No. 19-1004

IN THE

Supreme Court of the United States

OCTOBER TERM, 2019

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

Debtors,

TUMBLING DICE, INC. *ET AL.*,

Petitioner,

v.

UNDER MY THUMB, INC.,

Respondent.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

BRIEF FOR PETITIONER

Team 48P
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 where the debtor in possession is not materially distinct from the prepetition debtor.

2. Whether, in a case where a class of claims is proposed to be impaired under a joint, multi-debtor plan, 11 U.S.C. § 1129(a)(10) requires acceptance from at least one impaired class of claims of each debtor or, alternatively, acceptance from one impaired class of claims of any one debtor.

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In an unreported decision of the United States Bankruptcy Court Appellate Panel for the Thirteenth Circuit, the court found that 1) § 365(c)(1) of the Bankruptcy Code does not preclude a debtor in possession from assuming a non-exclusive license over the objection of the licensor where applicable bankruptcy law excuses the licensor from accepting performance from, or rendering performance to, an entity other than the debtor or the debtor in possession; and 2) § 1129(a)(10) of the Bankruptcy Code requires the debtor in a joint, multi-debtor plan to receive an affirmative vote from at least one impaired class of creditor. The United States Court of Appeal for the Thirteenth Circuit reversed as to both questions. The opinion for the Thirteenth Circuit is set forth in Case No. 18-0805, dated March 4, 2019, and is incorporated in the record on appeal (hereinafter "R.").

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

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

11 U.S.C. § 102(7)

11 U.S.C. § 365(c)

11 U.S.C. § 1107

11 U.S.C. § 1129(a)

STATEMENT OF FACTS

Chapter 11 of the United States Bankruptcy Code provides a critical economic safety net for commercial entities, allowing the American economy to continue uninterrupted, at least from the perspective of the average citizen. Chapter 11 allows debtors to continue operating their businesses during bankruptcy and its provisions are "designed to foster, not frustrate, the reorganization and the economic well-being of debtors in possession." *In re Footstar, Inc.*, 323 B.R. 566, 574 (Bankr. S.D.N.Y. 2005). Tumbling Dice, Inc. et al. ("TDI") lawfully availed itself of this safety net such that it could continue operating its casinos. Under My Thumb ("UMT") now seeks to block confirmation of the plan of reorganization, which all other relevant parties support, and to prevent TDI from continuing to use software that is essential to its continued operation and successful reorganization. R. 6.

Tumbling Dice, Inc. and its nine wholly-owned subsidiaries, the debtors in the jointly administered Chapter 11 case at issue, "constitute one of the largest gaming operations in the country." R. 4. TDI has thousands of employees, trade creditors, and other stakeholders that have contributed to its success. R.30. In 2008, pursuant to a Research and Development Agreement, UMT agreed to revamp and improve Tumbling Dice Development, LLC's ("Development's") customer loyalty program, Club Satisfaction. R. 4. UMT incurred roughly $10 million in costs to create the new copyrighted and patented software (the "Software") and Development agreed to reimburse some of these costs via an unsecured promissory note for $7 million (the "R&D Note"). *Id.* Development then entered into a nonexclusive software license agreement (the "Agreement") for the Software. R. 5. The license prohibited assignment or sublicensing without UMT's express consent, although Development was permitted to "extend the benefits of the Agreement to its affiliated entities." *Id.* Under the Agreement, Development was obligated to pay UMT monthly fees in proportion to the spending of Club Satisfaction members. *Id.*

The new version of Club Satisfaction has been an enormous success and is "an essential part of the Debtors' ongoing business model." *Id.* UMT received more in monthly payments than it had originally projected and was able to license similar versions of the Software to other companies. *Id.*

In December 2011, TDI granted first priority liens on its assets to a group of lenders (the "Lenders") in exchange for a $3 million loan as part of a leveraged buy-out in which TDI was acquired by Start Me Up, Inc. ("Start Me Up"). R. 6. TDI commenced a now-jointly-administered chapter 11 case in January 2016 when it owed the Lenders approximately $2.8 billion in addition to $120 million owed to its unsecured creditors. *Id.* UMT is among these unsecured creditors and is individually owed over $6 million on the R&D Note, which TDI has remained current on until June 2015. *Id.*

TDI, Start Me Up, the Lenders, and the committee of unsecured creditors, with the exception of UMT, have reached a deal to reorganize. R. 6-7. As part of the plan, Start Me Up would inject capital into TDI to fund a 55% distribution to the unsecured creditors in exchange for maintaining its equity interest in TDI, without changing TDI's corporate structure. R. 7. Also as part of the plan, TDI would assume the Agreement post-petition and continue making payments to UMT accordingly. *Id.* In addition, UMT was to receive a generous distribution on its unsecured claim. *Id.* UMT's view of the plan turned sour when it learned that over half of the distribution to unsecured creditors was not being funded by Start Me Up, but by Sympathy for the Devil, LP ("SFD"). *Id.* SFD was set to receive 51% of voting shares of the reorganized

TDI and several board seats. R. 8. Among SFD's portfolio of companies is a direct competitor of UMT. *Id.*

When support for the plan was examined, it was revealed that all but one debtor – Development – had at least one impaired accepting class of creditors. *Id.* UMT controlled Development's only class of creditors and had, for reasons detailed above, voted to reject the plan. *Id.* Furthermore, UMT was the only class of impaired creditors among all debtors that voted to reject the plan. R. 9. UMT then objected to the plan on two grounds: 1) 11 U.S.C. § 365(c)(1) forbade assumption by TDI because non-bankruptcy law excused UMT's performance without its consent to assumption, and 2) the plan could not be confirmed under 11 U.S.C. § 1129(a)(10) because no class of impaired creditors of Development voted to accept it. R. 8.

SUMMARY OF THE ARGUMENT

By reversing the bankruptcy court and the Bankruptcy Appellate Panel, the Thirteenth Circuit circumvents the central purpose of Sections 365(c)(1), 1129(a)(10), and Chapter 11 of the Bankruptcy Code as a whole, which is to provide for the successful reorganization of commercial entities in bankruptcy. Upholding the Thirteenth Circuit's judgment would provide an undeserved windfall to creditors like UMT who, after failing to protect themselves prior to bankruptcy, may not now railroad others' reorganization process.

UMT cites Section 365(c) of the Bankruptcy Code as support for its argument that TDI cannot assume the Agreement post-petition. Relying on what it views as unambiguous statutory language, UMT asserts that TDI, as debtor in possession, cannot assume the Agreement because UMT, the non-debtor, objects to its hypothetical assumption or assignment to someone "other than the debtor or the debtor in possession." Multiple courts have held, however, that the language of Section 365(c)(1) is highly ambiguous. *See, e.g., Summit Inv. & Dev. Corp. v.*

Leroux, 69 F.3d 608 (1st Cir. 1995). Sound bankruptcy policy and the legislative history behind the provision urge the Court to apply what has become known as the "actual test" – in a § 365(c)(1) analysis, a court must consider the "actual consequences—to the nondebtor party—of permitting these executory contracts to be performed by the debtor party following the institution of bankruptcy proceedings." *Summit Inv. & Dev. Corp.*, 69 F.3d at 613. The text of the statute itself, when taken in the context of the Bankruptcy Code as a whole, also supports adopting the actual test, as "trustee," as used in the prefatory clause to Section 365(c)(1) cannot include, and therefore must be distinct from, "debtor in possession." *Footstar*, 323 B.R. at 570.

UMT presented § 1129(a)(10) to the Thirteenth Circuit to stand for the proposition that it requires acceptance from one impaired class of claims of each debtor in a multi-debtor plan. This notion is novel because Bankruptcy courts, District Courts, and a Circuit Court of Appeal have adopted the view that § 1129(a)(10) is satisfied with the acceptance of one impaired class of claims of any one debtor. With disregard to congressional intent, the Thirteenth Circuit added a word to § 1129(a)(10) to meet its end. Sound economic, business, and bankruptcy policy require the application of § 1129(a)(10) as written by Congress to avoid devastation in the form of thousands unemployed, creditors not being compensated, and shareholders losing everything.

ARGUMENT

A bankruptcy court's conclusions of law are reviewed directly under the *de novo* standard of review. *In re Charbono*, 790 F.3d 80, 84-85 (1st Cir. 2015); *In re Soileau*, 488 F.3d 302, 305 (5th Cir. 2007). The parties involved here do not dispute the facts, only points of law. Thus, the Court must make determinations of law as if it were the original trial court. *Razavi v. Commissioner*, 74 F.3d 125, 127 (6th Cir. 1996), quoting *Bd. Of Cty. Comm'rs v. L. Robert Kimball & Assocs.*, 860 F.2d 683, 686 (6th Cir. 1988).

I. Tumbling Dice Can Assume the Agreement Over Under My Thumb's Objection Because it has No Actual Intent to Assign the Agreement.

Congress enacted Section 365(c)(1) of the Bankruptcy Code in 1978 in recognition of the importance of allowing businesses in bankruptcy to continue their operations uninhibited. A Bill to Establish a Uniform Law on the Subject of Bankruptcies, H.R. 8200, 95th Cong. (1978); 11 U.S.C. § 365(c)(1) (2012. This section enumerates a potential limitation on a debtor's reorganization plan: in short, that a trustee may not assume or assign an executory contract where doing so would force the non-debtor party to accept performance from someone other than the debtor, i.e. the party with whom it originally contracted. *Summit Inv. & Dev. Corp.*, 69 F.3d at 612. This involves an "actual showing" that there would be an actual assignment of the debtor's contract rights to a third party without the non-debtor's consent. *Id.* Courts that have analyzed § 365(c)(1) issues as just described have followed the "actual test," which the debtor asks this Court to apply today. UMT asks the Court to instead follow the "hypothetical test"; courts applying this test have held that "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 in question to any such third party." *In re Catapult Entm't*, 165 F.3d 747, 750 (9th Cir. 1999). Adopting the hypothetical test would be in error for three primary reasons: 1) it is contrary to sound bankruptcy policy, 2) it runs afoul of the legislative intent behind the enactment of § 365(c)(1), and 3) it leads to an impermissible textual interpretation of the provision and of the Bankruptcy Code as a whole.

Before addressing each of these reasons in turn, we address two preliminary matters. First, the Agreement is an executory contract within the meaning of § 365(c)(1). An executory contract is one where “The obligation of both the bankrupt and the other party are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other.” *In re Kmart Corp.*, 290 B.R. 614, 617 (Bankr. N.D. Ill. 2003), citing *In re Streets & Beard Farm Partnership*, 882 F.2d 233, 235 (7th Cir.1989) (quoting V. Countryman, Executory Contracts in Bankruptcy; Part I, 57 Minn. L. Rev. 439, 460 (1974)). “Generally speaking, a license agreement is an executory contract as such is contemplated in the Bankruptcy Code.” *Kmart*, 290 B.R. at 618, citing *In re Novon Intern. Inc.*, 2000 WL 432848, *4 (W.D.N.Y. March 31, 2000). The Agreement between TDI and UMT is a license agreement under which both parties owe ongoing performance and is therefore an executory contract.

As a final preliminary matter, the statutory language of section 365(c)(1) is “Ambiguous and open to more than one plausible interpretation.” *Summit Inv. & Dev. Corp.*, 69 F.3d at 613. This ambiguity is at the center of a jurisdictional split between courts that apply the actual test (the First Circuit and most bankruptcy courts) and those that apply the hypothetical test (the Third, Ninth, and Eleventh Circuits). In 2009, this Court recognized the importance of resolving this split but declined to grant certiorari. *N.C.P. Mktg. Grp., Inc. v. BG Star Prods.*, 556 U.S. 1145, 129 S. Ct. 1577 (2009). Today, 11 years later, the Court has an opportunity to take up this important task.

A. Sound Bankruptcy Policy Demands That the Actual Test Be Applied.

The hypothetical test “Purchases fidelity to the Bankruptcy Code’s text by sacrificing sound bankruptcy policy.” *N.C.P. Mktg. Grp.*, 129 S. Ct. at 1577. While we will subsequently argue that the hypothetical test in fact does not adhere to the plain language of the Code’s text, for now we focus on the reasons the hypothetical test is against good policy. First, debtor reorganization efforts deserve to be encouraged and facilitated by the courts. Second, the hypothetical test is fundamentally at odds with accepted contract law, the backdrop of many bankruptcy proceedings. Lastly, UMT's interests as a patent holder are already protected by the current plan of reorganization.

1. Debtor Reorganization Efforts Deserve Encouragement and Facilitation

One of the most appealing and unique aspects of Chapter 11 Bankruptcy is the fact that it allows and encourages entities filing for bankruptcy to continue operating their businesses while they reorganize to come out of bankruptcy better than they went into it. Adopting the hypothetical test would be counter to this defining characteristic of Chapter 11. As this Court put it previously, "The hypothetical test may prevent debtors-in-possession from continuing to exercise their rights under nonassignable contracts, such as patent and copyright licenses. Without these contracts, some debtors-in-possession may be unable to effect the successful reorganization that Chapter 11 was designed to promote." *N.C.P. Mktg. Grp.*, 129 S. Ct. at 1577. In the current case, this is not a far-fetched possibility but an imminent threat. Were the hypothetical test applied here, TDI would lose its ability to operate the Software, effectively severing its ability to continue operating Club Satisfaction, which has been a "tremendous success" and the continued operation of which is an "essential part of [TDI's] ongoing business model." R. 5.

UMT cannot be permitted to railroad the reorganization process, which is what the hypothetical test would effectively allow. All relevant parties with the exception of UMT have agreed to a plan of reorganization. R. 6-7. The "Interests of the creditors collectively and the bankruptcy estate as a whole will not yield easily to the convenience or advantage of one creditor out of many." *Kmart*, 290 B.R. at 620; *See In re Public Service Co. of New Hampshire*, 884 F.2d

11, 14–15 (1st Cir. 1989). Not only have other creditors agreed to the plan, the debtors have decided it would be in their business's best interest to reorganize according to the plan. This decision must be accorded proper deference: "The standard to be applied by a court in determining whether an executory contract ... should be assumed is the 'business judgment' test, which is premised upon the debtor's business judgment that assumption would be beneficial to its estate." *Footstar*, 323 B.R. at 568-569.

A court must ultimately ask "Whether it is prudent to upset the plan of reorganization at this late date"; at the stage of the current case, to do so would be imprudent. *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489 (1st Cir. 1997). *Institut Pasteur* had facts strikingly similar to ours. In it, a patent holder objected to its licensee's continued use of its patented technology after the licensee proposed a Chapter 11 plan of reorganization pursuant to which its stock would be sold to a company in direct competition with the patent holder. *Institut Pasteur*, 104 F.3d at 491. The Bankruptcy Court, District Court, and Court of Appeals all held that the debtor (licensee) could assume the license post-petition. *Id.* The Court of Appeals agreed with the debtor's argument that assumption of the license was the only proper remedy because the plan had already been agreed to by other relevant parties and retention of the license was so "indispensable to any successful reorganization" that prohibiting its assumption would be "deal-busting." *Id.* As discussed, retention of the Software is critical to the successful continued operation and reorganization of TDI. If it is not permitted to assume the Agreement, the other creditors could very well change their minds about agreeing to the deal.

2. The Hypothetical Test is Fundamentally at Odds with Contract Law.

It is a basic premise of contract law that each party to a contract should receive what it bargained for, and nothing more. If the hypothetical test is adopted, it will provide a windfall to non-debtors like UMT for which they did not bargain. Further, it is not the responsibility of the courts to rescue non-debtors from key drafting omissions that they now regret.

Implementing the hypothetical test would provide a windfall to the non-debtor that was not bargained for. The hypothetical test allows non-debtor parties to terminate an agreement simply because the debtor enters bankruptcy; outside of the bankruptcy context, such action would be a clear breach of contract. Under the hypothetical test, "If the debtor seeks bankruptcy protection, then the nondebtor obtains the power to reclaim—and resell at the prevailing, potentially higher market rate—the rights it sold to the debtor." *N.C.P. Mktg. Grp.*, 129 S. Ct. at 1577. The hypothetical test has dangerous policy implications in this regard. Would-be debtors may be less likely to file for Chapter 11 Bankruptcy when it is critical for them to do so because they fear losing their essential contracts. Waiting too long to file and allowing the business to further deteriorate could result in lost businesses, as what could have been brought in Chapter 11 is now unable to be saved and must be liquidated under Chapter 7. Further, the hypothetical test disincentivizes careful drafting by non-debtors, who know that should the licensee enter bankruptcy, § 365(c)(1) effectively provides them with a "Get Out of Jail Free card": "It is an axiomatic principle of Chapter 11 practice that creditors cannot be elevated to better position than their prepetition legal entitlements." *In re Charter Communs.*, 419 B.R. 221, 244 (Bankr. S.D.N.Y. 2009). Allowing UMT to terminate the license agreement now that TDI has been partially acquired by an entity with a tenuous relationship to its competitor may substantially benefit UMT in a way that it could not have benefitted prior to TDI's filing.

UMT failed to protect itself via the drafting process and it does not fall to the Court now to rescue it. "[T]he doctrine of *expressio unius est exclusio alterius* instructs that when certain matters are mentioned in a contract, other similar matters not mentioned were intended to be excluded." *Institut Pasteur*, 104 F.3d at 495, quoting *Plumbers & Steamfitters Local 150 Pension Fund v. Vertex Constr. Co.*, 932 F.2d 1443, 1449 (11th Cir. 1991). While we have not been given the specific language of the Agreement, the fact that the current case has progressed to this point lends itself to the conclusion that the Agreement contained no language preventing merger or providing that the Agreement would terminate for cause if TDI filed for bankruptcy. Following *Institut Pasteur*, the Court must conclude that these provisions were intentionally excluded. UMT has known since long before entering into the Agreement that SFD was its competitor; if it wished to prevent its licensees from merging with or otherwise receiving funding from such a competitor, it could have negotiated for such a provision. "The product-innovation theme promoted under patent law may well be accommodated by allowing patent holders to control sublicensing through negotiated contract restrictions." *Institut Pasteur*, 104 F.3d at n. 11. It is not this Court's responsibility to infer a provision into the Agreement that UMT failed to include.

3. The Interests of UMT as a Patent Holder are Protected by the Current Plan of Reorganization.

The debtors acknowledge the important policy goal of protecting and limiting patent assignability to encourage and foster innovation. They have chosen a plan of reorganization that furthers this goal by ensuring the patented Software remains only with TDI and its affiliates. The fact that TDI underwent a leveraged buy-out and received an injection of capital does not change that.

Respondent will likely cite *Unarco Industries* for its proposition that applying the actual test would run contrary to federal patent law, which prevents the sublicensing of patents without the licensor's express consent, by hamstringing the non-debtor party into contracting with a party it does not consent to doing business with merely because the debtor has entered bankruptcy.

Unarco Indus. V. Kelley Co., 465 F.2d 1303 (7th Cir. 1972). In *Unarco*, however, the licensee had actually attempted to assign (via asset sale) its license to another party, which also happened to be a direct competitor of the licensor. These facts are completely distinguishable from those of the present case. UMT is not being forced to contract with anyone besides the debtor; although TDI received funding from SFD, TDI survives and continues its corporate existence – its identity remains the same. As a corporation, TDI is "A legal entity distinct from its shareholders." *Institut Pasteur*, 104 F.3d at 494, quoting *Seagram Distillers Co. v. Alcoholic Beverages Control Comm'n*, 401 Mass. 713, 519 N.E.2d 276, 281 (1988) (citing 6 William M. Fletcher, Cyclopedia of Corporations § 2456 (1979 & Supp. 1986)).

The critical inquiry in a § 365(c)(1) analysis is whether the non-debtor is forced to contract with someone other than the debtor or debtor in possession. *Institut Pasteur*, 104 F.3d at 493, citing *Summit Inv.*, 69 F.3d at 612. "A bankruptcy court cannot simply presume, as matter of law, that debtor-in-possession is legal entity materially distinct from prepetition debtor, but must focus on performance which is actually to be rendered by debtor-in-possession to ensure that nondebtor party receives full benefit of its bargain." *Institut Pasteur*, 104 F.3d at 493. A court must engage in a case-by-case analysis to determine whether the debtor-in-possession is materially the same as the prepetition debtor. *Summit Inv.*, 69 F.3d at 612.

Again, our facts mimic those of *Institut Pasteur*. In that case, the prepetition debtor and the debtor-in-possession were held to be the same entity "Notwithstanding that, following sale of debtor's stock in bankruptcy, debtor was now owned by different company, which was in direct competition with patent holder." *Institut Pasteur*, 104 F.3d at 494. While TDI's voting shared may be owned by Start Me Up and SFD, it has continued its prepetition operations largely unchanged – this is not a situation in which the licensee continues on only as a "shell." *Institut*

Pasteur, 104 F.3d at n. 12; *See In re Alltech Plastics, Inc.*, 5 U.S.P.Q.2d 1806, 1987 WL 123991 (Bankr. W.D.Tenn. 1987).

This comports with Respondent's reading of the plain text of § 365(c)(1). Section 365(c)(1)(A) notes that only a party "other than the debtor" may be excused from continued contractual relations with the debtor. 11 U.S.C. § 365(c)(1)(A) (2012). By the statute's express terms, it does not prevent TDI as the debtor-in-possession from assuming the Agreement since, because TDI as the debtor and as the debtor-in-possession are one and the same, TDI is not an entity "other than the debtor." *Footstar*, 323 B.R. at 575.

B. The Legislative History Shows that it was Congress's Intent to Apply the Actual Test.

The starting point in determining legislative intent is the language of the statute itself; however, even when statutory language appears plain, legislative history must be examined to ascertain congressional intent. *In re Cardinal Indus.*, 116 B.R. 964, 978 (Bankr. S.D. Ohio 1990). The language of Section 365(c)(1) has been the focus of much debate and "Whenever there is some uncertainty about the meaning of a statute, it is prudent to examine its legislative history." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 255, 112 S. Ct. 1146 (1992) (Stevens, J., concurring).

Congress amended Section 365(c)(1) in 1984; this amendment replaced the language "the trustee or an assignee..." with "an entity other than the debtor or the debtor in possession." Pub.L. No. 98–353 (1984). This very same alteration had been proposed in 1980 in the Bankruptcy Technical Correction Act of 1980, but was not adopted until four years later. H.R. Rep. No. 1195, 96th Cong., 2d Sess. (1980). There is therefore "no sound reason" to ignore the legislative history found in a report by the Committee on the Judiciary (the "1980 Report") explaining the proposed changes in 1980 that were ultimately adopted in 1984. *Footstar*, 323

B.R. at 574. The 1980 Report states, “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 nature of the contract.” H.R. Rep. No. 1195 § 27(b), 96th Cong., 2d Sess. (1980) (emphasis added). Thus, Congress intended that where the same party (the debtor) seeks to assume an executory contract, § 365(c)(1) is not triggered. Even the *Catapult* Court, which disregarded the 1980 Report, acknowledged that “Several courts have relied on this legislative history in rejecting the ‘hypothetical test’ in favor of the ‘actual test.’” *Catapult*, 165 F.3d at n. 7, citing, e.g., *Summit Inv. & Dev. Corp.*, 69 F.3d at 613; *In re Fastrax*, 129 B.R. 274, 277 (Bankr. M.D. Fla. 1991). We respectfully ask this Court to accord with the First Circuit and the majority of bankruptcy courts and hold that not only is the 1980 Report relevant, it shows legislative intent to implement the actual test.

The 1980 Report evidences Congress’s goal of protecting the rights of both debtor and non-debtor via case-by-case inquiry into the actual performance to be rendered to the non-debtor. “[T]his section will require the courts to be sensitive to the rights of the non-debtor party to executory contracts and unexpired leases. If the trustee is to assume a contract or a lease, the court will have to ensure that the trustee’s performance under the contract or lease gives the other contracting party the full benefit of his bargain.” S. Rep. No. 989, 95th Cong., 2d Sess. 59 (1978), *as reprinted in* 1980 U.S.C.C.A.N. 5787, 5845. This language “pointedly suggests” that Congress foresaw case-by-case inquiries into the actual consequences to the non-debtor in allowing assumption post-petition. *Summit Inv. & Dev. Corp.*, 69 F.3d at 613. As elaborated on previously, UMT would still receive the “full benefit of its bargain” under the current plan. *Id.*

The legislative history also indicates Congressional intention and understanding that a debtor and debtor-in-possession may be the same entity. "Nothing in ... legislative history ... compels or countenances the use of a fiction (that a debtor in possession is 'an entity other than the debtor or the debtor in possession') in applying Section 365(c)(1) to a debtor in possession which assumes but does not assign its contract." *Footstar*, 323 B.R. at 578. TDI, as debtor in possession, clearly cannot be prohibited from assuming its own contract as it is by definition not "an entity other than the debtor or the debtor in possession."

C. The Statutory Language of Section 365(c)(1) and of the Bankruptcy Code as a Whole Begs the Court to Apply the Actual Test.

"The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification." *United States v. Ron Pair Enters.*, 489 U.S. 235, 109 S. Ct. 1026, 1034 (1989) (O'Connor, J., dissenting), quoting *United States v. Monia*, 317 U.S. 424, 431, 63 S.Ct. 409, 412, 87 L.Ed. 376 (1943) (Frankfurter, J., dissenting). While the plain meaning of a statute is controlling,

> The meaning, or "plainness," of discrete statutory language is to be gleaned from the statute as a whole, *see Little People's Sch., Inc. v. United States*, 842 F.2d 570, 573 (1st Cir. 1988), including its overall policy and purpose, *see Wilcox v. Ives*, 864 F.2d 915, 926 (1st Cir. 1988). "Literal" interpretations which lead to absurd results are to be avoided. *See Sullivan v. CIA*, 992 F.2d 1249, 1252 (1st Cir. 1993).

Summit Inv. & Dev. Corp., 69 F.3d at 610. Especially with an ambiguous statute like § 365(c)(1), the Court can and should look beyond the language of the provision in isolation to understand its meaning in context.

This Court has previously looked beyond the plain text or "four corners" of a section of the Bankruptcy Code in *Hartford Underwriters*. This case asked the Court to interpret Section 506(c); as part of Section 506, Determination of secured status, § 506(c) on its face details the trustee's power to recover the "costs and expenses of preserving, or disposing of" property securing a secured claim. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 120 S. Ct. 1942, 1944 (2000); 11 U.S.C. § 506(c) (2012). The Court held that, while nothing in the text explicitly limits this power to a trustee, contextual factors supported a conclusion that persons other than a trustee could not seek such recovery. *Hartford Underwriters*, 120 S. Ct. at 1944-1945. In arriving at this conclusion, the Court looked at the unique role of trustees in bankruptcy proceedings, as evidenced by their treatment throughout the entire Bankruptcy Code. *Id.* at 1945. The facts of the current case likewise turn on this important status of a trustee, as distinct from a debtor-in-possession.

Contrary to Respondent's argument, "No 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.'" *Footstar*, 323 B.R. at 571. What is more, "When the Bankruptcy Code refers to both 'trustee' and 'debtor' (or 'debtor in possession') in the same statutory provisions, the two terms are invariably invested with quite different meanings." *Id.* A fatal error in the decisions adopting the hypothetical test is that they have "Proceed[ed] from the premise, expressed or unstated, that 'trustee' as used in Section 365(c)(1) means 'debtor in possession.'" *Id.* at 571-572; *See Catapult*, 165 F.3d at 750 (where the Court states, without citation to the Code, "it is well-established that § 365(c)'s use of the term 'trustee' includes Chapter 11 debtors in possession") and *In re West Elecs., Inc.*, 852 F.2d 79, 82 (where the Court quotes Section 365(c), including in the quote the bracketed language: "(c) The trustee [which includes the debtor in possession [ftn. 1]] ..."). Footnote 1 included in the previous citation to *In re West Electronics* references Section 1107, Rights, powers, and duties of debtor in possession; while relevant, Section 1107 by its plain language again in no way states that the trustee and debtor in possession are the same. *Footstar*, 323 B.R. at 572; 11 U.S.C. § 1107 (2012).

This distinction matters because § 365(c)(1) applies on its face to limit only assumption or assignment of executory contracts *by a trustee*. *Footstar*, 323 B.R. at 570; *See also* 11 U.S.C. § 365(c) (the prefatory clause states that "the trustee may not..."). Construing "trustee" as "debtor in possession" would be the same sort of judicial rewriting that Respondent and other proponents of the hypothetical test fear the actual test would accomplish. *Id.* at 570-571. The basic objective of Section 365(c)(1) is to allow a non-debtor party to refuse to accept performance on a contract from someone "other than the debtor or the debtor in possession." *Id.* at 573. As explained, a trustee fits this description and accordingly cannot assume or assign an executory contract over the non-debtor party's objection. The provision would be rendered moot if the Court interprets "trustee" to include "debtor in possession":

> Where the debtor seeks to assume but not assign a contract, to read the statute to say that 'the debtor in possession may not assume ... any contract if ... applicable law excuses [the counterparty] ... from accepting performance from or rendering performance to an entity other than the debtor in possession ...' would render the provision a virtual oxymoron, since mere assumption (without assignment) would not compel the counterparty to accept performance from or render it to 'an entity other than' the debtor.

Id. The debtors therefore ask the Court to apply the actual test to conclude that the Agreement can be assumed under § 365(c)(1) because TDI is not a "trustee," the sole entity to whom this provision applies.

II. Section 1129(a)(10) Requires Acceptance From At Least One Impaired Class of Creditors of Any One Debtor.

A fundamental purpose of chapter 11 bankruptcy is to "Permit business debtors to reorganize and restructure their debts in order to revive the debtors' businesses and thereby preserve jobs and protect investors." *Toibb v. Radloff*, 501 U.S. 157, 111 S. Ct. 2197 (1991). Where a class of claims is impaired under the plan, § 1129(a)(10) says that a court shall confirm a plan only if, among other requirements, at least one class of claims that is impaired under the plan has accepted the plan. 11 U.S.C.A. § 1129 (2010). The plain language and inherent fundamental policy behind § 1129(a)(10) of the Bankruptcy Code provide that an affirmative vote of one impaired class under a plan is sufficient to satisfy § 1129(a)(10). *In re Enron Corp.*, No. 01-16034 (AJG), 2004 Bankr. LEXIS 2549 (Bankr. S.D.N.Y. July 15, 2004).

The issue presented here is whether the court should apply the "per-plan" approach or the "per-debtor" approach. Both approaches arise within the context of a multi-debtor chapter 11 bankruptcy where the debtors submit a joint plan of reorganization. The "per-plan" approach requires the vote of at least one impaired class of creditors as to the entire plan of reorganization whereas the "per-debtor" approach requires a vote in favor of the plan from an impaired class of creditors with respect to each debtor in the plan.

The "per plan" approach should be applied to § 1129(a)(10) rather than the "per debtor" approach because it is more consistent with the explicit text of the statute and Congress's intent, and it does not violate fundamental principles of corporate law when the entities requesting a joint plan of administration operate on an integral basis. The "per-plan" approach is appropriate in the bankruptcy case of TDI and its affiliates because the per-plan approach will allow the joint plan of reorganization to meet the requirements under § 1129(a)(10) for approval, which is consistent with Congress's preference for chapter 11 bankruptcies over chapter 7 liquidations. H.R. Rep. NO. 595, 95th Cong., 1st Sess. 220 (1977). With the per plan approach, TDI and its affiliates will continue to operate, saving jobs and contributing to local economies. Additionally, the application of the per plan approach to the TDI bankruptcies does not violate fundamental principles of corporate law because the operations of TDI and its affiliates are integral to the success of all entities involved.

A. Congress Explicitly Wrote the Statute to Permit the "Per-Plan" Approach.

The Circuit Court of Appeals for the Thirteenth Circuit interprets § 1129(a)(10) to include the word "each" by looking at other subparagraphs within § 1129, specifically § 1129(a)(8). R.20. In § 1129(a)(8) the code states "with respect to *each* class of claims or interests…." This is crucial to recognize because Congress inserted the word "each" and inserted "each" only two subparagraphs before the provision in question. R.20. Therefore, because congress used "each" in the Bankruptcy Code, it follows that if they wanted it in § 1129(a)(10) as well, the drafters would have included it.

There does not exist a circuit split about the interpretation of § 1129(a)(10), rather, the Thirteenth Circuit relies on a Delaware bankruptcy court over the Ninth Circuit Court of Appeals. R.17. The Ninth Circuit has found that § 1129(a)(10) applies on a "per plan" basis. JPMCC 2007-C1 *Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (In re Transwest Resort Props., Inc.)*, 881 F.3d 724, 729 (9th Cir. 2018). Specifically, § 1129(a)(10) gives the court the ability to confirm a plan if a class of claims is impaired under the plan, so long as at least one class of claims that is impaired under the plan has accepted the plan. *In re Transwest*, 881 F.3d at 729.

The Ninth Circuit also found that the plain language of § 1129(a)(10) supports the "per-plan" approach and goes further to state that § 1129(a)(10) "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*, 881 F.3d at 729. Further, the court reasoned that "under [the] plain language of § 1129(a)(10), once a single impaired class accepts a plan, § 1129(a)(10) is satisfied as to the entire plan." *In re Transwest*, 881 F.3d at 729.

The Thirteenth Circuit relies on decisions from the Bankruptcy Court for the District of Delaware because of its influence in business bankruptcy. R.17. In doing so, the court overlooks two important cases, one involving a casino, and the other involving a corporate powerhouse that was heard before the Southern District of New York.

In *In re Station Casinos, Inc.*, the Bankruptcy Court for the District of Nevada determined that "Bankruptcy courts that have expressly considered the matter [of per-plan versus per-debtor] have uniformly held that compliance with § 1129(a)(10) is tested on a per-plan basis, not on a per-debtor basis and that § 1129(a)(10) therefore does not require an accepting impaired class for each debtor under a joint plan." *In re Station Casinos, Inc.*, Nos. BK-09-52477, BK 09-52470, BK 09-52487, BK 10-50381, 2010 Bankr. LEXIS 5365 (Bankr. D. Nev. Aug. 27, 2010). Furthermore, the court held that the plain language of § 1129(a)(10) as well as its underlying policy support the position that the "Affirmative vote of one impaired class under the joint plan of multiple debtors is sufficient to satisfy § 1129(a)(10). *In re Station Casinos, Inc.*, LEXIS 5365 at 336 and 337.

The Thirteenth Circuit overlooked those two cases and found the Delaware opinions to be persuasive because the Bankruptcy Court for the District of Delaware is influential in business bankruptcy, and while it is impossible to deny that truth, there are other courts that are worthy of respect, such as the Southern District of New York. In *In re Enron Corp.* the Bankruptcy Court for the Southern District of New York found that § 1129(a)(10) is satisfied with a vote in the affirmative of one impaired class under the plan. *In re Enron Corp.*, No. 01-16034 (AJG), 2004 Bankr. LEXIS 2549 (Bankr. S.D.N.Y. July 15, 2004).

At the inception of this bankruptcy, TDI and its affiliates chose to submit a joint plan of reorganization. R.18. TDI and its eight casinos are comprised of thousands of employees, trade creditors, and other stakeholders that all face a great loss by the Thirteenth Circuit's interpretation of the word "each" in § 1129(a)(10). R.32. The Plan provides for a pro rata distribution to UMT that would greatly exceed the value of Development's assets, which means, without the Plan being jointly administered, UMT would not have seen such a favorable plan. R.7.

Among the ten debtors, each had at least one impaired accepting class of creditors, except Development. R.8. Because Development's only impaired creditor is UMT, UMT is able to control millions of dollars, thousands of jobs, and economic development, all because UMT has a suspicion. R.8. SFD, the private equity group that is injecting $35 million and will receive 51% of the voting shares of TDI after reorganization, surely has a large portfolio of companies. R.8. Among those companies it is highly likely that other creditors have competing interests involved, yet the plan received near universal support. R.8. If it is generally understood that § 1129(a)(10) was included in the Bankruptcy Code to encourage consensus in the reorganization process as the majority says, how is near universal support to the extent that the only class of creditors that did not vote in favor of the Plan was UMT not enough to reach the consensus? R.16.

The ultimate conclusion that will be reached if the Thirteenth Circuit's approach is adopted is a single creditor of a marginal affiliate within a greater corporate giant could derail an almost universally accepted Chapter 11 plan of reorganization. The dissenting creditor is voting to reject the plan for the purposes of its own self-interest of protecting its license rather than voting to protect its interest as a creditor for purposes of not receiving fair treatment compared to other creditors or because it didn't believe the plan was feasible. In this case, UMT is voting against the Plan out of fear that it will have its software reverse engineered, not that it will face unfavorable terms in the repayment of its agreements with TDI. Even the dissent recognizes that if UMT was prejudiced under the plan, this would give UMT a myriad of other grounds to object to the plan, however because UMT is not prejudiced by the plan it has no basis to do so. R. 30.

Adopting the per-plan approach not only is consistent with the text of the statute, it also furthers congressional intent because a business reorganization case exists to restructure a business's finances so it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders. H.R. Rep. NO. 595, 95th Cong., 1st Sess. 220 (1977). Furthermore, Congress believes that operating the business for the purpose in which it was created is more efficient and profitable than selling the parts for scrap and the return on assets in a foreclosure sale is less than the creditors would receive than if the business were to continue to operate. *Id.* Finally, if the business is set to be liquidated in a Chapter 7 because a circuit court reversed the opinion of a bankruptcy court because not every impaired debtor was able to vote, Congress believes that there is a high likelihood the business will experience cash flow problems which will require creditors of the business to wait for payment on their claims and that it is more economically efficient to reorganize than to liquidate because it preserves jobs and assets. *Id.* The per-plan approach will not give one creditor of one debtor in a jointly administered bankruptcy the power to dictate what would otherwise be a successful plan of reorganization and will not put one creditor in an advantageous position over other creditors cutting against one of the Code's fundamental principles of treating similarly-situated creditors equally.

To help in its construction of § 1129(a)(10), the Thirteenth Circuit looks to § 102(7), a construction provision, that provides "the singular includes the plural" and concludes that what § 1129(a)(10) is really trying to say is if "*classes of claims* are impaired under the *plans*, at least one *of the classes of claims* that is impaired under the *plans* has accepted the *plans*…." 11

U.S.C.A. § 102 (2019). This interpretation of § 1129(a)(10) relies on *In re Tribune* for the proposition that the plain meaning of § 1129(a)(10) incorporates the notion that the singular includes the plural from § 102(7). *In re Tribune Co.*, 464 B.R. 126 (Bankr. D. Del. 2011).

The Thirteenth Circuit uses multiple bankruptcy cases from the District of Delaware to defend its assertion that § 1129(a)(10) should be read to apply to each debtor rather than the plan overall. R. 17. In *In re Tribune Co.*, the court established its view that §1129(a)(10) should be applied to each debtor rather than to the plan as a whole, as the Ninth Circuit advocates. *In re Tribune Co.*, 464 B.R. 126 (Bankr. D. Del. 2011). *In re Tribune* relied on § 102(7) of the Code for the provision that "the singular includes the plural" and applied it to § 1129(a)(10). *In re Tribune Co.*, 464 B.R. at 182. According to the Ninth Circuit and the dissent, this application is still consistent with the per-plan approach. *In re Transwest*, 881 F.3d at 730.

As the dissent in the Thirteen Circuit correctly recognizes, even with this construction in the plural, the analysis should have stopped here because one impaired class voting in favor of the plan would be sufficient to meet the requirements under the statute even written in the plural. R. 28.

B. The "Per-Plan" Approach is Most Consistent with Fundamental Principles of Corporate Law.

A bedrock principle of corporate law is that a corporation exists separately as a legal entity with its own debts and assets, even if the corporation is wholly owned by another corporate entity. *Kreisler v. Goldberg*, 478 F.3d 209 (4th Cir. 2007). However, this notion is built on the understanding that courts will not pierce the corporate veil between a parent and a subsidiary company if the subsidiary has "some independent reason for its existence, other than being under the complete domination and control of another legal entity simply for the purpose of doing its act and bidding." *Kreisler*, 478 F.3d at 213. Occasionally, when multiple debtors in a jointly administered bankruptcy case want to file a joint plan, the bankruptcy court may substantively consolidate the estates of multiple debtors so that they can effectively administer all estates under a joint plan. R. 18. However, substantive consolidation is used sparingly by the bankruptcy courts because it has been seen as violating fundamental American corporate law and is the one exception to the rule that "A debtor may reorganize only the assets and liabilities of its own bankruptcy estate." R. 18.

The Bankruptcy Court's holding in the matter of TDI exercised judicial restraint by not being hasty in applying substantive consolidation when it did not see the need to do so because the joint plan accommodates all of the debtors' creditors. The Bankruptcy Court understood the merits of the plan were sound because all creditors would receive appropriate compensation and it did not find substantive consolidation necessary because there was no need to "cram down" the plan against the wishes of impaired debtors, as all but one impaired debtor voted to approve the plan. R. 30. UMT is the only creditor to reject the plan, and it did so not because of its concern for not being repaid but out of a hunch that it could possibly, one day, perhaps, have its software reverse-engineered by a competitor only tenuously related to SFD.

Development serves the limited purpose of acting as the licensee under a non-exclusive software license agreement with UMT, a role that is devoid of corporate responsibility and one that is clearly under the complete domination and control of TDI. R. 4. Furthermore, TDI and all of its affiliates have operated on an integrated basis, and the success of this chapter 11 bankruptcy quite possibly depends on their ability to continue operating on an integrated basis. R. 4. As the dissent argues, the integrated operations of TDI and its affiliates renders it appropriate for a jointly administered plan. R. 30.

The Thirteenth Circuit relies on *In re Jer/Jameson Mezz Borrower*, where the Bankruptcy Court for the District of Delaware applied its holding from *In re Tribune* that, absent substantive consolidation or consent, the plan must be satisfied by each debtor in a joint plan. *In re Jer/Jameson Mezz Borrower II, LLC*, 461 B.R. 293 (Bankr. D. Del. 2011). The facts in *In re Jer/Jameson Mezz Borrower* could not be more different from those in the present case. In *In re Jer/Jameson Mezz Borrower*, the court was dealing with a bad-faith debtor who was trying to manipulate and use the Bankruptcy Code for its own dishonest gain. *In re Jer/Jameson Mezz Borrower II, LLC*, 461 B.R. at 296. *In re Jer/Jameson Mezz Borrower* involved a bankruptcy petition filed in bad faith where the debtor was seeking an automatic stay on the eve of a foreclosure sale. *In re Jer/Jameson Mezz Borrower II, LLC*, 461 B.R. at 296. When these facts are compared against those of the current case, it is clear that TDI and its affiliates are the honest, but unfortunate, debtors that are filing for bankruptcy protection for the purpose of reorganizing debts and continuing operations which are both necessary to keep people employed and keep the economy healthy.

CONCLUSION

Congress intended to, and through careful drafting did, create Chapter 11 of the United States Bankruptcy Code to enable business debtors to continue their operations as they restructure themselves through bankruptcy proceedings. This process allows the economy to continue largely unaffected, as employees are able to keep their jobs and "business as usual" continues from the perspective of the general public. If the Thirteenth Circuit's judgment is upheld, Chapter 11 will have been repurposed for use by rogue, power-hungry creditors like UMT. The statutory text, legislative history, and fundamental policy concerns all urge this Court to conclude that, notwithstanding UMT's objections, 1) TDI must be allowed to assume the Agreement and 2) the Plan should be confirmed. For the foregoing reasons, the Petitioner respectfully asks this Court to reverse the judgment of the Court of Appeals for the Thirteenth Circuit.

Team 48P

Counsel of Record

APPENDIX A

11 U.S.C. § 102(7) (2012).

Rules of construction.

(7) the singular includes the plural;

APPENDIX B

11 U.S.C. § 365(c) (2012).

Executory contracts and unexpired leases.

(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) [omitted]

(3) [omitted]

APPENDIX C

11 U.S.C. § 1107 (2012).

Rights, powers, and duties of debtor in possession.

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

(b) [omitted]

APPENDIX D

11 U.S.C. § 1129(a) (2010).

Confirmation of plan.

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

(1) [omitted]

(2) [omitted]

(3) [omitted]

(4) [omitted]

(5) [omitted]

(6) [omitted]

(7) [omitted]

(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) [omitted]

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

(11) [omitted]

(12) [omitted]

(13) [omitted]

(14) [omitted]

(15) [omitted]

(16) [omitted]