No. 19-1004

IN THE

In the Supreme Court of the United States

IN RE TUMBLING DICE, INC. ET AL., DEBTORS; AND

TUMBLING DICE, INC. ET AL,

Petitioners,

v.

UNDER MY THUMB, INC.,

Respondent.

On Writ of Certiorari to the United States Supreme Court

BRIEF FOR PETITIONERS

Team 46P

Counsel for Petitioners

QUESTIONS PRESENTED

I. Does 11 U.S.C. § 365(c)(1) prohibit a debtor-in-possession from assuming an executory contract when the contract will continue to operate as it did pre-bankruptcy petition?

II. Under 11 U.S.C. § 1129(a)(10), may a plan for reorganization be confirmed if it is accepted by at least one impaired class of claims of any one debtor?

PARTIES TO THE PROCEEDING

The petitioning Debtors are: (i) Tumbling Dice, Inc. (Case No. 16-47250); (ii) Tumbling Dice Atlantic City, LLC (Case No. 16-47251); (iii) Tumbling Dice Chicagoland, LLC (Case No. 16-47252); (iv) Tumbling Dice Detroit, LLC (Case No. 16-47253); (v) Tumbling Dice Lake Tahoe, LLC (Case No. 16-47254); (vi) Tumbling Dice Las Vegas, LLC (Case No. 16-4725); (vii) Tumbling Dice New Orleans, LLC (Case No. 16-4726); (viii) Tumbling Dice Palm Springs, LLC (Case No. 16-4727); (ix) Tumbling Dice Tunica, LLC (Case No. 16-4728); and (x) Tumbling Dice Development, LLC (Case No. 16-4729).

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STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

Section 11 U.S.C. § 365(c) provides:

> (c) The trustee may not assume or assign any executory contract or an executory contract of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—
>
> (1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and
>
> (B) such party does not consent to such assumption or assignment.

11 U.S.C. § 365(c) (2020).

Section 11 U.S.C. 1129 outlines the requirements for confirmation of a plan and provides in relevant part:

> 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) (2020).

STATEMENT OF THE CASE

A. Factual Background

With the primary purpose to restructure or refinance more than one billion dollars of debt, in January of 2016, the Petitioner-Debtors commenced these Chapter 11 cases. R. at 6. Tumbling Dice, Inc. ("TDI") filed the lead bankruptcy case as the holding company of the nine wholly-owned debtor-subsidiaries, including eight that individually operated a luxury casino and resort (individually, an "Operating Debtor" and collectively, the "Operating Debtors") and Tumbling Dice Development, LLC ("Development"), which served as licensee under a non-exclusive software license agreement with Under My Thumb , Inc. ("UMT"). R. at 4.

In 2008, Development contracted with UMT to create a comprehensive loyalty and reservations program to modernize Club Satisfaction, the Debtors' thirty-year-old casino loyalty program. R. at 4. This contract included a Research and Development Agreement between Development and UMT, in which UMT incurred costs to create the Club Satisfaction Software (the "Software") and Development would repay those costs pursuant to an unsecured $7million promissory note (the "the R&D Note"). R. at 4. In June 2015, the Petitioner-Debtors defaulted under the R&D Note when they stopped making payments. R. at 6. UMT was an unsecured creditor of TDI and the Operating Debtors, owed about $6 million under the R&D Note at the commencement of the proceedings, with the total unsecured debt being more than $120 million. R. at 6.

The Software license agreement (the "Agreement") was executed after the Software was completed. R. at 5. The Agreement granted Development a non-exclusive license, which allowed Development to "extend the benefits of the Agreement to its affiliated entities," but prohibited Development from assigning or sublicensing the Software without UMT's consent. R. at 5. The

Agreement allotted UMT a monthly fee, calculated based on spending within the procured software. R. at 5. The Software was essential to the Operating Debtors business model. R. at 5. Because of the success of the Software, UMT received very high monthly payments. R. at 5. Debtors were current with payments due under the Agreement at the commencement of Chapter 11 proceedings. R. at 6.

In December of 2011, TDI was acquired by hedge fund Start Me Up, Inc. ("SMU") through a leveraged buy-out. As part of the leveraged buy-out, TDI and the Operating Debtors gave first priority liens on their assets to a group of Lenders in exchange for a $3 billion loan. R. at 6. It was this significant and unserviceable debt that led the Debtors to begin Chapter 11 proceedings. R. at 6.

In August of 2016, the Debtors filed a joint plan on behalf of all Debtors, which was reached by agreement with Start Me Up, the Lenders, and the unsecured creditors' committee—excluding UMT. R. at 6. This plan explicitly stated that "the Debtors' estates are not being substantively consolidated and no Debtor is to become liable for the obligations of another." R. at 7. It also restructured most of the secured debt owed to the lenders by lowering the interest rate and extending the repayment period. R. at 7. In addition, Start Me Up retained its equity interest in the Debtors in exchange for partially funding a 55% distribution to unsecured creditors. R. at 7. And finally, the plan required canceling the existing—and issuing new—shares and membership interests in the reorganized Debtors. R. at 7.

UMT initially agreed with the confirmation of the Plan since it would continue to receive monthly payments for the use of the Software under the Agreement and receive a pro rata share of the $66 million distribution. R. at 7. Consequently, UMT later changed its mind upon learning that private equity group, Sympathy for the Devil, LP ("SFD"), would receive 51% voting shares and

seats on the reorganized Board for TDI as a result of its $35 million investment in the unsecured distribution. R. at 7-8. UMT was suspicious because SFD owned one of its direct competitors that had been trying to replicate UMT's Software for years. R. at 8. UMT used § 365(c)(1)(A) to challenge the Plan on this basis. R. at 8.

Upon vote for the Plan, TDI and the Operating Debtors each had at least one impaired class of creditors. R. at 8. Development had none since UMT voted to reject the Plan, which left Development with no impaired accepting class of creditors. R. at 8. UMT made its second objection here to the confirmation of the Plan under section 1129(a)(10), arguing for the per debtor approach that at least one impaired class of Development's creditors must vote to accept the plan. R. at 8.

UMT objected to the Plan on multiple grounds, two of which are the issues presented in this case. R. at 8.

B. Procedural Background

The Bankruptcy Court overruled the objections of Under My Thumb, adopting the 'actual test', holding that " . . . section 365(c)(1) contemplates a case-by-case inquiry into whether the non-debtor party actually was forced to accept performance under its executory contract from someone other than the party with whom it originally contracted; and the per-plan approach, which states that ". . . section 1129(a)(10) is satisfied where at least one impaired class in a joint, multi-debtor plan accepts the plan." R. at 8-9. UMT appealed and the Bankruptcy Appellate Panel affirmed the decision of the bankruptcy court. R. at 9. UMT appealed again and the Court of Appeals reversed the decision of the bankruptcy court as to both challenges, which resulted in this petition by TDI and the other Debtors. R. at 9.

SUMMARY OF ARGUMENT

Chapter 11 of the Bankruptcy Code is designed to facilitate reorganizations, and to balance the interests of the debtor and the creditor. *Mission Prod. Holdings, Inc. v. Tempnology*, LLC, 139 S. Ct. 1652, 1658 (2019). In the instant case, two provisions of the Code are at issue; 11 U.S.C. § 365(c)(1)(A) and 11 U.S.C. § 1129(a)(10).

Section 365(c) regulates the authority of a debtor-in-possession to assume or assign executory contracts or unexpired leases. The provision prohibits a debtor-in-possession from assuming or assigning an executory contract when applicable non-bankruptcy law excuses a non-debtor from performing for any entity other than the debtor or debtor-in-possession. 11 U.S.C § 365(c)(1)(A).

It is plain from this language that if: (1) applicable non-bankruptcy law is not triggered and/or (2) the nondebtor is not required to perform for any entity other than the debtor or the debtor-in-possession, then § 365(c) is inoperable and should not stall the bankruptcy proceedings. Yet, this provision has cultivated a split amongst Circuits, and the Court is now tasked with resolving the split in a manner that offers the best interpretation of the provision. *N.C.P. Mktg. Grp., Inc. v. BG Star Prods., Inc.*, 556 U.S. 1145 (2009) (*cert. denied*).

Because reasonable minds differ, the Court is empowered to resolve the ambiguity with traditional tools of statutory interpretation. *In re Conrad*, 604 B.R. 163, 168 (Bankr. M.D. Pa. 2019). Here, the legislative history both lends support to adopting the actual test and contradicts the plain language interpretation of the hypothetical test.

Before 1984, the language of § 365(c)(1)(A) operated to shield debtors or the debtor-in-possession from their obligations pre-bankruptcy petition. Pub. L. No. 95-598 (*amended by* 11 U.S.C. § 365(c)). Now, amended by the Bankruptcy Amendments and Federal Judgeship of 1984

(“BAFJA”), the language carves out an exception to the rule when the debtor or debtor-in-possession and the nondebtor will continue to operate in the same way as they had pre-bankruptcy. 11 U.S.C. § 365(c). This interpretation of the statute represents the ‘actual test,’ which requires applicable non-bankruptcy law to be presently triggered or the nondebtor to actually be required to perform for any entity other than the debtor or debtor-in-possession. The ‘actual test’ operates as sound public policy. This approach allows the court to conduct a case by case inquiry, and to balance the interests of the creditor and debtor. The latter approach would allow the bankruptcy courts to be governed by hypotheticals.

Furthermore, the second issue requests that this Court resolves another circuit split regarding the proper way to satisfy the plan confirmation requirement of 11 U.S.C. § 1129(a)(10). Section 1129 provides sixteen steps that are required for confirmation of plans for reorganization; it is the requirement of acceptance “by at least one class of impaired creditors” under § 1129(a)(10) that has caused Delaware to be the only jurisdiction to follow an alternative approach. That approach being the per debtor approach. Petitioners and all other jurisdictions that have reviewed this issue, advocate for the per plan approach, not only because it is consistent with the primary objectives of chapter 11, but also because it aids in the efficient and fair confirmation of plans.

ARGUMENT

I. SECTION 365(c)(1) DOES NOT PRECLUDE A DEBTOR-IN-POSSESSION FROM ASSUMING A CONTRACT, WHERE THE ASSUMPTION MAINTAINS THE PRE-BANKRUPTCY STATUS QUO

The provision relevant to the first issue is § 365(c)(1)(A). § 354(c) limits the authority of a debtor-in-possession[1] to assume or assign an executory contract. *Perlman v. Catapult Entm't*, 165 F.3d 747, 749 (9th Cir. 1999). The section is triggered when applicable non-bankruptcy law would

[1] Section 1107(a) grants the debtor-in-possession the rights, powers, and duties of a trustee for Chapter 11 proceedings. 11 U.S.C. § 1107(a).

excuse the nondebtor party from accepting or rendering performance to any entity other than the debtor or the debtor-in-possession. 11 U.S.C. § 365(c). The section provides that:

> (c) The trustee *may not assume or assign* any executory contract or *an executory contract of the debtor*, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, *if*--
>
> (1)(A) *applicable law excuses a party*, other than the debtor, to such contract or lease *from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession*, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and
>
> (B) such party does not consent to such assumption or assignment.

11 U.S.C.A. § 365 (West) (*emphasis added*).

When the Bankruptcy Code was first enacted, § 365(c)(1)(A) limited the authority of the trustee to assume or assign only when the debtor was excused from performance t*o the trustee*. Pub. L. No. 95-598. In 1984, it was revised to reach only entities other than the debtor or debtor-in-possession. 11 U.S.C. § 365(c).

This amendment, however, was not enough to supply the courts with a consistent interpretation of the provision. *In re Catapult Entm't, Inc.*, 165 F.3d 747, 749 (9th Cir. 1999). The conflict has been previously recognized by this Court because of the importance of this provision in reorganizations. *N.C.P. Mktg.* U.S. at 1145. Currently, courts are split between two major standards for addressing a challenge brought under this provision. *Id.*

Some courts adopt the 'hypothetical test.' *Id*. The 'hypothetical test' bars the authority of a debtor-in-possession to assume an executory contract, even if the debtor presents no intention of assigning that contract to any entity other than the debtor or the debtor-ni-possession. *Catapult* F.3d at 750. Along with the Ninth Circuit, the Third, Eleventh, and Fourth Circuit have adopted the hypothetical test. *Catapult* F.3d at 749; *In re West Elec., Inc.*, 852 F.2d 79, 83 (3d Cir.1988);

RCI Tech. Corp. v. Sunterra Corp., 361 F.3d 257, 265-70 (4th Cir. 2004); *In re James Cable Partners, L.P.,* 27 F.3d 534, 537–38 (11th Cir. 1994).

On the other hand, the First and Fifth Circuit have adopted the 'actual test,' which requires an actual showing ". . . that the nondebtor party would not be forced to perform[] 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), *see also In re Mirant Corp.*, 440 F.3d 238, 249 (5th Cir. 2006). The Fifth Circuit employs the actual test, but only to determine if applicable law is actually being triggered. *In re O'Connor*, 258 F.3d 392, 402 (5th Cir. 2001). The distinction between the approaches is minimal. One looks at whether the creditor is actually being disadvantaged by the plan and the latter approach looks at whether the facts of the case, at the time, trigger any applicable non-bankruptcy law. *See Mirant* F.3d at 249.

This case provides the Supreme Court with the space to intimately analyze each approach and formalize the standard moving forward. This brief sets forth the case for the formal adoption of the 'actual test.'

A. The Plain Language of § 365(c) Does Not Preclude the Assumption of An Executory Contract, Unless the Contract Will Actually Be Assigned to a Nondebtor Party

It is well settled that where the language of the statute is plain the function of the court is only to enforce those terms. *Caminetti v. United States*, 242 U.S. 470, 485 (1917). Here, the plain language requires: (1) applicable law to excuse the party from accepting or rendering performance and/or (2) the nondebtor to actually be forced to perform for an entity other than the debtor-in-possession. 11 U.S.C. 365(c)(1)(A).

Section 365(c)(1)(A) is not triggered unless applicable non-bankruptcy law excuses the performance of the nondebtor. In the instant case, UMT relies on federal intellectual property law. This intellectual property law, however, is not triggered until the contract is actually assigned to

another entity, not the debtor or the debtor-in-possession. *Unarco Indus., Inc. v. Kelley Co.*, 465 F.2d 1303, 1306 (7th Cir. 1972). In *Unarco*, the Seventh Circuit describes "[t]he long standing federal rule of law[,which limits] the *assignability* of patent license agreements provid[ing] that these agreements are personal to the licensee and not assignable unless expressly made so in the agreement. *Id.* (*emphasis added*). This scheme prohibits *assignability*, but not assumption without actual assignment.

In the case before us, the debtor-in-possession is not assigning their license to any entity other than themselves. The reorganization plan does not operate to obligate UMT's performance to any new entity, which removes our facts from the implications of 11 U.S.C. § 365(1)(a). This follows because the federal intellectual property law is not triggered until there is actual assignment to some other entity.

Even if applicable non-bankruptcy law was triggered, the provision is still not operable on these facts. The language requires that Under My Thumb be required to accept or render " . . . performance to any entity other than the debtor or the debtor-in-possession." 11 U.S.C. § 365(c)(1)(a). In this case, the parties do not intend to extend the scope of the licensing agreement. As stated earlier, the licensing agreement will operate in the same fashion as it did before bankruptcy was sought.

To be operable on a set of facts, § 365(c) requires several factors, relevant here are: 1) whether applicable non-bankruptcy law excuses performance based on the facts in this case—where there has been no assignment; and 2) whether the nondebtor is required to accept or render performance to any entity other than the debtor or debtor-in-possession. If the answer to both questions is no, § 365(c)'s plain reading does not limit the debtor-in-possession's authority.

Conversely, under the hypothetical test, creditors can raise an objection to a plan based purely on the potential for a scenario that has not, and may not arise.

The plain language of the statute supports the 'actual test' interpretation of this provision and supports the statute's legislative history. This is opposed to the hypothetical test, which produces a result that is contrary to the legislative intent.

B. The Hypothetical Test Produces a Result that is Contrary to the Legislative Intent

1. The Legislature intended for the court to balance the interests of the creditor and the debtor on a case by case basis.

While the Court may presume that Congress' intent is evidenced in the statute's plain language, when the plain interpretation is clearly contrary to what the legislature intended, the Court may reject that reading. *Greer v. United States*, 938 F.3d 766, 774 (6th Cir. 2019). To determine whether a statute deviates from the legislature's intent, the Court can rely on legislative history and the statute's purpose. *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940).

Respondent encourages the court to adopt the hypothetical test. Yet, this interpretation of the provision allows 365(c) to operate in a way that always favors the creditors. In reorganization, generally, and here, debtors are tasked with restructuring their business in a way that avoids the loss of jobs, finances, and resources. *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). In the instant case, the debtors have offered a plan that will keep operations going, pay off creditors, and leave The Agreement unaffected, yet UMT refuses to collaborate prematurely.

Section 365(c) is meant to shield creditors from accepting or rendering performance to any entity other than the debtor or the debtor-in-possession. Of course, UMT is fearful of Its software being mishandled or inappropriately assigned, but this has not occurred and it should not stall the bankruptcy process. If the reorganization plan operated to extend the benefits of the license to

another entity outside of the scope of their agreement, federal intellectual property law could stay that conduct, but these are not the facts present.

The actual test framework provides a tool for bankruptcy courts to conduct a case by case inquiry into whether the proposed plan, at the time of its execution, would provide the creditors with a claim under applicable non-bankruptcy law. On the contrary, the hypothetical test excuses the court from looking into the relevant facts of the case, to determine whether a creditor will actually be disadvantaged by the plan or whether the applicable law is actually triggered by the schematics of the plan. This interpretation eliminates the possibility of a court to find an appropriate balance between the creditor's interest and the debtor's interest because the nondebtor would only have to show that some law exists which would excuse performance, but not that—in their specific case—that law does excuse performance under the reorganization plan. This was not what Congress had in mind when it modified the provision, not to excuse debtors or the debtor-in-possession from pre-bankruptcy petition obligations.

2. *The Legislative History Supports a Reading of the Statute That Does Not Excuse Performance if the Executory Contract Continues to Operate as it did Pre-Bankruptcy Petition.*

In 1978, when the Bankruptcy Code was originally enacted, § 365(c)(1)(A) only prohibited assumption or assignment when applicable non-bankruptcy law excused any entity other than the debtor from accepting or rendering performance to the *trustee*. Pub. L. No. 95-598. In 1984, Congress adopted the language at issue today, which substitutes trustee for debtor or debtor-in-possession. Pub. L. No. 98-353.

Congress' discussion around the Bankruptcy Amendments and Federal Judgeship Act was predominantly concerned with addressing a constitutional crisis stemming from the Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982),

but Congress incorporated a number of other pending matters into BAFJA. *In re Cardinal Indus., Inc.*, 116 B.R. 964, 978 (Bankr. S.D. Ohio 1990); *See also* Northern Pipeline Bankruptcy Decision, Comm. On the Judiciary (July 22 AND 23, 1982) (WEST).

Importantly, in 1980, Congress worked to pass the Bankruptcy Technical Correction Act, which provides the best starting point by which to determine Congress' intent. *Cardinal* B.R. at 978–79. During that time, the Committee on the Judiciary published a report proposing an amendment to the original text of § 365(c). H.R.Rep. No. 1195, 96th Cong., 2d Sess. § 27(b) (1980). The report explained that:

> This amendment makes it clear that the prohibition against a trustee's power to assume an executory contract does not apply where it is the debtor that is in possession and the performance to be given or received under a personal service contract will be the same as if no petition had been filed because of the personal service nature of the contract.

Id.

This Committee Report supplies the context necessary for the Court to make a determination about what Congress intended when it submitted this language to amend the statute to exclude debtors or debtor-in possession from its reach. Except, the gap in time between the Report and when the amendment was enacted diminishes the confidence of some courts in the Report's reliability for legislative intent. *Catapult* F.3d at 754.

This reasoning, however, ignores the plain truth—that in the *history* of § 365(c) this language was offered by the Committee on the Judiciary to amend the statute as it is today. That time has elapsed since the report was authored, does not negate that Congress sought to adopt the

exact same language that was contemplated in 1980. This language did not come from a statement on the floor or an interested third-party, but from the Committee on the Judiciary as a Report to provide clarity on the reach of the provision.

From this historical lens, it can be seen how Congress intended to specifically limit the authority to assume or assign only when it would actually obstruct or expand the scope of an executory contract pre-petition. Before the amendment, when a reorganization plan did not obstruct or expand the original obligations of the debtor and non-debtor, the plan could be invalidated simply because a trustee was assuming or assigning that executory contract. Now, the provision eliminates this loophole and requires creditors to maintain their obligations to the debtor or debtor-in-possession, especially when each party is operating the same as it would have had there been no bankruptcy petition at all.

Of course, Congressional Committee Reports are not dispositive of the question of legislative intent, but this Report was accompanied by no other history, the language enacted was exactly that as was previously suggested, and this reading aligns with the purpose of Chapter 11—to balance the interests of the creditor and the debtor. This intention to strike a balance also aligns with sound public policy.

C. The 'Actual Test' Supports Public Policy, Allowing the Needs of the Debtor and the Interests of the Creditor to be Balanced

The hypothetical test offered by the Respondent fosters stagnation in the bankruptcy process. This follows, because the hypothetical test allows creditors to stall reorganization when they can offer the court a theoretical scenario where they will be wronged once the bankruptcy proceedings have closed. While bankruptcy courts are often interplaying issues that stretch beyond bankruptcy, here it is not appropriate.

Here, the courts should only be charged with reviewing applicable non-bankruptcy law and determining whether it actually applies to the facts before them. Too, they should be reviewing whether the nondebtor will have to perform for any entity other than the debtor or the debtor-in-possession. This approach, the 'actual test,' supplies the courts with enough information to allow the reorganization to continue or not and it preserves the non-debtor's ability to bring a claim should applicable non-bankruptcy law be triggered or should the executory contract ever be inappropriately assigned.

The 'actual test' provides space for courts to conduct a case by case inquiry, and to question the balance of each parties' interests through the reorganization process.

II. SECTION 1129(a)(10) HAS A PER PLAN REQUIREMENT, THUS ACCEPTANCE FROM ONLY ONE IMPAIRED CLASS OF CLAIMS UNDER A JOINT, MULTI-DEBTOR PLAN IS NECESSARY

The objective of chapter 11 bankruptcy is to encourage consensual reorganization plans between the debtors and creditors while also allowing the debtor to continue operating its business while negotiations for the plan are underway. *See In re Windsor on the River Assocs., Ltd.*, 7 F.3d 127, 131 (8th Cir. 1993). Support from creditors ensures the objectives of chapter 11 are met as well as the requirements for confirmation under 1129(a). *Id.*

Additionally, chapter 11 provides interested parties with rights, specifically, it provides impaired creditors the right to vote to object or approve the plan for reorganization. *See generally* 11 U.S.C. § 1126(a) (2020). Creditors are able to vote individually, however, they are classified into classes of claims under the plan. *See* 11 U.S.C. § 1122(a) (2020) ("A plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class."). The plan then contains the same treatment for all claims or interests within the class. 11 U.S.C. § 1123(1)(4) (2020) (stating the exception to the similar

treatment of claims rule is if the "holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest"). Section 1129(a)(10) applies to impaired claims, which are claims under a plan of reorganization that alters "the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest." 11 U.S.C. § 1124(1) (2020).

Moreover, § 1129(a) establishes the requirements for confirmation of a chapter 11 plan for reorganization. 11 U.S.C. § 1129(a) (2020); *In re Marston Enterprises, Inc.*, 13 B.R. 514, 516 (Bankr. E.D.N.Y. 1981). The provision at issue here is section 1129(a)(10), which provides "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) (2020) (emphasis added). This section operates as a "statutory gatekeeper barring access to cramdown where there is absent even one impaired class accepting the plan." *In re 266 Washington Assocs*., B.R. 275, 287 (Bankr. E.D.N.Y.), *aff'd*, 147 B.R. 827 (E.D.N.Y. 1992); *see also In re Raytech Corp.*, 190 B.R. 149, 151 (Bankr. D. Conn. 1995) ("The comprehensive and complex plan confirmation provisions of § 1129 are designed to safeguard parties in interest."). A plan is accepted by a class of claims "if such plan has been accepted by creditors . . . that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors . . . that have accepted or rejected such plan." 11 U.S.C. § 1126(c) (2020). Section 1129(a)(10) is intended to provide that there is "some indicia of support by affected creditors and prevent confirmation where such support is lacking." *In re Windsor*, 7 F.3d at 131 (citing *In re Lettick Typografic, Inc.,* 103 B.R. 32, 38 (Bankr.D.Conn.1989)). Additionally, this section was passed by Congress "[t]o curb the inequities of such reorganization plans being "crammed down" the throat of secured lenders." *In re Windsor*,

7 F.3d at 131; *see generally* 11 U.S.C. § 1129(b) (2020). Although correct on the purpose of section 1129(a)(10), the lower court incorrectly held that section 1129(a)(10) requires a per debtor approach.

A. The Majority of Jurisdictions Agree with Petitioners and Follow the Per Plan Approach, Which Requires Acceptance From Only One Impaired Class of Claims Under a Joint, Multi-Debtor Plan

This is a case of first impression in this Court, and for the other jurisdictions that have heard this issue, there is a circuit split on the best approach to follow under section 1129(a)(10). The approaches are the per debtor approach, as followed by UMT and the lower court, or the per plan approach satisfies the plan confirmation requirements under section 1129(a)(10). The lower court erroneously based its opinion on the holdings of only one jurisdiction – Delaware – which is the only jurisdiction to embrace the per debtor approach that requires acceptance by one impaired class of creditors *for each debtor* in a multi-debtor plan to satisfy section 1129(a)(10). Although the court is correct that there is a circuit split on this issue, the court solely relies on opinions from Delaware jurisdiction to come to this conclusion. *See generally In re Tribune Co.*, 464 B.R. 126 (Bankr. D. Del. 2011) (holding that § 1129(a)(10) applies on a per-debtor basis where the plan did not provide for substantive consolidation of the debtors); *In re Woodbridge Grp. of Cos.*, LLC, 592 B.R. 761 (Bankr. D. Del. 2018) (having been substantively consolidated, the plan met the requirements of the per debtor approach); *In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293 (Bankr. D. Del. 2011) (confirmation must be on a per debtor basis). No other jurisdictions agree with Delaware even though most jurisdictions tend to follow Delaware's lead in other important bankruptcy and business matters. If other jurisdictions are breaking from the lead of Delaware, which tends to be a precedent setter, then something must truly be incorrect, inefficient, and overall wrong with this approach to leave such a leading jurisdiction as the lone wolf.

Conversely, the Southern District of New York, the Middle District of Pennsylvania, and the Ninth Circuit all follow the per plan approach, which requires that only one class of impaired claims confirm the plan. *See generally In re SGPA, Inc.*, No. 1-01-02609, 2001 Bankr. LEXIS 2291 (Bankr. M.D. Pa. Sep. 28, 2001) (earliest case adopting a per plan approach); *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props. (In re Transwest Resort Props.)*, 881 F.3d 724 (9th Cir. 2018*)* (first Court of Appeals to weigh in and adopt a per plan approach); *JPMorgan Chase Bank, N.A. v. Charter Commc'ns Operating, LLC* (*In re Charter Commc'ns*), 419 B.R. 221 (Bankr. S.D.N.Y. 2009), *aff'd*, 691 F.3d 476 (2d Cir. 2012*), cert. denied*, 133 S. Ct. 2021 (2013) (holding that § 1129(a)(10) was satisfied by a per plan approach).

Furthermore, the minority per debtor approach argues that the per plan approach is only acceptable if the cases have been substantively consolidated first because in such instance, then there is only one plan to accept. Thus, the minority approach argues that per debtor and per plan approaches are the same under substantive consolidation. However, this argument is also incorrect. Substantive consolidation – a judicially-created, equitable remedy in bankruptcy – is irrelevant to a technical requirement like section 1129(a)(10). *See In re Rhead*, 179 B.R. 169, 177 (Bankr. D. Ariz. 1995) (finding that section 1129(a)(10) provides no substantive rights to creditors whereas substantive consolidation does). *See generally* 11 U.S.C. § 105(a) (2020) (granting the court equitable power to order substantive consolidation). In substantive consolidation, the "assets and liabilities of technically distinct corporate entities are pooled together and such entities are treated as if they were, in fact, one single entity." *Skidmore, Owings & Merrill v. Canada Life Assurance Co.*, 907 F.2d 1026, 1027 (10th Cir. 1990). Following substantive consolidation, the "claims of creditors against separate debtors morph to claims against the consolidated survivor." *In re Woodbridge*, 592 B.R. at 775.

Moreover, joint administration is a means of administrative convenience. Joint administration allows subsidiaries and affiliated companies, or other closely-related debtors, to file joint bankruptcy petitions to be administered in the same court. *See* Fed. R. Bankr. P. 1015. However, courts have held that regardless of joint administration or substantive consolidation, section 1129(a)(10) is satisfied on a per plan basis. *See In re Charter Commc'ns*, 419 B.R. at 266.

B. Section 1129(a)(10) is Unambiguous and its Plain Language Requires a Per Plan Approach Acceptance

Majority of jurisdictions agree with the per plan approach because it is consistent with the plain meaning of the statute, which is where any exercise in statutory interpretation begins. Based on this Court's precedent in interpreting statutes, when the meaning of the statute is plain and unambiguous, then that plain meaning of the statute shall stand and the interpretive analysis of the statue should end. *See Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 93 (2007) ("If the intent of Congress is clear and unambiguously expressed by the statutory language at issue, that would be the end of our analysis."); *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) ("Where, as here, that examination [of the ordinary meaning and structure of the law] yields a clear answer, judges must stop."); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."). The lower court improperly engaged in statutory interpretation of an unambiguous statute without providing any justification as to whether the statute was ambiguous.

The plain language of § 1129(a)(10) states that "If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan." § 1129(a)(10). It is likely that the court and UMT skipped this step because it knew that it would not be able to find any ambiguity since the statute is clear. The phrase "at least one" reveals that the

requirement of section 1129(a)(10) is met so long as one class of impaired claims to the plan accept the plan and thus acceptance from multiple or all classes of impaired claims for each debtor is not necessary. "Thus, once an impaired class has accepted the plan, § 1129(a)(10) is satisfied as to all debtors because all debtors are being reorganized under a joint plan of reorganization." *In re Transwest Resort Props, Inc.*, 554 B.R. 894, 901 (D. Ariz. 2016), *aff'd sub nom. Matter of Transwest Resort Props, Inc.*, 881 F.3d 724 (9th Cir. 2018). "It makes no distinction concerning or reference to the creditors of different debtors under "the plan," nor does it distinguish between single-debtor and multi-debtor plans." *In re Transwest Resort Props., Inc.*, 881 F.3d at 729.

Furthermore, the lower court improperly applies 11 U.S.C. § 102(7), which states that "the singular includes the plural" to expand the meaning of section 1129(a)(10) to include "of each debtor" as a requirement. *But see BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004) (holding a court presumes that Congress says in the statute what it means). Even in applying section 102(7) the per plan approach is still consistent with the plain meaning of section 1129(a)(10), which would read "at least one class of claims that is impaired under the *plans* has accepted the *plans*." *In re Transwest Resort Props., Inc.*, 881 F.3d at 730.

In following the per debtor approach, the Court would be overreaching its power and legislating through interpretation. *See Id.* at 729 ("It is not our role to modify the plain language of a statute by interpretation."); *Henson v. Santander Consumer USA Inc.*, 137 S.Ct. 1718, 1726 (2017) (stating that "the proper role of the judiciary" in statutory interpretation is "to apply, not amend, the work of the People's representatives").

C. The Per Plan Approach is Consistent with the Public Policy to Encourage Efficient Reorganization

The per plan approach to § 1129(a)(10) is consistent with the public policy objectives of chapter 11 bankruptcy proceedings and joint administration. The per plan approach achieves

support from creditors without granting a single creditor the power to independently decide the fates of the majority of creditors. Here, this plan has support from all except UMT. If this Court follows the per debtor approach then the decision would "allow[] a single creditor to dictate, if not circumscribe, the Debtors' reorganization efforts," going against chapter 11's objectives of promoting consensual reorganization. R. at 21. Furthermore, the Debtors intentionally chose not to substantively consolidate the plan because they knew that substantive consolidation could disadvantage some creditors. *See generally In re Woodbridge*, 592 B.R. at 775. If this Court follows the per debtor approach, then this Court would be going against the will of the majority of the parties to the contract because it would be allowing the vote of one to prevent all other creditors from confirming the plan in disregard of the intent of the debtors in choosing to jointly administer the case rather than to substantively consolidate. Ultimately, UMT's argument is frivolous and without merit as UMT is better off financially under the per plan approach than it would be under the per debtor approach that it advocates for. For the same reason the ABI recommends deleting § 1129(a)(10), the per debtor approach does the most harm. ABI Commission to Study the Reform of Chapter 11, Final Report and Recommendations 257 (2014), available at https://abiworld.app.box.com/s/vvircv5xv83aavl4dp4h. It serves as a barrier to confirmation and thus the per plan approach is most appropriate.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the decision below should be reversed.

Respectfully submitted,
Team 46P
January 21, 2020