note were made regularly until June of 2015; approximately $6 million remains due under the note. R. at 6.

In December of 2011, TDI was purchased by a hedge fund, Start Me Up, Inc., through a leveraged buy-out. R. at 6. This transaction was financed by a $3 billion loan made by a group of syndicated lenders (the "Lenders") and secured by first priority liens on the assets of TDI and the

Operating Debtors. R. at 6. When this burden proved unmanageable, TDI and its subsidiaries filed Chapter 11 petitions to initiate the current proceedings, with the principal goal of restructuring the remaining $2.8 billion owed to the Lenders. R. at 6. TDI and its subsidiaries owed a further $120 million to unsecured creditors, including the $6 million note to Under My Thumb. R. at 6.

Following court-ordered mediation among TDI, the Lenders, and the unsecured creditors' committee, an agreement was reached and memorialized in the debtors' *Joint Plan of Reorganization* (the "Plan"). R. at 3, 6. Under this Plan, Start Me Up, Inc. would be allowed to keep its ownership interest in TDI but would have to fund a 55% distribution to unsecured creditors, including Under My Thumb. R. at 7. In addition, the terms of the indebtedness to the Lenders would be changed to lower the interest rate and extend the payment period. R. at 7. The Plan further proposed to assume the Agreement, allowing TDI to continue using the indispensable Club Satisfaction software while Under My Thumb continued to receive monthly payments. R. at 7.

Because the proposed distribution to creditors far exceeded the available assets of TDI, the Plan enjoyed nearly universal support from all creditor groups, including, initially, Under My Thumb. R. at 7-8. However, Under My Thumb reversed its support for the plan upon discovering that, following the reorganization, a majority of TDI shares would be owned by Sympathy for the Devil, LP, a private equity group which also owns a competitor of Under My Thumb. R. at 7-8. Every class of creditors voted in favor of the plan, save one—the class of Development creditors controlled by Under My Thumb. R. at 17. Thus, by Under My Thumb's vote alone, Development had no accepting class of impaired creditors. R. at 8.

Under My Thumb objected to the Plan on the grounds that section 365(c) of the Bankruptcy Code requires a "hypothetical" test under which Development cannot assume the Agreement, even

though Development has no intention to assign it. R. at 8. Under My Thumb further objected based on its contention that, to accept the Plan, section 1129(a)(10) requires at least one accepting class of impaired creditors per debtor, rather than per plan. R. at 9. The bankruptcy court overruled these objections, and the Bankruptcy Appellate Panel affirmed. R. at 9. The Court of Appeals for the Thirteenth Circuit reversed, upholding both of Under My Thumb's arguments. R. at 9. This Court granted certiorari. R. at 1.

SUMMARY OF ARGUMENT

This Court should reverse both holdings of the court below. Section 365(c) should be understood to allow a debtor in possession to assume an executory contract so long as they do not intend to assign it to a third party. Additionally, Section 1129(a)(10) should be applied on a "per plan" basis, rather than a "per debtor" basis.

Under 11 U.S.C. § 365(c), a trustee may not assume or assign the debtor's executory contract if applicable law excuses the counterparty from rendering performance to or accepting performance from a party other than the debtor. This rule protects the nondebtor party from being forced to deal with an entity, such as the trustee or a third party, with whom the nondebtor did not contract. For two independent reasons, this statutory provision does not prevent the debtor in possession in a Chapter 11 proceeding from assuming executory contracts. First, by its own terms, section 365(c) applies only to trustees. The limitations on a debtor in possession derive from 11 U.S.C. § 1107(a), which subjects the powers of the debtor in possession to "any limitations" on the trustee. Because the substantive limitation of section 365(c) is that nondebtors may not be forced to do business with a stranger, this limitation does not implicate or prohibit assumption of contracts by debtors in possession. Second, section 365(c) establishes an "actual" test, in which

debtors in possession can assume so long as they do not intend to assign. The plain meaning of 365(c), its conflicts with section 365(f), legislative history, and the gravest of policy concerns support this conclusion.

Section 1129(a)(10) is fulfilled when "at least one class of claims that is impaired under the plan has accepted the plan." 11 U.S.C. § 1129(a)(10). By its plain terms, once "at least one" impaired class has accepted the plan, section 1129(a)(10) is satisfied as to the entire plan. The statute contains no textual clues which indicate that an additional requirement that at least one impaired class of claims *per debtor* must approve the plan and, indeed, adopting that reading would contravene the purposes of section 1129, in particular, and of Chapter 11 reorganization, in general.

STANDARD OF REVIEW

The parties do not dispute the facts set forth herein; all disputes regard issues of law which are reviewed de novo. *Texas v. Soileau (In re Soileau)*, 488 F.3d 302, 305 (5th Cir. 2007) (citation omitted). Under a de novo standard of review, the reviewing court decides an issue as if it were the original trial court in the matter. *Razavi v. Comm'r of Internal Revenue*, 74 F.3d 125, 127 (6th Cir. 1996) (quotation omitted).

ARGUMENT

I. Accepted Principles of Statutory Interpretation, Legislative History, and Bankruptcy Policy All Indicate that Section 365(c) Allows Debtors in Possession To Assume Executory Contracts.

Debtors in possession should be permitted to assume, but not assign, their prebankruptcy contracts because section 365(c) of the Bankruptcy Code is applied to debtors in possession only through 11 U.S.C. § 1107(a) and, in any event, is triggered only by an actual intent to assign.

Bankruptcy, district, and circuit courts have disagreed on multiple issues concerning the correct interpretation and application of section 365(c). One source of disagreement is that the provision, on its face, applies to bankruptcy trustees, forbidding them to assign or assume the debtor's contract under certain circumstances, and courts have differed over the extent to which the provision applies to debtors in possession under Chapter 11. Moreover, the Federal Courts of Appeal have been split over whether section 365(c) applies where there is any possibility of assignment of a contract, or only where there is an actual intent to do so. Because section 365(c) applies only through section 1107(a) and because the statute's plain language calls for an actual test, this Court should find that Tumbling Dice, as debtor in possession, can assume its contract with Under My Thumb.

A. The Plain Meaning and Overall Scheme of Section 365 Support the Use of the Actual Test.

1. The Plain Meaning of Section 365(c) Supports Use of the Actual Test.

A careful reading of section 365(c) reveals that the statute is perfectly consistent with allowing debtors in possession to assume executory contracts. According to the reasoning promulgated by multiple circuit courts, the language of section 365(c) establishes "a 'hypothetical test': a debtor in possession may not assume an executory contract over the nondebtor'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 to any such third party." *Perlman v. Catapult Entm't (In re Catapult Entm't)*, 165 F.3d 747, 750 (9th Cir. 1999). Other circuits interpret section 365(c) as mandating what has become known as the "actual" test, under which "the statute bars assumption by the debtor in possession only where the reorganization in question results in the nondebtor *actually* having to accept performance from a third party." *Id.* at 751.

Though courts adopting the hypothetical test assert that their reading better comports with the plain meaning of section 365(c), *id.*, as will be explained, "it is at least as plausible to construe [the statutory language] as requiring an *actual* showing . . . that the nondebtor party . . . would not be forced to accept performance under its executory contract from someone other than the debtor party with whom it originally contracted," *Summit Inv. & Dev. Corp. v. Leroux*, 69 F.3d 608, 612 (1st Cir. 1995) (ruling on section 365(e)); *see also Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997) (applying *Leroux* to section 365(c)). Courts holding that the plain meaning of the statute mandates the hypothetical test appear to focus extensively on whether the provision's disjunctive language stating that the "trustee may not assume *or* assign" can be read in the conjunctive as "may not assume *and* assign." 11 U.S.C. § 365(c); *see RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257, 260 (4th Cir. 2004) ("[W]e must resolve the issue of whether the disjunctive term 'or' . . . should be construed in the conjunctive as 'and.'"). Unsurprisingly, these courts have concluded that 'or' is not equivalent to 'and.' *See, e.g.*, *Sunterra Corp.*, 361 F.3d at 260. However, the language of section 365(c) supports an actual test even without conflating these conjunctions; in particular, the statute's single phrase "applicable law excuses a party" provides multiple lines of evidence that section 365(c) is best interpreted as requiring an actual test. § 365(c).

While courts approving the hypothetical test have taken the phrase "applicable law" to mean any law which could possibly be applicable, in actuality "the phrase 'applicable law' is commonly used to refer to the law applicable to the facts of the case at hand rather than some law that may be applicable to another set of circumstances." *Texaco, Inc. v. La. Land & Expl. Co.*, 136 B.R. 658, 671 (M.D. La. 1992). Because law is not applicable if its application depends on some unfulfilled contingency, the phrase "applicable law" is best read as supporting the actual test.

The Fifth Circuit's case law supports this reading. Interpreting 11 U.S.C. § 365(e)(2), which contains language highly similar to section 365(c) and uses the same "applicable law excuses a party" construction, the court stated that the "plain text of § 365(e)(2)(A) requires an actual test for determining whether law is 'applicable.'" *Bonneville Power Admin. v. Mirant Corp. (In re Mirant Corp.)*, 440 F.3d 238, 249 (5th Cir. 2006).

Moreover, the language of section 365(c) requires that "applicable law *excuses* a party," suggesting that the excuse must be actual and presently applicable rather than hypothetical. § 365(c) (emphasis added). In addition to the fact that Congress placed the verb in the indicative ("law excuses") rather than the conditional mood ("law would excuse"), the choice of the verb itself suggests that the passage creates an actual test. To "excuse" is "[t]o relieve from liability; to relieve from a duty or obligation." *Excuse, Ballentine's Law Dictionary* (3d ed. 1969). The word "excuse" thus implies that there already exists some actual obligation or duty to which the excuse applies; as an example, one is excused from jury service only after actually being summoned. Had Congress intended to refer to "any potentially applicable law which could excuse," it could have used such language, "but instead Congress tethered the exception to 'applicable' law that 'excuses a party.'" *Mirant Corp.*, 440 F.3d at 250. Indeed, the *Mirant Corp.* court goes so far as to say that a litigant "creates smoke and erects mirrors" when it argues it is excused by applicable law where "no such assignment existed in fact and no excuse existed in fact for the nondebtor party to refuse acceptance or performance." *Id.* at 250.

2. The Hypothetical Test Should Be Rejected Because It Creates Inconsistencies in Section 365 in Violation of Accepted Rules of Statutory Interpretation.

The hypothetical test should also be rejected because it renders section 365 at war with itself. As this Court has observed, it is courts' "duty 'to give effect, if possible, to every clause

and word of a statute,' rather than to emasculate an entire section." *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (citation omitted) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1882)). Courts should "interpret a statute, if possible, so as to minimize discord among related provisions," *Catapult Entm't*, 165 F.3d at 751, and should seek to avoid rendering any part of it inoperative or superfluous, *City of Jamestown v. James Cable Partners (In re James Cable Partners)*, 27 F.3d 534, 538 (11th Cir. 1994) (per curiam).

The conflict of section 365(c) becomes apparent when read in conjunction with subsection (f). Subsection (f) provides that, "[e]xcept 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." 11 U.S.C. § 365(f). This language creates a fundamental inconsistency between subsections (c) and (f), for subsection (f) purports to override provisions in private agreements or in nonbankruptcy law which would impede assignment. But subsection (f) is subject to the exception of subsection (c). If subsection (c) does indeed forbid assumption in any case where applicable nonbankruptcy law would prohibit assignment, then (c) revives the very same anti-assignment provisions which (f) would otherwise override. Because the hypothetical test would prevent a contract from being assumed by a debtor in possession against the nondebtor's will, the assignment provisions of subsection (f) will never be operative under this test and are mere surplusage.

Some courts have attempted to reconcile the hypothetical test with subsection (f), but these efforts are ultimately in vain. Though the early decision of *West Electronics* does not appear to recognize the conflict between subsections 365(c) and (f), later opinions by the Courts of Appeals attempt to reconcile the subsections. *See In re West Elecs., Inc.*, 852 F.2d 79 (3d Cir. 1988). These

attempted reconciliations appear to have their origin in *Rieser v. Dayton Country Club Co. (In re Magness)*, 972 F.2d 689, 695-96 (6th Cir. 1992), which is cited by two of the circuit court opinions adopting the hypothetical test. *Sunterra Corp.*, 361 F.3d at 266-67 (discussing and adopting *Magness*); *Catapult Entm't*, 165 F.3d at 751-52 (same). Though not citing *Magness*, the remaining circuit to adopt the hypothetical test used similar reasoning. *James Cable*, 27 F.3d at 538. According to the *Magness* court, subsection (f) is targeted towards and overrides any "general prohibition against the assignment of executory contracts." 972 F.2d at 695. The court goes on to hold that "[s]ubsection (c) states that if the attempted assignment by the trustee 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 . . . or render performance . . . will prohibit assignment." *Id.* The court drew a distinction between "365(f) covering 'applicable law' (and contractual clauses) prohibiting or restricting assignments as such," and "365(c) embracing legal excuses for refusing to render or accept performance, regardless of the contract's status as 'assignable.'" *Id.* at 699 (Guy, J., concurring).[1] According to this analysis, a rule excusing performance "where the identity of the original contracting party was material" was an excuse against performance upheld by subsection (c), not a prohibition against assignment struck down by subsection (f). *Id.* at 700. Courts adopting the hypothetical test have accepted this line of argument, holding that "[o]nly if the law prohibits assignment on the rationale that the identity of the contracting party is material to the agreement will subsection (c)(1) rescue it." *Catapult Entm't*, 165 F.3d at 752; *accord Sunterra Corp.*, 361

[1] The *Magness* majority appears to have adopted the concurrence's analysis of the relationship between subsections (c) and (f), calling it "a helpful amplification of our understanding of the distinct meanings of the phrase 'applicable law.'" 972 F.2d at 695 n.1.

F.3d at 266-67 ("[O]nly applicable anti-assignment law predicated on the rationale that the identity of the contracting party is material to the agreement is resuscitated by § 365(c)(1).").

Unfortunately, this interpretation is simply not supported by the statute's text. Courts that attempt to distinguish subsections (c) and (f) assert that subsection (c) saves only laws which have a particular rationale and which relate to the materiality of the contracting party's identity, but in fact, section 365(c) makes no mention of these issues. § 365(c). Though courts adopting the hypothetical test claim that their interpretation is more faithful to the plain text of the statute, their attempted reconciliation of subsections (c) and (f) forces them to insert language regarding applicable laws' purpose and the materiality of parties' identities which is nowhere to be found in the text. *See Catapult Entm't*, 165 F.3d at 751-52.

Moreover, the attempted distinction between laws "prohibiting or restricting assignment" and laws constituting "legal excuses for refusing to render or accept performance" is not tenable. *Murray v. Franke-Misal Techs. Grp. (In re Supernatural Foods, L.L.C.)*, 268 B.R. 759, 782 (Bankr. M.D. La. 2001) (holding that, though subsection (c) speaks of excusing a party from accepting or rendering performance and subsection (f) speaks of prohibiting, restricting, or conditioning assignment, seizing on this difference in phraseology was an "artificial limitation on the scope of the statute"). Even if the realm of acceptable "legal excuses" is narrowed to excuses based on the materiality of the contracting party's identity, "every law of general application . . . which prohibits or restricts transfers is by definition making the identity of the parties to the contract material." *Supernatural Foods*, 268 B.R. at 781. "A law which states that certain forms of contracts cannot be assigned is inherently concerned with the identity of the parties to the contract." *Id.*

In sum, courts applying the hypothetical test simply cannot reconcile subsections (c) and (f). Their attempts to do so rely upon insertion into the statute of non-textual considerations such as the materiality of the contracting party's identity and the rationale behind the "applicable law." § 365(c). Because this Court and lower courts have repeatedly emphasized the importance of reading statutes as a whole and avoiding interpretations which result in a conflict among provisions, the hypothetical test should be rejected.

B. Section 365(c) Applies to Debtors in Possession Only Through Section 1107(a), Which Makes Debtors in Possession the Substantive but Not Literal Equivalent of Trustees.

1. The Substantive Requirement of Section 365(c), Applied by Section 1107(a), Is that Parties May Not Assume or Assign if Doing so Would Introduce a New Party to the Contract.

Section 365(c) does not, by its own terms, apply directly to debtors in possession. § 365(c). Rather, the Bankruptcy Code directs that "[t]he *trustee* may not assume or assign any executory contract" under the specified conditions. § 365(c) (emphasis added). As courts have held, "the debtor and the trustee in a Chapter 11 case are entirely different parties." *In re Footstar, Inc.*, 323 B.R. 566, 571 (Bankr. S.D.N.Y. 2005) ("[N]o provision of the Bankruptcy Code states in words or substance that references in the Code to 'trustee' are to be construed to mean 'debtor' or 'debtor in possession.'"). The rights, powers, and limitations of a trustee are related to those of a debtor in possession by a specific statutory provision which, while tightly linking the roles and responsibilities of the two entities, cannot be understood as defining the debtor in possession's power by mandating that every instance in the Bankruptcy Code of the word "trustee" be replaced with "debtor in possession."

The powers and duties of a debtor in possession are described by 11 U.S.C. § 1107. "Subject to any limitations on a trustee serving in a case under this chapter . . . a 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(a). This provision confers on the debtor in possession the trustee's power to assume executory contracts conferred in section 365(a), but also subjects that power to whatever "limitations on a trustee" may apply. § 1107(a). That the debtor in possession's power to assume executory contracts is in some way qualified by section 365(c) is beyond question.

Section 1107 does not, however, specify precisely how the limitations upon the trustee are to be applied to the debtor in possession. One approach is to simply substitute the term "debtor in possession" for the word "trustee" wherever it appears in a statute limiting the trustee's power. This has been the course taken, with little discussion or analysis, by many circuit courts. *See West Elecs.*, 852 F.2d at 82 ("The trustee [which includes the debtor in possession] may not assume . . . any executory contract . . . ." (alteration in original) (footnote omitted) (quoting 11 U.S.C. § 365(c))); *James Cable*, 27 F.3d at 537 ("The trustee [read debtor in possession] may not assume or assign . . . ." (alteration in original) (quoting 11 U.S.C. § 365(c))); *Catapult Entm't*, 165 F.3d at 750 (holding the word trustee includes within its meaning debtors in possession); *Sunterra Corp.*, 361 F.3d at 261 n.5 (same); *Institut Pasteur*, 104 F.3d at 492 & n.7 (same). In this approach, after the statute is reconstructed by substituting "debtor in possession" for "trustee," it is then parsed using normal tools of statutory interpretation for its formal, semantic meaning in order to determine how the statute at hand limits the debtor in possession's power. It is under this approach to applying section 1107 that the disagreement over the meaning of section 365 and consequent circuit split between courts using the hypothetical and actual tests have arisen. *Compare Sunterra Corp.*, 361 F.3d at 267, *with Institut Pasteur*, 104 F.3d at 493.

The approach taken by the circuit courts is neither the only nor the best possible course. Rather than substituting certain words and attempting to strictly apply the resultant language, courts should "focus[] on the *substantive* limitation set forth in the statute." *Footstar*, 323 B.R. at 577. After all, section 1107 does not require that limitations on the powers of debtors in possession be discerned by substitution of words, but rather that the powers of the debtor in possession be "[s]ubject to any limitations on a trustee." § 1107(a). Put succinctly, courts should evaluate a statute to discern the core, substantive limitation it places upon the trustee, and then apply that substantive limitation to the debtor in possession.

In the case of section 365(c), the provision's "basic objective" or core purpose "is vindication of the right under applicable law of a contract counterparty to refuse to accept performance from or render performance to an entity 'other than the debtor or the debtor in possession.'" *Footstar*, 323 B.R. at 573 (emphasis omitted) (quoting 11 U.S.C. § 365(c)). In other words, the substantive limitation upon the trustee is that he cannot force the party which contracted with the debtor to deal with a third party when applicable law excuses them from doing so. *Id.* Since "a trustee is not the same as a debtor in possession in point of fact and law," the assumption of the contract by the *trustee* forces a change of party upon the contractor, thus violating the "basic objective" of section 365(c). *Id.* at 573, 577. On the other hand, assumption (but not assignment) of the contract by the *debtor in possession* merely preserves the contract as written and requires only that parties carry out their bargained-for obligations. As such, the "basic objective of Section 365(c)(1) . . . simply is not implicated when a debtor in possession seeks to assume." *Id.* at 573-74. Applying the limitation of section 365(c) against the debtor in possession in this manner—by finding the substance or core of the statutory provision and applying that substantive rule, rather

than by simply substituting the phrase "debtor in possession" for "trustee"—is faithful to the text and purpose of 1107 and, as will be discussed, finds significant support in precedent.

2. Precedent Supports the View That Section 1107 Incorporates the Substance of Limitations Against Debtors in Possession.

In using section 1107 to apply limitations on the power of a trustee to a debtor in possession, courts have frequently found it necessary to go beyond the language of a statutory provision to find its core meaning. For instance, a series of cases in multiple circuit courts considered the ability of a debtor in possession to bring suit to avoid impermissible preference payments; such actions are subject to a statute of limitations under 11 U.S.C. § 546(a). *See, e.g.*, *U.S. Brass & Copper Co. v. Caplan (In re Century Brass Prods.)*, 22 F.3d 37, 38-40 (2d Cir. 1994). The version of section 546(a) then in place stated that an "action or proceeding under [specified sections] may not be commenced after the earlier of (1) two years after the appointment of a trustee under [specified sections]; or (2) the time the case is closed or dismissed."[2] *Id.* at 39. As with section 365, the portions of the Bankruptcy Code dealing with preference-avoidance actions and the associated statute of limitations were written in terms of the trustee, meaning that the debtor in possession's authorization to bring such actions and the limitations on that power must be "found in § 1107." *Id.* Litigants seeking to evade the statute of limitations argued that section 1107 functions by substituting the term "debtor in possession" for "trustee," meaning that the statute would set the statute of limitations with reference to the "appointment of a debtor in possession." *See Constr. Mgmt. Servs., Inc. v. Mfrs. Hanover Tr. Co. (In re Coastal Grp.)*, 13 F.3d 81, 84 (3d Cir. 1994). According to this line of argument, since "a debtor-in-possession is not appointed but

[2] Congress later amended the statute to resolve the issue considered by the courts. *See* 11 U.S.C. § 546(a).

comes into existence with the filing of a bankruptcy petition," the statute of limitations does not, in practice, apply to debtors in possession. *Id.*

Not a single Court of Appeals accepted this argument. Most circuit courts ruled that the statute of limitations did apply to the debtor in possession, reasoning that focusing on the appointment or non-appointment of a debtor in possession was unduly literal and ignored that section 1107 "giv[es] a DIP powers *paralleling* those of a trustee." *Century Brass*, 22 F.3d at 40 (emphasis added); *Coastal Grp.*, 13 F.3d at 84 (holding the two-year statute of limitations applied to debtors in possession and began when the bankruptcy petition was filed); *CompuAdd Corp. v. Tex. Instruments, Inc. (In re CompuAdd Corp.)*, 137 F.3d 880, 883 (5th Cir. 1998) (same); *Upgrade Corp. v. Gov't Tech. Servs., Inc. (In re Softwaire Ctr. Int'l, Inc.)*, 994 F.2d 682, 683 (9th Cir. 1993) (per curiam) (same); *Zilkha Energy Co. v. Leighton*, 920 F.2d 1520, 1524 (10th Cir. 1990) (same). Rather than attempting to apply verbatim the statutory product of replacing "trustee" with "debtor in possession," these courts recognized and applied to debtors in possession the substantive rule embodied by section 546(a), namely, that once an entity was empowered to bring an avoidance action, it had two years to do so.

Moreover, while the Fourth Circuit found that the statute of limitations under section 546(a) does not apply to debtors in possession, it did not do so on the grounds that there is no appointment of a debtor in possession. *See Maurice Sporting Goods, Inc. v. Maxway Corp. (In re Maxway Corp.)*, 27 F.3d 980, 983-84 (4th Cir. 1994). Rather, because the statute then in place provided that an "action or proceeding . . . may not be commenced," as opposed to providing that the trustee could not bring an action, the court ruled that "by its terms, § 546(a) applies to both

trustees and debtors in possession" directly without implicating section 1107.[3] *Id.* at 984. In so ruling, the court characterized section 1107 as establishing a "general statutory scheme of *functional* equivalency," *id.* (emphasis added), suggesting that the section 1107 analysis should be more substantive and practical than formalistic.[4]

This ruling, in conjunction with the decisions of the other Courts of Appeals, supports the conclusion that when section 1107 makes limitations on the powers of trustees applicable against debtors in possession, it is the substance of these limitations which is applied. Rather than allowing themselves to be confounded by the awkwardness of the phrase "appointment of a debtor in possession" which is created by replacing "trustee" with "debtor in possession," courts instead saw through to the substance of the statute of limitations, which is ultimately a rule giving the entity bringing suit two years to do so, and said courts applied this rule to the debtor in possession. Like the majority of the Courts of Appeal applying section 546(a), this Court should see through to the substantive limitation of section 365(c), which is ultimately a rule forbidding assumption or assignment when doing so would force a contracting party to do business with a stranger against its will. Because Tumbling Dice seeks only to assume, and not assign, the contract to which it is already a party, its actions are in compliance with this substantive rule made applicable to it through section 1107.

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[3] Unlike the statute of limitations in section 546(a), section 365(c) is written as a direct limitation on the power of the trustee, and section 1107 is thus applicable to section 365(c) under the Fourth Circuit's analysis. *See* 11 U.S.C. § 365(c) ("The *trustee* may not assume or assign . . . ." (emphasis added)).

[4] Two other circuits ruled that debtors in possession were not subject to the statute of limitations because such statutes are procedural, and, in these courts' view, section 1107 incorporates against the debtor in possession only substantive limitations. *Gleischman Sumner Co. v. King, Weiser, Edelman & Bazar*, 69 F.3d 799, 801-02 (7th Cir. 1995); *M.K. Moore & Sons, Inc. v. Slutsky (In re Wm. Cargile Contractor, Inc.)*, No. 96-4353, 1998 U.S. App. LEXIS 7964, at *15 (6th Cir. 1998) (unpublished decision). Though Tumbling Dice does not argue that the substantive/procedural analysis in these two cases applies to section 365(c), these decisions are still noteworthy in that they, like every other circuit court decision on this issue, do not apply section 1107 by substituting the term "debtor in possession" for "trustee."

C. Legislative History Clearly Indicates Debtors in Possession Should Be Able to Assume Executory Contracts.

The legislative history of section 365(c) supports the assertion that, in accordance with the policy considerations discussed, Congress intended for debtors in possession to assume executory contracts without hindrance. Section 365 assumed its current form after being amended by Congress in the Bankruptcy Amendments and Federal Judgeship Act ("BAFJA") of 1984. *In re Cardinal Indus., Inc.*, 116 B.R. 964, 978 (Bankr. S.D. Ohio 1990). Under the law as passed in 1978, a trustee could not assume or assign when "applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or an assignee of such contract or lease." *Leroux*, 69 F.3d at 613. The 1984 amendment replaced "the trustee" with the phrase "an entity other than the debtor or the debtor in possession."[5] *Cardinal Indus.*, 116 B.R. at 979; 11 U.S.C. § 365(c).

Because the Act was hastily passed "primarily to rectify the constitutional crisis stemming from the decision of the Supreme Court" in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), "there is no authoritative legislative history for BAFJA as enacted in 1984." *Cardinal Indus.*, 116 B.R. at 978. However, the language in BAFJA amending the Bankruptcy Code was actually taken verbatim from The Technical Amendment Act of 1980, which had been languishing in Congress for years due to insufficient impetus for its passage. *Id.* The legislative history for the Technical Amendment Act explains that:

> This amendment makes 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

[5] This amendment rendered the language "or an assignee of such contract or lease" superfluous, and this phrase was subsequently struck by an amendment in 1986. *Footstar*, 323 B.R. at 574 n.5.

> contract will be the same as if no petition had been filed because of the personal nature of the contract.[6]

H.R. Rep. No. 96-1195, at 57 (1980). This legislative history unambiguously supports the view that section 365(c) should be interpreted to allow assumption by a debtor in possession.

Indeed, when concluding that debtors in possession cannot assume a contract, courts' primary argument appears to be that the legislative history is simply not strong enough. *See Sunterra Corp.*, 361 F.3d at 270 (stating that the 1980 House report is "not conclusive" as to congressional intent); *Catapult Entm't*, 165 F.3d at 754 (stating report was not "clear indication of contrary intent that would overcome" the perceived plain meaning of the statute). These courts name three reasons for discounting the importance of legislative history, namely, that "the 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." *Catapult Entm't*, 165 F.3d at 754; *accord Sunterra Corp.*, 361 F.3d at 270 (citing same three reasons). The criticism that the House report was generated from the unenacted Technical Amendment Act of 1980 is true enough, but seems markedly weakened by the fact that the same language was incorporated into the enacted BAFJA. *Cardinal Indus.*, 116 B.R. at 979. Discounting this clear manifestation of legislative intent merely because it is four years old and was produced by a single committee would be to ignore this Court's "repeated[] warn[ings] against the approach to statutory construction which confines itself to the bare words of a statute . . . for 'literalness may strangle meaning.'" *Lynch v. Overholser*, 369 U.S. 705, 710 (1962) (quoting *Utah Junk Co. v. Porter*, 328 U.S. 39, 44 (1946)). Taken in concert with the strong policy considerations favoring assumption by debtors in

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[6] The reference to personal service contracts within this legislative history may stem from the view, espoused by a minority of courts and dating to around the time of the creation of the cited committee report, that § 365(c) applies only to personal service contracts. *In re Rooster, Inc.*, 100 B.R. 228, 232 n.6 (Bankr. E.D. Pa. 1989).

possession, the legislative history points strongly towards interpreting sections 365 and 1107 to allow debtors in possession to assume executory contracts.

D. Sound Bankruptcy Policy Strongly Supports Allowing Assumption of Contracts by Debtors in Possession, as Doing So Is Often Essential to a Successful Reorganization.

Considerations of policy militate toward interpreting sections 1107 and 365(c) as allowing assumption of an executory contract by a debtor in possession. As this Court has observed, "the policy of Chapter 11 is to permit successful rehabilitation of debtors." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984). Under the rule advocated by Respondent, "bankruptcy reorganizations will be defeated when debtors in possession cannot succeed to their pre-bankruptcy contracts." *In re GP Express Airlines*, 200 B.R. 222, 232 (Bankr. Neb. 1996). Such a rule raises the specter of "preventing the estate from assuming an executory contract which potentially is its most valuable asset," leading in turn to liquidation of the debtor and the attendant loss of jobs and economic productivity. *Cardinal Indus.*, 116 B.R. at 981.

Disallowing assumption of contracts would also interfere with other parts of the statutory scheme of bankruptcy. Section 365(e), among other sections, ensures that "the Bankruptcy Code will not enforce provisions in private agreements or in nonbankruptcy law which terminate a debtor's interest in property or an executory contract merely because of a bankruptcy filing." *GP Express Airlines*, 200 B.R. at 232. Because the approach of the *Sunterra Corp.* court and other courts, "provides for the termination of a debtor's property interest in a contract merely because of the filing of a bankruptcy petition," such decisions are "directly at odds with . . . other provisions of the Bankruptcy Code which decline to enforce forfeiture provisions in private contracts." *Id.* at 232-33. Such terminations of contracts upon bankruptcy, whether effected through a termination

provision or through a refusal to allow assumption, ultimately "impair a successful reorganization" and thus frustrate the central purpose of Chapter 11. *Id.* at 232.

Even some courts which have concluded that debtors in possession cannot assume an executory contract without permission have conceded that sound bankruptcy policy favors allowing such assumptions. *See, e.g.*, *Catapult Entm't*, 165 F.3d at 754 ("[T]hat the plain language of § 365(c)(1) may be bad policy does not justify a judicial rewrite."); *Sunterra Corp.*, 361 F.2d at 268 (holding that even if policy outcome were "quite unreasonable," result was not "so grossly inconsistent with bankruptcy policy as to be absurd").

The concerns of policy are particularly acute in this case. Tumbling Dice is a major employer running numerous resorts across the nation—indeed, it is one of the largest gaming operations in the country. R. at 4. The use of the software developed by Under My Thumb is an essential part of Tumbling Dice's business model, as it has significantly increased the membership and spending per member of the Club Satisfaction loyalty program. R. at 5. As such, allowing Under My Thumb to effectively void its contract with Tumbling Dice would significantly impair Tumbling Dice's efforts to reorganize and increase the likelihood of a liquidation.

Given the consistency of the statute's plain meaning with assumption of contracts, the conflict of the hypothetical test with section 365(f), the import of section 1107, and the legislative history, it is appropriate to take into account the grave policy concerns which weigh strongly in favor of allowing assumption of contracts. As one court observed, refusing to allow debtors in possession to assume contracts:

> stands bankruptcy law upon its head. The proposition tends to defeat the basic bankruptcy purpose of enhancement of the bankruptcy estate for benefit of rehabilitation and the general creditors upon a highly technical "hypothetical" test which furthers no bankruptcy purpose at all. It would allow one disgruntled

> creditor to frustrate payment of claims to other creditors or rehabilitation, contrary to the whole purpose of bankruptcy.

Texaco, Inc., 136 B.R. at 671. Simply put, this Court should not take a statute, fairly readable as producing a reasonable outcome, and interpret it in a way which is inconsistent with the statute's other provisions, produces an outcome contrary to the legislature's stated intent, and is utterly inconsistent with sound policy. For these reasons, the Court should reverse the judgment of the Thirteenth Circuit with respect to the interpretation of section 365(c) and allow Tumbling Dice to assume the contract for which it bargained.

II. Section 1129(a)(10) Is Satisfied by Acceptance from One Impaired Class of Claims When One Plan Covers Multiple Debtors

A single hold-out creditor should not be permitted to stop the debtors' reorganization process dead in its tracks and even force a potentially lucrative group of companies into liquidation. The plan at issue today has been accepted by all impaired classes of claims except one, and undoubtedly fulfills the requirement of 11 U.S.C. § 1129(a)(10) that when a class of claims is impaired under a plan, at least one class of claims that is impaired under the plan has accepted the plan.

A class of claims is impaired if their rights are changed under the plan. Impairment triggers extra protections for the claimholder. Usually, a Chapter 11 plan may be confirmed only if each class of impaired creditors consents. 11 U.S.C. § 1129(a)(8). However, this requirement is abridged in "cram down" situations like the one at hand in which a plan is confirmed over the objections of one or more of the creditors. *See* 11 U.S.C. § 1129(b). Section 1129 lists the requirements for approval of a cram down plan and "contains a number of safeguards for secured creditors who could be negatively impacted by a debtor's reorganization plan." *In re The Vill. at Lakeridge, LLC*, 814 F.3d 993, 1000 (9th Cir. 2016). One such safeguard is section 1129(a)(10),

which requires that at least one impaired creditor has accepted the plan. *See* 11 U.S.C. § 1129(a)(10). This requirement importantly gives impaired creditors a seat at the negotiation table, but it should not be interpreted so as to give them a cudgel with which to hold the bankruptcy process hostage.

Section 1129(a)(10)'s safeguard should apply on a "per plan," rather than "per debtor," basis. The "per plan" approach, which has been adopted by the only circuit court to address this question as well as several federal bankruptcy courts, requires acceptance of the plan by one impaired class of claims under the plan. *See JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (In re Transwest Resort Props., Inc.)*, 881 F.3d 724, 729-30 (9th Cir. 2018) (assessing and rejecting "per debtor" approach and applying "per plan" approach); *In re Enron Corp.*, No. 01-16034, 2004 Bankr. LEXIS 2549, at *234-36 (Bankr. S.D.N.Y. July 15, 2004) (same); *In re SGPA, Inc.*, No. 1-01-02609, 2001 Bankr. LEXIS 2291, at *12-22 (Bankr. M.D. Pa. Sept. 28, 2001) (same); *see also In re Station Casinos, Inc.*, Nos. BK-09-52477, BK 09-52470, BK 09-52487, 10-50381, 2010 WL 11492265, at *23 (Bankr. D. Nev. Aug. 27, 2010) (citing *SGPA* and *Enron* and applying "per plan" approach); *JPMorgan Chase Bank, N.A. v. Charter Commc'ns Operating, LLC (In re Charter Commc'ns)*, 419 B.R. 221, 264-66 (Bankr. S.D.N.Y. 2009) (same). On the other hand, the "per debtor" approach, which has been adopted by the Delaware Bankruptcy Court, requires one accepting impaired class of claims for each debtor. *See In re Tribune Co.*, 464 B.R. 126, 182-83 (Bankr. D. Del. 2011) (applying "per debtor" approach); *see also In re Woodbridge Grp. of Cos.*, 592 B.R. 761, 778-79 (Bankr. D. Del. 2018) (citing *Tribune* and applying "per debtor" approach to case involving substantively consolidated parties); *In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293, 301-02 (Bankr. D. Del. 2011)

(citing and applying *Tribune*).[7] This Court should adopt the "per plan" reading of section 1129(a)(10) because it more closely accords with the text of the statute, it fits comfortably with the rest of the section, and it better advances the purposes of Chapter 11 reorganization.

A. The Plain Language of Section 1129(a)(10) Indicates a "Per Plan" Interpretation

The starting point for statutory interpretation must always be the text itself, and here it is clear that the text plainly supports the "per plan" approach. It is well-established that "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *see also United States v. Ron Pair Enters.*, 489 U.S. 235, 241-42 (1989) (announcing same principle in Chapter 11 bankruptcy context). The text of section 1129(a)(10) reads: "If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(10). The text makes no reference to debtors and makes no distinction between the creditors of various debtors or between single-debtor and joint, multiple-debtor plans, yet Respondent would have this Court read in the additional requirement of approval by an impaired class of claims of each debtor. Imputing this additional requirement and negating the plain statutory language strains the principles of statutory interpretation and undermines the purposes of bankruptcy.

The language of section 1129(a)(10) is clear and unambiguous. Once "at least one" impaired class has accepted the plan, section 1129(a)(10) is satisfied as to the entire plan. *See*

[7] One federal bankruptcy court has considered without deciding the issue. *In re ADPT DFW Holdings LLC*, 574 B.R. 87, 104-07 (Bankr. N.D. Tex. 2017) (applying "per plan" approach to substantively consolidated debtors, making no comment as to which approach would be appropriate for jointly administered, multi-debtor plans).

Transwest, 881 F.3d at 729. If Congress had intended this section to apply on a "per debtor" basis, it would have been trivially easy for them to evince this intent in language. The total absence of language referring to the debtor or debtors, distinguishing between single-debtor and multi-debtor plans, or otherwise indicating any situation in which "at least one" should be multiplied indicates that Congress did not intend for these considerations to be a part of the section 1129(a)(10) inquiry. As the Supreme Court has repeatedly stated, we must "presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Because the text of section 1129(a)(10) is unambiguous, our inquiry could end at this stage with the conclusion that it requires a "per plan" approach.

Respondent argues that the rule that "the singular includes the plural" changes the plain meaning of section 1129(a)(10), but this argument is unavailing. *See* 11 U.S.C. § 102(7). The first clause of section 1129(a)(10) uses the indefinite article "a" to refer to the impaired class or classes of claims which trigger the condition. In contrast, the second clause uses the definite number "one" to refer to the impaired class of claims that must consent to the plan to fulfill the condition. Because "one" cannot be made plural without self-contradiction, the rule that "the singular includes the plural" does not change the plain meaning of the section and does not support a "per debtor" interpretation. The only relevant word which can be sensibly made plural is plan(s), which lends support to the plan being the appropriate point of reference for the number of approving impaired classes of claims. *See Transwest*, 881 F.3d at 730 (evaluating the "singular includes the plural" rule in the context of section 1129(a)(10)).

B. The Context of the Bankruptcy Code and Canons of Statutory Interpretation Confirm a "Per Plan" Interpretation

Even if this Court does not find the language of section 1129(a)(10) unambiguous, the context of the bankruptcy code supports a "per plan" approach to section 1129(a)(10). *See generally FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (citation omitted)). The only way to give full effect to all terms in section 1129, to avoid surplusage, and to achieve a consistent reading of the section is to apply a "per plan" interpretation.

The court in *Tribune* concluded that section 1129(a)(10) must apply on a "per debtor" basis because certain other subsections of 1129(a) apply on a "per debtor" basis. 464 B.R. at 182–83. This argument fails for three independent reasons, as will be explained below. Firstly, it is not at all clear that the sections frequently cited for this proposition actually do apply on a "per debtor" basis. Secondly, presuming the cited sections do apply on a "per debtor" basis, that does not create a conflict or contradiction within the statute when section 1129(a)(10) is interpreted "per plan." Finally, even if the cited sections apply on a "per debtor" basis and create a general rule that the subsections of section 1129(a) be read with a "per debtor" element, the more specific "per plan" rule announced by 1129(a)(10) should be understood to be an exception to that general rule.

The court below reasoned that sections 1129(a)(1) and (a)(3) apply on a "per debtor" basis. *See* 11 U.S.C. § 1129(a)(1), (3); R. at 19-20. They contend that neither section could be satisfied if one or more, but fewer than all, debtors complied with its requirements. This mis-states the inquiry. Section (a)(3) requires that *the plan* be proposed in good faith—if one or multiple of the debtors demonstrates bad faith, that bad faith is imputed to *the plan*. So too with (a)(1)—if one or more of the debtors takes action inconsistent with the bankruptcy code, that is imputed to the plan,

making the plan out of compliance with applicable law. In either case, the debtors are only relevant insofar as their actions affect the plan. Further, neither cited section contains any language explicitly indicating that it requires individualized application to each debtor.

Even assuming that sections 1129(a)(1) and (a)(3) apply on a "per debtor" basis, there is no reason that (a)(10) must function the same way. Though it is an important principle of statutory interpretation that statutes be read to be consistent with themselves, this principle reaches its breaking point when it is used to contradict the statutory text itself. There is no reason "that all subsections must uniformly apply on a 'per debtor' basis, especially when the Bankruptcy Code phrases each subsection differently." *Transwest*, 881 F.3d at 730. Because the various subsections of section 1129(a) are phrased differently, they should be interpreted differently. To supply a "per debtor" element to section 1129(a)(10) would require both adding words that are not present in the statute and ignoring the words that are present. Further, there is nothing contradictory about interpreting section 1129(a) such that some subsections apply "per debtor" and others apply "per plan"; such an interpretation would lead to no impossibilities or absurdities.

The court in *Tribune* asserted not only that sections 1129(a)(1) and (a)(3) apply on a "per debtor" basis, but that these and other subsections of 1129(a) establish a general rule that all of the section's requirements ought to apply "per debtor." 464 B.R. at 183. Even if this is right, it does not follow that this general "per debtor" rule must be imputed to section 1129(a)(10). On the contrary, if there is a general rule, then 1129(a)(10)'s specific and different rule must be understood as an exception to the general rule. *See Morton v. Mancari*, 417 US 535, 550-51 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."); *see also RadLAX Getaway Hotel, LLC v. Amalgamated Bank*, 566 US 639, 645 (2012) (applying rule of statutory construction that "the

specific provision is construed as an exception to the general one" in Chapter 11 bankruptcy context).

Additionally, reading a "per debtor" approach into section 1129(a)(10) would diminish the significance of the exemption from section 1129(a)(8) that is given in cram down cases. *See* 11 U.S.C. § 1129(b). Under 1129(b), the court may cram down a reorganization plan over objections, so long as all requirements of 1129(a) other than 1129(a)(8) are met. Section 1129(a)(8) provides that "each class" of claims or interests must either accept or be unimpaired under the plan for the plan to be approved—in other words, each impaired class must approve. If a "per debtor" reading is given to 1129(a)(10), then the 1129(a)(8) requirement is partially revived in the multi-debtor context. The "per debtor" reading re-introduces a class-by-class approach to approval and gives hold-outs disproportionate power, thus significantly reducing the utility of cram down approval and section 1129(b).

If Congress had intended 'per debtor' consideration, they would have included that in writing, as they did in other sections. While some subsections like 1129(a)(7) and (8) specifically refer to "each impaired class of claims" and "each class of claims," subsection (a)(10) does not give the various classes this individualized treatment. 11 U.S.C. § 1129(a)(7), (8). Rather, 1129(a)(10) lumps together all classes impaired under the plan and demands acceptance by at least one. Congress knew how to invite individualized scrutiny, but it declined to do so as to section 1129(a)(10).

C. Substantive Consolidation Is Not Necessary for Satisfaction of Section 1129(a)(10)

The plan has sufficient approval to satisfy section 1129(a)(10), even absent substantive consolidation of the debtors. Reorganization in this case will, if approved, proceed under a jointly administered, multi-debtor plan. Unlike substantive consolidation, which is a judicially created

equitable remedy through which multiple corporate entities are merged and treated as one, this approach maintains each entity's individual identity. *See* Fed. R. Bankr. P. 1015 advisory committee's note (discussing differences between substantive consolidation and joint administration); *see also, e.g.*, *Reider v. Fed. Deposit Ins. Corp. (In re Reider)*, 31 F.3d 1102, 1109 (11th Cir., 1994) (distinguishing between "attributes of joint administration and indicia supporting substantive consolidation"). Whereas joint administration is a mere tool of convenience, substantive consolidation is a serious remedy which substantially affects the parties' rights. *See, e.g.*, *Reider*, 21 F.3d at 1109.

Reorganizing under a jointly administered, multi-debtor plan means that the plan will control each debtor's reorganization. It does not mean, as the court below concluded, that the number of plans is artificially multiplied. R. at 19 ("Because the Debtors were not substantively consolidated, the Plan actually consists of ten different plans, one for each of the Debtors."). This multiplicative move is without basis in law. When a lawsuit names multiple defendants, it may make separate claims about each and treat each entity individually, but it is nonetheless one complaint. So too here.

Finally, treating the joint plan as a series of separate plans, each corresponding to one of the debtors, would defeat the purpose of having a joint plan. The debtors' businesses have always been managed on an integrated basis, making joint administration a natural and efficient choice. *See Charter Commc'ns*, 419 B.R., at 266; R. at 30. Further, every creditor will reap the benefits of the Plan and the Debtors' reorganized business enterprise, regardless of whether the creditor has a claim against TDI, Development, or any other debtor. R. at 30. To disjoin the plan and multiply it would have the absurd result of forfeiting all the efficiency gains created by joint administration.

D. The Purposes of Chapter 11 Reorganization Are Better Advanced by a "Per Plan" Interpretation than by a "Per Debtor" Interpretation

A "per debtor" approach to section 1129(a)(10) would contravene to purposes of Chapter 11 reorganization and create a perverse incentive for creditors holding impaired claims in multi-debtor bankruptcies to hold out and obstruct the reorganization process. The purposes of Chapter 11 are to revive the debtor's business in a timely manner and to maximize the value and productivity of the bankruptcy estate. *See, e.g.*, *Toibb v. Radloff*, 501 U.S. 157, 163-64 (1991) (stating that Chapter 11 reorganization serves both the purposes of "permitting business debtors to reorganize and restructure their debts in order to revive the debtors' businesses and thereby preserve jobs and protect investors" and of "maximizing the value of the bankruptcy estate."); H.R. Rep. No. 95-595, at 5 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6179 ("The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders."). The "per debtor" approach not only prolongs the reorganization process and thus siphons value from the bankruptcy estate and retards the process of restarting the debtor's business, but also encourages creation of plans that serve particular interests at the expense of these overall policy goals.

Under My Thumb has impermissibly turned this bankruptcy into a hostage situation. *See Young v. Higbee Co.*, 324 U.S. 204, 211 (1945) (stating that a stakeholder should not be permitted to "obstruct a fair and reasonable reorganization in the hope that someone would pay them more."). If a "per debtor" reading is given to section 1129(a)(10), Under My Thumb can continue to hold out for a reorganization plan that is beneficial to them, regardless of whether the plan would beneficially restructure the debtors' businesses, preserve jobs, protect other creditors and investors,

or maximize the value of the bankruptcy estate. Under Respondent's proposed rule, Under My Thumb and similarly situated creditors are incentivized to use their leverage as a bludgeon and drag out the bankruptcy process, costing debtors, other creditors, and courts significantly more time and money. If a "per debtor" reading is given to section 1129(a)(10) and Under My Thumb continues to withhold consent, the debtors will eventually be forced into liquidation, an outcome which is undisputedly worse for all parties involved than reorganization. *See* R. at 31 ("Under My Thumb, like all stakeholders, is far better off under the Plan that it vehemently opposes than it would be in a liquidation scenario under chapter 7."). Nor is this a unique case—the problem of a class of one has occurred before and is likely to occur again. *See In re Jameson Mezz Borrower II*, 461 B.R. at 302 ("Because Colony is Mezz II's only creditor, confirmation of a plan to which they do not consent is not possible [under a 'per debtor' approach]."). Additionally, there could be a class of zero problem. If one or multiple of the debtors in a jointly administered, multi-debtor bankruptcy had no voting impaired classes of claims, it is not clear that 1129(a)(10) could ever be satisfied under a "per debtor" approach. *See Station Casinos*, 2010 WL 11492265, at *23 (approving reorganization plan under "per plan" approach in case where "several of the Debtors had no Voting Classes.").

There is some disagreement as to the purpose of section 1129(a)(10). Some courts view section 1129(a)(10) as a mere technical requirement which does not create substantive rights for creditors. *See In re Rhead*, 179 B.R. 169, 177 (Bankr. D. Ariz. 1995) ("Section 1129(a)(10) is a technical requirement for confirmation. It is an obligation for the proponent to fulfill; it is not a substantive right of objecting creditors."). Under this view, the "per debtor" reading is not only inconsistent with the statute, it undermines its very purpose. A "per debtor" approach gives Under My Thumb the right to unilaterally reject any reorganization plan they do not like; it not only

creates a substantive right, but a very powerful one. Others argue that the purpose of section 1129(a)(10) is to ensure there are "some indicia of support" for a Chapter 11 plan. *See, e.g., In re Combustion Eng'g, Inc.*, 391 F.3d 190, 243-44 (3d Cir. 2004); P. Murphy, *Creditors' Rights in Bankruptcy*, § 16.11, at 16-20 (1980) ("The only conceivable purpose of Section 1129(a)(10) is to require some indicia of creditor support [for the reorganization plan]."). "Some indicia" is not a high bar. Under either view, the purpose of section 1129(a)(10) is not well served by manufacturing an additional requirement of heightened support. Even under the view that section 1129(a)(10) is more than a technical requirement, there is no reason that a "per debtor" approach is needed in order to ensure that the plan has "some indicia" of creditor support.

The Bankruptcy Code is intended to encourage consensual resolution of claims through the plan negotiation process. *See, e.g., In re Windsor on the River Assoc.*, 7 F.3d 127, 131 (8th Cir. 1993); *In re AVBI, Inc.*, 143 B.R. 738, 739-40 (Bankr. C.D. Cal. 1992). Chapter 11 in particular is designed to encourage the timely and efficient reorganization of distressed businesses so as to preserve jobs and economic value. *See, e.g., Toibb*, 501 U.S., at 163-64. None of these purposes are advanced by refusing to accept a plan with overwhelming creditor support, including among creditors holding impaired claims, which would revive debtors' businesses, and which does not prejudice the sole objecting creditor. *See* R. at 30 ("Under My Thumb . . . was in no way prejudiced under the Plan."). Applying the "per debtor" approach would allow Under My Thumb to commandeer the debtors' reorganization and potentially force them into liquidation, to the detriment of all parties involved.

Not only is a "per plan" approach clearly indicated by the statutory text and context, but also it is urged by common sense and the purposes of Chapter 11. For the foregoing reasons, this Court should reverse the judgment of the Thirteenth Circuit with respect to its interpretation of

section 1129(a)(10) and allow the reorganization plan with overwhelming creditor support to be approved.

CONCLUSION

For the reasons stated above, this Court should reverse both holdings of the court below.

Respectfully submitted,

Petitioner 44
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APPENDIX

11 U.S.C. § 102(7)
[T]he singular includes the plural . . . .

11 U.S.C. § 365(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.

11 U.S.C. § 365(c)
The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—
(1)
(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and
(B) such party does not consent to such assumption or assignment; or
(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or
(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

11 U.S.C. § 365(f)
(1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.
(2) The trustee may assign an executory contract or unexpired lease of the debtor only if—
(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and
(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.
(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

11 U.S.C. § 1107(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.

11 U.S.C. § 1129(a)

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

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

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

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

(5)

(A)

(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

(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 on 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.

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that—

(A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

(B) with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive—

(i)if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii)if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;

(C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim regular installment payments in cash—

(i)of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;

(ii)over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and

(iii)in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)); and

(D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

(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.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(12) All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

(14) If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.

(15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan—

(A)the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B)the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

(16)All transfers of property under the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

11 U.S.C. § 1129(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.