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 a Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit

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BRIEF FOR PETITIONER

TEAM P4
COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

I. Whether 11 U.S.C. § 365(c)(1) prohibits a debtor in possession from assuming a pre-bankruptcy licensing contract when the debtor in possession has no actual intent to assign the contract, where the debtor in possession remained current on that contract's obligations and the contract is essential to the debtor in possession's reorganization.

II. Whether 11 U.S.C. § 1129(a)(10) requires acceptance from a minimum of one impaired class of claims per plan when multiple debtors propose a single, joint plan in a joint reorganization, where the statute's language requires that at least one class impaired under the plan has accepted the plan.

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The Debtors, Tumbling Dice, Inc. ("Tumbling Dice") and its nine subsidiaries, sought confirmation of a joint reorganization plan ("Plan") in a joint bankruptcy proceeding. (R. 2–3.) Under My Thumb, Inc., a creditor of one of the Debtors and the Respondent here, objected to confirmation on two grounds. (R. 2–3, 8.) The Bankruptcy Court confirmed the Plan over Respondent's objections. (R. 3.) The Bankruptcy Appellate Panel ("BAP") for the Thirteenth Circuit affirmed the Bankruptcy Court on both issues. (R. 3.) The Thirteenth Circuit Court of Appeals reversed on both issues, denying confirmation of the Plan. (R. 3.) The record contains the undisputed facts and the Thirteenth Circuit Court of Appeals' opinion, but not the Bankruptcy Court's or the BAP's opinions. (R. 2–3.)

STATEMENT OF JURISDICTION

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

STATEMENT OF FACTS

This case involves a Chapter 11 bankruptcy reorganization effort by parent company Tumbling Dice and its nine wholly owned subsidiaries. (R. 2–3.) Eight of Tumbling Dice's subsidiaries (the "Operating Debtors") own and operate casino properties. (R. 4.) The final subsidiary and joint Debtor, Tumbling Dice Development, LLC ("Development"), runs the enterprise's player rewards program, Club Satisfaction. (R. 4.)

Development holds a non-exclusive software license agreement with Respondent. (R. 4.) Under that agreement, Development possesses a license to use Respondent's copyrighted and patented software. (R. 5.) Respondent limited the license to Development and "to [Development's] affiliated entities only." (R. 5.) The agreement between Development and Respondent prohibited Development from assigning or sublicensing Development's rights under the contract to any other entity without Respondent's written consent. (R. 5.) Respondent, however, retained the right to "license similar versions of the [s]oftware" to third parties. (R. 5.)

Respondent's software is essential to the continued profitability of Tumbling Dice and its subsidiaries. (R. 5.) The software enabled the Debtors to implement a new and improved customer rewards program across all their casinos. (R. 5.) The rewards program was a "tremendous success" for Tumbling Dice's business, membership in Club Satisfaction tripled, and spending by customers who were part of the rewards program also increased. (R. 5.) The new and improved software provided by Respondent is "an essential part of [Tumbling Dice's] ongoing business model." (R. 5.) Respondent even received higher payments than it expected under the licensing agreement because Club Satisfaction's popularity. (R. 5–6.)

Tumbling Dice's leveraged buyout by Start Me Up, Inc. ("Start Me Up"), left it and the Operating Debtors with $3 billion in debt, owed to a syndicated group of lenders ("Lenders").

(R. 6.) The Lenders also hold first priority liens on Tumbling Dice's and the Operating Debtors' assets. (R. 6.) Development alone took on no debt or liens in the acquisition. (R. 6.) The Debtors remained current on payments to Respondent under the agreement with Development, despite the buyout. (R. 6.) The Debtors filed this joint bankruptcy with the intent of restructuring their debt from the leveraged buyout, on which they still owed $2.8 billion. (R. 6.)

After filing for Chapter 11 relief, the Debtors began negotiations with the Lenders, Start Me Up, and the unsecured creditors' committee. (R. 6–7.) The Lenders agreed to accept a lower interest rate and a twenty-year repayment period on the Debtors' loans. (R. 7.) The unsecured creditors' committee agreed to a 55% distribution on unsecured claims for all the Debtors, which would result in unsecured creditors being paid a total of $66 million of their $120 million claims. (R. 7.) Start Me Up agreed to invest $31 million toward the unsecured claims, for which it would receive 49% of the reorganized Debtors' stock. (R. 7–8.) Sympathy for the Devil, an outside private equity group, provided the remaining $35 million for unsecured creditors in return for 51% of the reorganized Debtors' shares. (R. 7–8.)

The Debtors ultimately filed a joint reorganization plan (the "Plan") based on the negotiated agreement. (R. 7.) The Plan specifically stated that "the Debtor's estates are not being substantively consolidated, and no Debtor is to become liable for the obligations of another." (R. 7.) In other words, the plan expressly prohibited the other subsidiaries from taking on the obligations of Development and vice versa. (R. 7.)

The Plan was supported by nearly all creditor groups. (R. 7.) In fact, the Lenders and most of the unsecured creditors accepted the Plan. (R. 8.) Each of the Debtors except for Development "had at least one impaired accepting class of creditors." (R. 8.) A single unsecured creditor—Respondent—prevented the confirmation of the plan. (R. 3, 7–8.) Respondent

"initially viewed the Plan favorably" but ultimately objected. (R. 7–8.) Respondent objected because it disapproved of Sympathy for the Devil's acquisition of shares in the reorganized Debtors, not because Respondent was treated unfairly. (R. 7–8.) Sympathy for the Devil's portfolio includes a competitor of Respondent's. (R. 8.) Respondent became "suspicious" of the Plan because of that competitor's interest in the software licensed to Development. (R. 8.)

The Plan specifically accounted for Respondent's interests under the licensing agreement. (R. 7.) Development would assume its contract with Respondent. (R. 7.) Respondent would continue to receive the monthly payments due under the licensing agreement. (R. 7.) The Plan also provided that Respondent would receive a pro rata share of the unsecured creditors' 55% distribution. (R. 7.) Respondent's pro rata share greatly exceeded the amount that Respondent would have received in liquidation. (R. 7, 31.) At the time this appeal was filed, and to this day, Development has never attempted to assign its licensing agreement with Respondent. (R. 6.)

Respondent objected that Development could not assume the licensing agreement under the Code. (R. 3.) Respondent claimed that applicable non-bankruptcy law excused it from performing its obligation to any entity other than the debtor or debtor in possession. (R. 3.) Respondent argued that under the "hypothetical" approach to § 365(c)(1), Development could not assume the agreement. (R. 3).

Respondent also objected that because no impaired class of creditors of Development has accepted the Plan, the Plan cannot be confirmed. (R. 3, 8.) There are, however, accepting impaired classes under the Plan. (R. 3, 8.) Respondent claims that § 1129(a)(10) applies on a "per debtor" rather than a "per plan" basis. (R. 3, 8.)

Both the Bankruptcy Court and the BAP interpreted § 365(c)(1) to require a case-by-case analysis to determine whether the Code prohibits or permits a particular assumption. (R. 3). Both

also interpreted § 1129(a)(10) to apply on a "per plan," not a "per debtor," basis. (R. 3.) Over a written dissent, the Thirteenth Circuit reversed. (R. 3, 21) The Debtors petitioned this Court to determine the correct interpretation of §§ 365(c)(1) and 1129(a)(10). (R. 1, 3.)

STATEMENT OF THE STANDARD OF REVIEW

The parties do not dispute the material facts, and the issues for review are questions of law. (R. 9.) This Court reviews questions of law *de novo*. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014).

SUMMARY OF THE ARGUMENT

11 U.S.C. § 365(c)(1) requires that a court must conduct a case-by-case inquiry into the actual intentions of a debtor in possession regarding the assumption of an executory contract with a nondebtor party. This "actual" test gives full effect to every word in § 365(c)(1). The "actual" test also harmonizes § 365(c)(1) with other provisions in the Code. The alternative "hypothetical" test used by the Thirteenth Circuit focuses only on one word in § 365(c)(1) and renders the remaining language superfluous. The "actual" test upholds the purposes of Chapter 11 and preserves the integrity of contracts. In contrast, the "hypothetical" test allows a single creditor to stall bankruptcy proceedings and manipulate plan confirmation to promote its own interests at the expense of all other parties.

11 U.S.C. § 1129(a)(10) requires that only one impaired class of creditors per plan must accept the plan, whether that plan covers a sole debtor or joint debtors. The language and statutory context of § 1129(a)(10) both support the "per plan" interpretation. The "per debtor" approach reads additional language into the statute. The "per plan" approach also best supports the Bankruptcy Code's purpose of reorganization of corporate debtors. In contrast, the "per debtor" approach allows a lone creditor to derail joint reorganization proceedings.

ARGUMENT

I. SECTION 365(c)(1) REQUIRES THE "ACTUAL" TEST AND NOT THE "HYPOTHETICAL" TEST TO DETERMINE WHICH EXECUTORY CONTRACTS ARE ASSUMBALE BY DEBTORS IN POSSESSION.

Section 365(c)(1) permits a debtor in possession to assume, but not assign, a non-assignable executory contract over the objection of the nondebtor party: "The trustee may not assume or assign any executory contract . . . of the debtor . . . if: (1)(A) applicable law excuses a party, other than the debtor, to [such executory contract] from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession . . . ." *See* 11 U.S.C. § 365(c)(1) (2012). This language requires a case-by-case inquiry into whether a nondebtor party is *in fact* being forced to accept performance from an entity other than the debtor in possession. *See Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997); *Bonneville Power Admin. v. Mirant Corp.*, 440 F.3d 238, 249 (5th Cir. 2006). The "actual" test comports with well-established principles of statutory interpretation and the legislative history of § 365(c)(1). *Id.* The "actual" test also promotes the goal of reorganization and benefits all of a debtor's creditors and affiliates by allowing debtors in possession to assume valuable executory contracts. *Id.* Therefore, this Court should reverse the Thirteenth Circuit and reject the use of the "hypothetical" test.

A. The Text of § 365(c)(1), Interactions Between It and Other Provisions in the Code, and Its Legislative History All Support the Use of the "Actual" Test.

The language of § 365(c)(1) indicates that the "actual" test should be used to determine when assumption of an executory contract by a debtor in possession is permitted. *Id*. One of the fundamental principles of statutory construction is that the meaning of a statute cannot be determined in isolation, but the meaning must be drawn from the context in which the statute is used. *See Deal v. United States*, 508 U.S. 129, 132 (1993). In other words, the meaning of a

statute can be determined by its place within the broader context of the whole statutory scheme. *See Robinson v. Shell Oil Co*., 546 U.S. 481, 486 (2006). In this case, the "actual" test derives its meaning from giving effect to every word in § 365(c)(1), and it harmonizes § 365(c)(1) with the other provisions in the Code. *See* 11 U.S.C. §§ 365(c)(1), (f)(1); *In re Cardinal Industries, Inc.*, 116 B.R. 964, 978–80 (Bankr. S.D. Ohio 1990). In contrast, the "hypothetical" test renders language in § 365(c)(1) itself as well as the entirety of § 365(f) meaningless. *Cardinal Indus.*, 116 B.R. at 978–80. Given the textual and contextual support, this Court should find that § 365(c)(1) requires the use of the "actual" test to determine the assumability of an executory contract. *Id.*; *see also Institut Pasteur*, 104 F.3d at 493; *Bonneville Power*, 440 F.3d at 249.

1. The "hypothetical" test fails to give distinction to the terms "trustee" and "debtor in possession" as used in § 365(c)(1) and additionally, fails to give effect to § 365(c)(1)'s conditional clause.

This Court requires that effect be given to *every* word of a statute. *United States v. Menasche*, 348 U.S. 528, 538 (1955). "Hypothetical" test jurisdictions have determined that § 365(c)(1) must be read literally to mean that a debtor may not "assume *or* assign" an executory contract if the contract is nonassignable under applicable nonbankruptcy law. (R. 23.) However, that restrictive interpretation ignores the rest of the language in § 365(c)(1). *See In re Footstar*, 323 B.R. 566, 570 (Bankr. S.D.N.Y 2005). Instead, the "actual" test gives effect to every word in § 365(c)(1). *See id.*

The "hypothetical" test fails to give effect to § 365(c)(1)'s distinct use of both "trustee" and "debtor in possession." *Id*.; *see also* (R. 24) (Jones, J., dissenting). Section 365(c)(1) clearly states that "[t]he *trustee* may not assume or assign . . . [executory contracts] . . . if applicable law excuses a party from accepting performance from or rendering performance to an entity other than the debtor or *the debtor in possession*." 11 U.S.C. § 365(c)(1) (emphasis added). The Code

does not define the term "trustee" as interchangeable with the term "debtor in possession." *Footstar*, 323 B.R. at 570; *see also* 11 U.S.C. § 1107 (stating only that a debtor in possession has the same duties as a trustee and never stating that the terms "trustee" and "debtor in possession" are interchangeable). In fact, it is an established rule of statutory construction that where Congress refers to *both* a trustee and a debtor in possession in the same statutory provision, the two terms are meant to have distinct meanings. *Footstar*, 323 B.R. at 571. Here, § 365(c)(1) uses both trustee and debtor in possession in separate clauses of the same sentence. *See id.* This means that § 365(c)(1) treats those two terms as having distinct meanings. *Id.* In other words, a court cannot simply substitute "debtor in possession" for "trustee" when interpreting § 365(c)(1) because they are used to refer to separate entities. *Id.* On its face, the prohibition in § 365(c)(1) applies only to the *trustee* and not to a debtor in possession.

Even if this Court does not wish to recognize a distinction between a "trustee" and a "debtor in possession" as used in § 365(c)(1), the "hypothetical" test *still* fails to give meaning to the conditional clause in § 365(c)(1). *See Summit Inv. & Dev. Corp. v. Leroux*, 69 F.3d 608, 613 (1st Cir. 1995). The prohibition in § 365(c)(1) is conditional: "The trustee may not assume or assign any executory contract . . . ***if***: (1)(A) applicable law excuses a party . . . from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession." 11 U.S.C. § 365(c)(1) (emphasis added). In other words, the limitation on assumption in § 365(c)(1) becomes operative only "***if***" the nondebtor is excused from rendering performance to an entity other than the debtor in possession. *See id*.; *see also Summit Inv.*, 69 F.3d at 613. If the nondebtor party is never *actually* required to perform for an entity other than the debtor in possession, then the applicable law is never triggered and the conditional clause is never fulfilled. *See Summit Inv.*, 69 F.3d at 613. For example, in the context of this case, patent

law excuses Respondent from performing on its licensing contract ***if*** Development assigns the contract to a third party. (R. 8 n.7, 12.) However, Development has not attempted to assign the licensing contract to a third party. (R. 8.) Therefore, the applicable patent law restriction has never been triggered, and the conditional clause in § 365(c)(1) has not been fulfilled. (R. 8.); *see also Summit Inv.*, 60 F.3d at 612–14. Accordingly, the limitation in § 365(c)(1) cannot apply to a debtor in possession who only assumes a contract and never assigns it to an entity other than the debtor in possession. *See id*.

2. The "hypothetical" test makes the "or assign" language in § 365(c)(1) superfluous.

Whether § 365(c)(1) applies to trustees or debtors in possession, the "hypothetical" test renders the "or assign" language in § 365(c)(1) unnecessary. *Cardinal Indus.*, 116 B.R. at 976. Under the "hypothetical" test, the non-assignability of an executory contract suffices to prohibit assumption of that contract as a matter of law. *Id.* at 977. In other words, if the trustee or debtor in possession cannot assign the contract, then the contract cannot be assumed. *See id.* However, another section in the Code, § 365(f), prohibits the trustee or debtor in possession from assigning *any* contract unless they have first assumed that contract. *Id.*; 11 U.S.C. § 365(f)(2)(A). In other words, a trustee cannot assign *any* contract, whether executory or not, unless the trustee has assumed the contract. *See Cardinal Indus.*, 116 B.R. at 977. This means that if Congress intended to use § 365(c)(1) to prohibit the *assumption* of *executory* contracts, Congress just needed to include the language prohibiting assumption in § 365(c)(1). *Id.* This is because the trustee would already not be able to *assign* an executory contract per the existing prohibition on assigning *any* contracts without assumption found in § 365(f). *Id.* at 976. However, Congress included the "or assign" language in § 365(c)(1). *Id.*; 11 U.S.C. § 365(c)(1). The inclusion of the "or assign" language clarifies Congress' intention that in some circumstances an entity should be

able to *assume* but not *assign* an executory contract. *Cardinal Indus.*, 116 B.R. at 976. The "actual" test contemplates that exact scenario by permitting assumption of executory contracts by debtors in possession without assignment. *See id*. Because the "hypothetical" test prohibits the assumption of executory contracts as a matter of law and the "or assign" language in § 365(c)(1) is incompatible with such a rigid prohibition on assumption, the "hypothetical" test cannot be correct. *See id*.

Conversely, the "actual" test gives meaning to every word in § 365(c)(1). *See id.*; *see also Institut Pasteur*, 104 F.3d at 493; *Bonneville Power*, 440 F.3d at 249. The "actual" test recognizes a distinction between the terms "debtor in possession" and "trustee" by allowing debtors in possession to assume executory contracts and simultaneously preventing a trustee's assumption in accordance with the language of § 365(c)(1)'s prohibition. 11 U.S.C. § 365(c)(1) ("The trustee may not assume or assign . . . ."). The "actual" test also gives meaning to the conditional clause in § 365(c)(1) by limiting the reach of the statute to situations where a contract is *actually* assigned to an entity "other than a debtor in possession." *Institut Pasteur*, 104 F.3d at 493; 11 U.S.C. § 365(c)(1). The "actual" test permits the assumption without assignment of an executory contract by a debtor in possession, which gives meaning to the "or assign" language in § 365(c)(1). *See Institut Pasteur*, 104 F.3d at 493. Thus, while the "hypothetical" test ignores key language in § 365(c)(1), the "actual" test gives effect to every single word in the statute.

3. The "hypothetical" test creates a conflict between the "applicable law" language used in § 365(c)(1) and § 365(f).

The "actual" test also makes the most sense given Congress' use of "applicable law" in both § 365(c)(1) and § 365(f). *See Cardinal Indus.*, 116 B.R. at 976. This Court has previously dictated that the language of a statute cannot be read in isolation. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004). Rather, courts must refrain from rendering any statutory language insignificant

or superfluous when interpreting a particular provision of the Code. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Because the "hypothetical" test creates a direct conflict between § 365(c)(1) and § 365(f), it cannot be the correct interpretation. *Cardinal Indus.*, 116 B.R. at 976; *see also In re Catron*, 158 B.R. 629, 636 (Bankr. E.D. Va. 1993).

Under the "hypothetical" test, § 365(c)(1) operates to prohibit the assumption or assignment of executory contracts so long as "applicable law" renders the contract non-assignable. 11 U.S.C. § 365(c)(1); (R. 12); *Catron*, 158 B.R. at 636. Read in that way, § 365(c)(1) contradicts the plain language of § 365(f)(1): "*notwithstanding a [contrary] provision in . . . applicable law . . .* the trustee may assign such [executory] contract . . . ." *Compare* 11 U.S.C. § 365(c)(1), *with* § 365(f)(1) (emphasis added). In other words, the Thirteenth Circuit reads § 365(c)(1) so that applicable law governs to prohibit assignment and assumption, while at the same time § 365(f) explicitly demands that the court ignore applicable law when examining the assignment and assumption of an executory contract. *Catron*, 158 B.R. at 637. Given this conflict, the Thirteenth Circuit's use of the "hypothetical" test cannot be correct. *Cardinal Indus.*, 116 B.R. at 677.

Instead, reading § 365(c)(1) to require the "actual" test construes the statute in a way that also gives effect to the language in § 365(f): under the "actual" test, the prohibition in § 365(c)(1) does not turn on the relevant applicable law, but rather on the debtor in possession's intent. *Id.* Applying the "actual" test, a debtor in possession may assume an executory contract if the debtor in possession actually intends to keep the contract and not assign the contract. *See id*. Because under the "actual" test the "applicable law" language is not the operative language, § 365(f)'s "notwithstanding" clause is not at odds with § 365(c)(1). *Id.* Therefore, the "actual" test is the only approach compatible with the rest of § 365.

The "hypothetical" test has one overarching problem: it ignores the situation where a debtor in possession has the specific intent to continue performing its obligations under a beneficial executory contract. *Institut Pasteur*, 104 F.3d at 493. By focusing solely on the word "or," the "hypothetical" test jurisdictions miss the remaining language in § 365. *Id.* Instead, the "actual" test gives effect to all of the language in § 365. *Id.* This Court should adopt the reasoning of the First Circuit, Fifth Circuit, and the majority of bankruptcy courts by holding that the "actual" test is the correct approach to § 365(c)(1). *Id.*

4. House Report Number 1195 confirms that Congress never intended to create a "hypothetical" test for § 365(c)(1).

Given the difficulty that courts have interpreting § 365(c)(1), this Court should look to the legislative history of § 365(c)(1) to ascertain its true purpose. *See TRW, Inc.*, 534 U.S. at 31. The relevant legislative history of § 365(c)(1) confirms that Congress contemplated the "actual" test, not the "hypothetical" test, when it enacted § 365(c)(1). *See Summit Inv.*, 69 F.3d at 613.

Changes in the language of § 365(c)(1) over time indicate that the term "trustee" has a meaning distinct from "debtor in possession." *Id*. Congress enacted § 365(c)(1) in 1978. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, § 365(c)(1) (1978). The original iteration of § 365(c)(1) provided that "[t]he trustee may not assume or assign an executory contract . . . if applicable law excuses [the nondebtor party from rendering performance to] *the trustee or an assignee.*" *Id*. A 1980 proposal for an amendment to § 365(c)(1) suggested that Congress should replace the "trustee or an assignee" language with the "debtor or debtor in possession" language found in the current iteration of § 365(c)(1). *Summit Inv.*, 69 F.3d at 613; 11 U.S.C. § 365(c)(1) (2012). The fact that Congress later adopted this proposal shows that Congress intended to differentiate between the terms "trustee" and "debtor in possession": if the terms were meant to be interchangeable, there would have been no

need for such an amendment to § 365(c)(1). *See Summit Inv.*, 69 F.3d at 613. This reinforces the fact that § 365(c)(1) does not apply to debtors in possession at all.

Further, in a House Report accompanying the proposed modifications, Congress explained that § 365(c)(1) was never intended to apply to the situation of a debtor in possession that intends to assume its own prepetition contract with a nondebtor party:

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

H.R. Rep. No. 1195, 96th Cong., 2d Sess. § 27(b) (1980) (emphasis added). This explanation of § 365(c)(1) indicates that Congress did not intend to use § 365(c)(1) to preclude assumption of an executory contract if the performance to be given or received under the contact "will be the same as if no petition had been filed." *Id.*; *see also Summit Inv.*, 69 F.3d at 613. In other words, Congress meant to permit a debtor in possession to assume an executory contract that is nonassignable under applicable nonbankruptcy law as long as performance would be the same as if no bankruptcy petition had been filed. H.R. Rep. No. 1195. Therefore, the correct interpretation of § 365(c)(1) is to require a case-by-case analysis of the *actual* consequences of an assumption. *Id.* Where the nondebtor party's original bargain is unaffected by the assumption, the assumption is not prohibited by § 365(c)(1). *See Summit Inv.*, 69 F.3d at 613.

B. The "actual" test makes successful reorganization more likely and does not result in an abuse of bankruptcy proceedings.

In addition to providing meaning to all of the language in § 365(c)(1), the "actual" test achieves the best overall results for bankruptcy litigants. *Little People's Sch., Inc. v. United States*, 842 F.2d 570, 573 (1st Cir. 1988). This Court holds that bankruptcy courts "are

essentially courts of equity, and their proceedings [are] inherently proceedings in equity." *Local Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934). Courts applying the Code should seek to reach the most equitable results for all parties involved. *Id.* In other words, where the language of a statute supports an interpretation that leads to beneficial results, this Court can and *should* consider policy arguments. *See N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). Interpreting § 365(c)(1) to require the "actual" test delivers the most equitable results. In contrast, as this Court recognized, the "hypothetical" test to § 365(c)(1) sacrifices sound bankruptcy policy in exchange for a rigidly formalistic approach to a single word in § 365(c)(1). *See N.C.P. Marketing Grp., Inc. v. BG Star Prods. Inc.*, 556 U.S. 1145, 1145 (2009). To prevent a nondebtor party from unilaterally stalling bankruptcy proceedings for its sole benefit, this Court should reject the "hypothetical" test in favor of the "actual" test. *See id*.

1. The "hypothetical" test prevents debtors from being able to reorganize.

The "hypothetical" test creates obstacles to successful reorganization. *See Footstar*, 323 B.R. at 568. In a "hypothetical" test jurisdiction, a debtor in possession may be unable to assume a beneficial contract that is absolutely critical to its ability to reorganize. *Id.* This case provides a crystal-clear example. Development planned to assume its contract with Respondent. (R. 7). Development's assumption of its highly profitable contract with Respondent will enable the Debtors to confirm a reorganization plan that benefits *every* secured and unsecured creditor, including Respondent. (R. 7). Development's contract with Respondent is an essential part of the Debtors' ongoing business model, and Development's inability to assume the contract would result in liquidation instead of reorganization. (R. 5). This case illustrates how a recalcitrant nondetor party can use the "hypothetical" test's strained reading of § 365(c)(1) to defeat an otherwise viable reorganization. *See N.C.P. Marketing Grp., Inc.*, 556 U.S. at 1145 (noting that

under the "hypothetical" test, debtors in possession may be unable to affect the successful reorganization that Chapter 11 was designed to promote).

Moreover, the prevention of a successful reorganization by an obstinate creditor who holds a valuable executory contract is not limited to the facts of this case. *See, e.g., Footstar*, 323 B.R. at 568 (finding that the debtors' assumption of an executory contract to exclusively sell shoes within a particular Kmart store was necessary to the debtors' successful reorganization); *see also* (R. 26.) (Jones, J., dissenting) (stating that the majority's adoption of the "hypothetical" test will "have wide ranging consequences in future Chapter 11 cases, as the majority invites a nondebtor party to extort concessions in exchange for its consent to assumption").

Additionally, the "hypothetical" test advances the interests of a single creditor over the interests of other creditors, the debtor, and all parties affiliated with the debtor. (R. 26.) (Jones, J., dissenting). This provides a single creditor with an unbalanced amount of leverage and an opportunity to avoid the responsibilities of its contract. *See Footstar*, 323 B.R. at 582; *see also N.C.P. Marketing Grp., Inc.*, 556 U.S. at 1145. Here, Respondent seeks to prevent the reorganization because the Plan gives a majority share to an entity that is a partial owner of one of Respondent's competitors. (R. 7.) Using the "hypothetical" test, Respondent has attempted to single-handedly prevent Development's reorganization by not consenting to Development's assumption of the licensing agreement despite near universal support for the Plan from all other creditors. (R. 8). This shows that the "hypothetical" test allows a single creditor, regardless of that creditor's subjective basis, to dictate the outcome of a bankruptcy proceeding against the interests of all other creditors and debtors.

2. The "actual" test promotes the integrity of contractual relationships and upholds the principles of Chapter 11.

The "actual" test preserves the pre-petition contractual status quo. *See Cardinal Indus.*, 116 B.R. at 982. Should Development be permitted to assume its contract with Respondent, the only effect that such an assumption will have is to require Respondent to honor its original contractual obligations to Development. (R. 26.) (Jones, J., dissenting). Allowing Respondent to rescind its agreement with Development at this point would provide Respondent a way to avoid its contractual obligations that would not be available outside of bankruptcy. *N.C.P. Marketing Grp., Inc.*, 556 U.S. at 1145. Absent bankruptcy, Respondent "does not have the option to renege on its agreement [without breaching the contract]." *Id.* The "hypothetical" test would insist that because Development sought bankruptcy relief, then Respondent "obtained the power to reclaim—and resell at the prevailing, potentially higher market rate—the contract rights it sold to [Development]." *Id.* A Chapter 11 filing should not become a fortuitous event that excuses a nondebtor party from its contractual obligation when the nondebtor's essential bargain is unaffected and the identity of the original parties has not actually changed. *See id.*; *see also Cardinal Indus.*, 116 B.R. at 982. Instead, the "actual" test allows an entity that intends to perform the original contract to assume that contract. *Id.* at 573–74. This prevents a nondebtor party from receiving a windfall in bankruptcy and promotes the integrity of pre-petition contractual obligations. *See id.* at 982.

Finally, the "actual" test promotes the goals of Chapter 11. *See id.*; *see also Bildisco*, 465 U.S. 528 (1984); *Toib v. Radloff*, 501 U.S. 157, 163–64. Reorganization of a business is substantially more valuable to society than a liquidation; a reorganization preserves jobs, sustains the benefit of the business to the community, and maximizes the value of the estate for the benefit of all creditors. *See Bildisco*, 465 U.S. at 528. Chapter 11's object is to empower debtors

with going concern value to reorganize and rehabilitate their enterprises. *Footstar*, 323 B.R. at 566. Preventing a bankruptcy estate's assumption of an executory contract will hinder, if not foreclose, a business's potential rehabilitation. *Id*. The "hypothetical" test undermines the principles of Chapter 11, while the "actual" test promotes successful reorganization. *See Cardinal Indus.*, 116 B.R. at 982. By advocating the "hypothetical" test and opposing reorganization, Respondent places its own concerns above the interests of the Debtors' creditors, employees, and customers.

If this Court adopts the Thirteenth Circuit's approach, Development will be prohibited from assuming its existing licensing agreement even though Development *has no actual intent* to assign the licensing agreement to a third party. (R. 8–9.) In other words, Respondent will be allowed to unilaterally prevent the Debtors' reorganization based on a hypothetical that will never exist. (R. 8–9.) Instead, this Court should adopt the "actual" test because it makes a debtor in possession's power to assume contingent on the actual intent of the assuming party and not on speculation and the whim of a single creditor. *See Summit Inv.*, 69 F.3d at 613; *Institut Pasteur*, 104 F.3d at 493; *Bonneville Power*, 440 F.3d at 249.

The "actual" test best applies the language of § 365(c)(1). It does so in a manner consistent with the surrounding provisions of the Code and the legislative history of § 365(c)(1). The "actual" test achieves this harmony without rendering any language in the statute superfluous, which the "hypothetical" test does. The "actual" test also comports with the general purpose and policies of Chapter 11. Because the "actual" test gives effect to all of the language in § 365(c)(1) and incorporates sound bankruptcy policy, this Court should reverse the Thirteenth Circuit and hold that the "actual" test is the correct approach to § 365(c)(1).

II. SECTION 1129(a)(10) REQUIRES A "PER PLAN" RATHER THAN A "PER DEBTOR" APPROACH TO PLAN CONFIRMATION.

Section 1129(a)(10) of the Bankruptcy Code requires that only one impaired class of creditors accept a plan for that plan to be confirmable. This holds true whether that plan is a single plan for a single debtor or a joint plan covering multiple debtors. The Code states, "[i]f 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 an insider." 11 U.S.C. § 1129(a)(10). Read on its own and viewed in its appropriate statutory context, § 1129(a)(10) must mean that any plan presented for confirmation requires the approval of only a single impaired class of creditors, rather than one class per debtor in a joint bankruptcy proceeding. *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (In re Transwest Resort Props., Inc.)*, 881 F.3d 724, 729–30 (9th Cir. 2017). The "per plan" approach is also more consistent with the policies that underpin Chapter 11 bankruptcies: it better supports effective reorganizations and protects other parties' interests in a business's continued operations. *Toib*, 501 U.S. at 163–64; (R. 31.) (Jones, J., dissenting).

A. Section 1129(a)(10) Is Clear on Its Face and in Context where It Requires That "at least one class of claims that is impaired under the plan has accepted the plan."

Only a single impaired class of creditors must accept a joint plan in a multi-debtor bankruptcy. *Transwest Resort Props.*, 881 F.3d at 729. Both the text and surrounding statutory context support the "per plan" interpretation of § 1129(a)(10). 11 U.S.C. §§ 102(7), 1129(a); *Transwest Resort Props.*, 881 F.3d at 729–30; (R. 28–29.) (Jones, J., dissenting). The alternate approach, requiring one accepting impaired class of creditors per debtor in a joint bankruptcy, writes additional language into the statute. (R. 27.) (Jones, J., dissenting). Additionally, applying the "per plan" approach does not result in de facto substantive consolidation of joint enterprises.

Transwest Resort Props., 881 F.3d at 732 (Friedland, J., concurring); (R. 30.) (Jones, J., dissenting).

1. The language of § 1129(a)(10) is clear on its face and requires the "per plan" approach.

Interpretation of the Code should begin with and focus on the text of the statute. *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011). Courts must presume "that Congress says in a statute what it means and means in a statute what it says there." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quotations omitted). Courts must then apply the text of a statute as it is written to the case at hand. *Lamie*, 540 U.S. at 534 ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." (quotations omitted)).

Section 1129(a)(10) requires that only one impaired class of creditors accept a plan. *Transwest Resort Props.*, 881 F.3d at 729. The Ninth Circuit Court of Appeals determined the language of the statute to be clear and held that § 1129(a)(10) requires only one impaired class of creditors to approve of the plan, rather than one class per debtor. *Id.* at 729. Affirming the District Court of Arizona's decision, the Ninth Circuit stated that the statute "makes no distinction concerning or reference to the creditors of different debtors . . . nor does it distinguish between single-debtor and multi-debtor plans." *Id.* Indeed, as the words of the statute simply state, *any* impaired class of creditors can accept a joint plan. *Id.* That acceptance makes a joint plan confirmable because the statute does not treat single-debtor and joint plans differently. *Id.*

The Debtors' Plan here is confirmable because at least one impaired class of creditors (more, in fact) has accepted the Plan. (R. 6, 8.); *Transwest Resort Props.*, 881 F.3d at 729–30. The Debtors' joint Plan garnered "near universal" creditor support. (R. 8.) The secured creditor class—the Lenders—accepted the Plan, and the Lenders constitute an impaired, accepting class

of claims for every Debtor other than Development. (R. 6–8.) Only Development does not have an accepting impaired class because Respondent controls Development's only impaired class of claims. (R. 8.) Applying the text of § 1129(a)(10) and the "per plan" approach, the Plan is thus confirmable despite Respondent's lone opposition. 11 U.S.C. § 1129(a)(10); *Transwest Resort Props.*, 881 F.3d at 729–30; (R. 8.)

2. The language of § 1129(a)(10) requires the same outcome when "plan" is replaced with "plans" consistent with § 102(7).

The "per plan" interpretation of § 1129(a)(10) enjoys broad support across a number of courts, including the Ninth Circuit and the Bankruptcy Courts for the Southern District of New York and the Middle District of Pennsylvania. *Transwest Resort Props.*, 881 F.3d at 729; *JPMorgan Chase Bank, N.A. v. Charter Commc'ns Operating, LLC (In re Charter Commc'ns)*, 419 B.R. 221, 266 (Bankr. S.D.N.Y. 2009) (finding "it is appropriate to test compliance with § 1129(a)(10) on a per-plan basis, not . . . on a per-debtor basis."); *In re SGPA, Inc.*, No. 1-01-02609, 2001 WL 34750646, at *6–7 (Bankr. M.D. Pa. Sep. 28, 2001) (finding "that in a joint plan of reorganization it is not necessary to have an impaired class of creditors of each Debtor vote to accept the Plan.").

Respondent relies instead on a single Bankruptcy Court, the District of Delaware's, which has interpreted § 1129(a)(10) to require acceptance by at least one class of creditors per debtor and has applied that approach in two later cases. *In re Tribune Co.*, 464 B.R. 126, 183 (Bankr. D. Del. 2011); *see also In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293, 301 (Bankr. D. Del. 2011) (applying *Tribune's* "per debtor" approach to § 1129(a)(10)); *In re Woodbridge Grp. of Cos., LLC*, 592 B.R. 761, 778 (Bankr. D. Del. 2018) (same). In *Tribune*, the court relied on statutory context to determine that § 1129(a)(10) must apply on a "per debtor" basis. *Tribune Co.*, 464 B.R. at 180–84. Yet when § 1129(a)(10) is viewed in its statutory

context, the Ninth Circuit's "per plan" approach provides the simpler and clearer reading of the statute. *Transwest Resort Props.*, 881 F.3d at 730.

When § 102(7) is applied to § 1129(a)(10), the "per plan" approach becomes even more clearly correct. *Id.* Section 102(7) states that "the singular includes the plural." 11 U.S.C. § 102(7). Reading § 1129(a)(10) in the plural, the section would require that "at least one class of claims that is impaired under the *plans* has accepted the *plans*." 11 U.S.C. §§ 102(7), 1129(a)(10) (emphasis added); *Transwest Resort Props.*, 881 F.3d at 730. Whether a joint plan is viewed as a single plan encompassing multiple debtors or multiple plans filed simultaneously (one plan for each debtor), § 1129(a)(10) requires that *only* a single impaired class of creditors in the entire joint reorganization approve of the joint plan(s) before a court can confirm the plan(s). *See* 11 U.S.C. § 1129(a)(10); *Transwest Resort Props.*, 881 F.3d at 730. Therefore, the "per debtor" approach ignores the directive of § 1129(a)(10) as amended by § 102(7). *Transwest Resort Props.*, 881 F.3d at 730.

3. The surrounding provisions of § 1129(a) indicate the "per plan" approach is the correct reading of the statute.

Section 1129(a)(10)'s meaning remains the same when viewed in the context of § 1129(a)'s surrounding provisions. *Id.* The *Tribune* court relied on the wording of § 1129(a)(3) when it determined that § 1129(a)(10) applies on a "per debtor" basis. *Id.*; *Tribune Co.*, 464 B.R. at 183. As the Ninth Circuit noted, however, "the Bankruptcy Code phrases each section [of § 1129(a)] differently." *Transwest Resort Props.*, 881 F.3d at 730. The phrasing of § 1129(a)'s other subsections therefore lends no support to the idea that § 1129(a)(10) applies on a "per debtor" basis. *Id.*

Rather, § 1129(a)'s subsections confirm the fact that (a)(10) does not apply to every debtor in a joint bankruptcy. *Id.* In fact, other subsections of § 1129(a) make specific reference to

"the proponent of the plan" or to "the debtor," while subsections (a)(3) and (10) do not. *Compare* 11 U.S.C. §§ 1129(a)(2) ("*The proponent of the plan* complies with the applicable provisions of this title.") (emphasis added), (4) ("Any payment made or to be made, *by the proponent, or the debtor* . . . .") (emphasis added), (5)(A)(i) ("*The proponent of the plan* has disclosed the identity and affiliations of any individual proposed to serve . . . as a director, officer, or voting trustee of the debtor . . . .") (emphasis added), (5)(B) ("*The proponent of the plan* has disclosed the identity of any insider that will be employed or retained by the reorganized debtor . . . .") (emphasis added); *with* 11 U.S.C. §§ 1129(a)(3) ("The plan has been proposed in good faith and not by any means forbidden by law."), (10) ("[A]t least one class of claims that is impaired under the plan has accepted the plan . . . ."). Because other subsections of § 1129(a) explicitly state "the proponent of the plan" or "the debtor" in some requirements, which when applying § 102(7) would read in the plural as "the *proponents* of the *plans*" or as "the *debtors*," § 1129(a)(10) should not be read to function the same as differently worded subsections. *See generally* 11 U.S.C. § 1129(a); *see also Transwest Resort Props.*, 881 F.3d at 730.

Instead of reading § 1129(a) as a cohesive whole, the "per debtor" approach advocated by Respondent and the *Tribune* court writes additional words into § 1129(a)(10). (R. 29.) (Jones, J., dissenting). This reading of the statute effectively amends it to say, "at least one class of claims *of each debtor* that is impaired under the *joint* plan has accepted the plan." *Compare Tribune Co.*, 464 B.R. at 183; *with* 11 U.S.C. § 1129(a)(10) (emphasis added to indicate substantive changes). Because this approach conflicts with both the language of § 1129(a)(10) itself and with the surrounding subsections of § 1129(a), it cannot be the correct reading. *Transwest Resort Props.*, 881 F.3d at 729–30; (R. 29–30.) It is not the courts' role to rewrite the statute to include

Respondent's preferred language and outcome, especially to satisfy Respondent's desire to derail the Debtors' reorganization. *See Lamie*, 540 U.S. at 534; (R. 29.) (Jones, J., dissenting).

4. The "per plan" approach does not cause de facto substantive consolidation.

The Thirteenth Circuit's decision also conflates substantive consolidation with plan confirmation requirements in joint proceedings. (R. 18–20.) The "per plan" approach to § 1129(a)(10) does not create the same practical outcomes as substantive consolidation. (R. 18–19.) In fact, substantive consolidation remains a distinct and separate legal issue from a plan's failure to meet the § 1129(a)(10) confirmation requirement: the first is a court-made doctrine that collapses multiple entities in a bankruptcy into a single entity, and the second is a statutory requirement for confirmation that may involve multiple debtors utilizing a joint bankruptcy proceeding. *Transwest Resort Props.*, 881 F.3d at 732 (Friedland, J., concurring); (R. 30.) (Jones, J., dissenting).

The Bankruptcy Code authorizes joint proceedings for efficiency and fairness. Fed. R. Bankr. P. 1015; *Transwest Resort Props.*, 881 F.3d at 732 (Friedland, J., concurring). When multiple corporations file for Chapter 11 bankruptcy relief at the same time, and those corporations are part of a related enterprise, they may utilize the Code's provisions and conduct their bankruptcy process in one case. Fed. R. Bankr. P. 1015. Joint proceedings do not disrupt corporate separateness—creditors maintain claims against specific corporations in the overall corporate structure, and the corporations involved exit the reorganization process intact. *Transwest Resort Props.*, 881 F.3d at 732 (Friedland, J., concurring). Yet, corporations may file joint reorganization plans that reflect the integrated nature of a corporate enterprise with multiple separate corporations. *See Charter Commc'ns*, 419 B.R. at 266. Unless those plans actually consolidate the corporations involved in the reorganization, the judicial doctrine of substantive

consolidation is not implicated by joint proceedings. *Transwest Resort Props.*, 881 F.3d at 732 (Friedland, J., concurring); *Charter Commc'ns*, 419 B.R. at 266; Fed. R. Bankr. P. 1015 advisory committee's note to 1983 rules.

Conversely, substantive consolidation alters the pre-existing corporate structure of joint debtors by pooling their assets and claims into a single group. *See, e.g., In re Bonham*, 229 F.3d 750, 764 (9th Cir. 2000). The corporations that entered bankruptcy separate do not necessarily exit the process as distinct entities once a court substantively consolidates them. *Id.* Because the doctrine does not observe typical corporate formalities and ignores corporate separateness, courts apply specific tests to determine if such an action is appropriate in a given case. *Id.*

Substantive consolidation therefore requires its own analysis, separate from plan confirmation requirements, and that analysis must be made on a case-by-case basis. *Transwest Resort Props.*, 881 F.3d at 732 (Friedland, J., concurring) (citing *Bonham*, 229 F.3d at 764). When a joint plan actually collapses multiple, separate debtors, then creditors may object to an inappropriate substantive consolidation. *Id.* Here, Respondent never pursued an objection to the Plan's confirmation on substantive consolidation grounds. (R. 8.) In fact, Respondent could not do so because the Plan specifically stated that it was not substantively consolidating the Debtors, and the Plan treated the Debtors similarly to the integrated manner in which they had conducted business prior to filing for bankruptcy. (R. 7–8.) *Transwest Resort Props.*, 881 F.3d at 732 (Friedland, J., concurring). Instead, intent on disrupting the Debtors' reorganization efforts, Respondent argued that the "per plan" approach applied by the Bankruptcy Court must always result in effective substantive consolidation. (R. 8.) The Thirteenth Circuit held, wrongly, that the Debtors were here substantively consolidated only because it conflated substantive consolidation with the "per plan" reading of § 1129(a)(10). (R. 18–20.) Because substantive

consolidation and plan confirmation under § 1129 involve two separate legal issues that may only sometimes overlap, this Court should confirm that they remain distinct issues and that the "per plan" approach to § 1129(a)(10) does not function as substantive consolidation.

Section 1129(a)(10) is written clearly, so this Court should hold that the statute requires the "per plan" approach to impaired classes' acceptance of the plan. *Transwest Resort Props.*, 881 F.3d at 729. The statutory language makes no distinction between single and joint plans. *Id.* When read in the plural by applying § 102(7), the statute more clearly requires that only one impaired class must accept the plan among all debtors covered by the joint plan. *Id.* at 730. When read in the context of the other subsections of § 1129(a), the statute can still only necessitate a single impaired class's acceptance. *Id.* Finally, the "per plan" approach does not result in de facto substantive consolidation. Therefore, this Court should reverse the Thirteenth Circuit, confirm the "per plan" approach is the valid interpretation of § 1129(a)(10), and allow the Debtors to proceed with their reorganization.

B. The "Per Plan" Approach Better Advances the Policies and Purposes of Chapter 11 Reorganizations.

The Code's emphasis on reorganization favors allowing debtors to restructure their businesses when possible. *Toib*, 501 U.S. at 163-64; (R. 20.); (R. 31.) (Jones, J., dissenting). The Code also provides specific procedural protections to creditors throughout the reorganization process; those protections, provided by Congress, should govern parties' positions in reorganization, rather than court-provided protections drawn from expansive readings of specific statutes. *See generally* 11 U.S.C. § 1129; *see also SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 967 (2017) ("[W]e cannot overrule Congress's judgment based on our own policy views."). This Court should not adopt an expansive reading of

§ 1129(a)(10), especially where that reading provides lone creditors opportunities to hold joint reorganizations hostage even when the majority of creditors accept the plan. (R. 7–8.)

1. The "per debtor" approach allows lone creditors to frustrate successful joint reorganizations.

This Court has recognized "Congress's purpose of permitting debtors to reorganize and restructure their debts in order to revive the debtors' businesses and thereby preserve jobs and protect investors." *Toib*, 501 U.S. at 163; *Bildisco*, 465 U.S. at 528. Congress also sought to maximize the value of the bankruptcy estate in Chapter 11 proceedings and guarantee creditors at least as much as they would receive in a Chapter 7 liquidation. *Toib*, 501 U.S. at 163–64.

Here, the Debtors' Plan provides for a viable path to reorganization and seeks to pay creditors significantly more than they would receive were the Debtors to liquidate. (R. 7–8, 31.) The Plan would preserve the business operations of ten business entities, including eight separate casinos. (R. 2, 7–8.) The Plan's confirmation would allow the Debtors to maintain operations, protect their investors, and continue paying their employees. (R. 2, 7–8.) The Plan also guarantees that Respondent will receive significantly more from the proposed reorganization than it would from a potential liquidation of the Debtors. (R. 31.) (Jones, J., dissenting). If confirmation fails, the Debtors will almost certainly be forced to convert their case to a Chapter 7 liquidation or dismiss their bankruptcy case entirely, leading to the businesses' total loss. (R. 31.) (Jones, J., dissenting). The vast majority of creditors involved in this case have accepted the Plan; only the Respondent stands opposed to it, holding both the Debtors' reorganization efforts and other creditors' payments hostage. (R. 7–8.) This Court should not allow a strained reading of § 1129(a)(10) to create situations where future creditors may hold up joint reorganizations despite the assent of the majority of the creditors involved.

2. Creditors retain specific and powerful protections under the Bankruptcy Code that make the "per debtor" approach unnecessary.

The "per debtor" approach is also unwarranted to protect creditors in Chapter 11 proceedings. Congress has provided substantial creditor protections throughout § 1129. These protections show that a contorted reading of § 1129(a)(10) is not needed to protect creditors in joint reorganizations. *See Transwest Resort Props.*, 881 F.3d at 733 (Friedland, J., concurring) (arguing that creditors retain the ability to object to plans that would constitute substantive consolidation under the "per plan" approach to § 1129(a)(10)); *see generally* 11 U.S.C. § 1129.

Creditors possess both statutory and judicial protections in joint reorganizations. Creditors can object to joint plans that actually substantively consolidate multiple debtors—a powerful protection for creditors in joint bankruptcies. *Transwest Resort Props.*, 881 F.3d at 733 (Friedland, J., concurring). Additionally, creditors may still object to joint plans that provide them with less protections than a Chapter 7 liquidation. 11 U.S.C. § 1129(a)(7)(A)(ii). Further, those creditors must be treated in a "fair and equitable" manner under the plan even if they vote to deny the plan and the debtor pursues cramdown. 11 U.S.C. § 1129(b). A single, unsecured creditor should not be able to exercise veto power over joint bankruptcy proceedings. *See In re LOOP 76, LLC*, 442 B.R. 713, 722 (Bankr. D. Ariz. 2010). Indeed, § 1129(a)(10) is not meant to be "an all-purpose creditor protection mechanism." *SGPA*, 2001 WL 34750646, at *6. Rather, it is a "technical requirement" that must be met independently from other creditor protections present in § 1129. *Id.* Therefore, this Court should confirm that § 1129(a)(10) is simply what it is: one confirmation requirement among many, not a veto power for lone creditors in joint bankruptcies. *Id.*; *see also LOOP 76*, 442 B.R. at 722.

Indeed, Respondent here had access to these exact protections. Yet Respondent argued only that the Plan could not be confirmed because of a single bankruptcy court's interpretation of

§ 1129(a)(10). (R. 8.); *Tribune Co.*, 464 B.R. at 180–84. Respondent did not argue that the Plan substantively consolidated the Debtors because the Plan explicitly provided that it did not. (R. 7.) Respondent did not object that it was receiving less under the Plan than it would if the Debtors had liquidated because Respondent in fact received far more under the Plan. 11 U.S.C. § 1129(a)(7)(A)(ii); (R. 7–8, 31.) Respondent did not argue it was treated inequitably or unfairly under the Plan because it was not. 11 U.S.C. § 1129(b); (R. 8.)

Instead, Respondent advocated the "per debtor" approach to § 1129(a)(10) as an attempt to hold the Debtors' reorganization hostage based on its speculative concerns about the new majority owners. (R. 7–8.) Despite majority support for the Plan, Respondent seeks to use § 1129(a)(10)'s requirement as a "veto" over the Plan and the Debtors' entire joint proceeding. (R. 8.); *LOOP 76*, 442 B.R. at 722. The "per debtor" approach and the Respondent's position here do not only fail to properly apply the wording of the Bankruptcy Code; they also fail to abide by the Code's purpose and Congress's policy behind Chapter 11 reorganization. (R. 31.) (Jones, J., dissenting). Therefore, this Court should confirm that the "per plan" approach more faithfully applies both the text and the policies of the Code.

The "per plan" approach to § 1129(a)(10) best applies the language of the Code. It does so in a manner consistent with the surrounding context and the Code's own definitions. It does so without adding language to the statute, which the "per debtor" approach must. It does not result in de facto substantive consolidation because courts must continue to analyze substantive consolidation when presented as an issue in joint reorganizations. The "per plan" approach more faithfully applies the purpose and policies of Chapter 11 reorganization. Finally, creditors retain many protections in joint reorganizations that Congress has granted in the Code. For these reasons, this Court should reverse the Thirteenth Circuit Court of Appeals' ruling and hold that

the "per plan" approach to § 1129(a)(10) better comports with the text, context, and purpose of the statute.

CONCLUSION

For the foregoing reasons, the Debtors respectfully request that this Court find that Development may assume its contract with Respondent and that the accepting impaired classes satisfy the Code's confirmation requirements.

DATED: January 21, 2020

APPENDIX A

UNITED STATES CODE TITLE 11: BANKRUPTCY

11 U.S.C. § 102 – Rules of Construction

In this title—

. . .

(7) the singular includes the plural;

. . . .

11 U.S.C. § 365 – 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)** such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or
>
> **(3)** such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

. . .

(f)(1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

> **(2)** The trustee may assign an executory contract or unexpired lease of the debtor only if--
>
> > **(A**) the trustee assumes such contract or lease in accordance with the provisions of this section; and
> >
> > **(B)** adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

. . . .

§ 1107. Rights, powers, and duties of debtor in possession

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

(b) Notwithstanding section 327(a) of this title, a person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case.

§ 1129. Confirmation of plan

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

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

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

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

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

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

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

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

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

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

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

(i) has accepted the plan; or

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

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

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

(A) such class has accepted the plan; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

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

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

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

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

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

(C) With respect to a class of interests--

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

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

(c) Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127(b) of this title, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this title. If the requirements of subsections (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.

(d) Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. In any hearing under this subsection, the governmental unit has the burden of proof on the issue of avoidance.

(e) In a small business case, the court shall confirm a plan that complies with the applicable provisions of this title and that is filed in accordance with section 1121(e) not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3).

APPENDIX B

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 1015. Consolidation or Joint Administration of Cases Pending in Same Court

(a) Cases involving same debtor

If two or more petitions by, regarding, or against the same debtor are pending in the same court, the court may order consolidation of the cases.

(b) Cases involving two or more related debtors

If a joint petition or two or more petitions are pending in the same court by or against

(1) spouses, or
(2) a partnership and one or more of its general partners, or
(3) two or more general partners, or
(4) a debtor and an affiliate, the court may order a joint administration of the estates.

Prior to entering an order the court shall give consideration to protecting creditors of different estates against potential conflicts of interest. An order directing joint administration of individual cases of spouses shall, if one spouse has elected the exemptions under § 522(b)(2) of the Code and the other has elected the exemptions under § 522(b)(3), fix a reasonable time within which either may amend the election so that both shall have elected the same exemptions. The order shall notify the debtors that unless they elect the same exemptions within the time fixed by the court, they will be deemed to have elected the exemptions provided by § 522(b)(2).

(c) Expediting and protective orders

When an order for consolidation or joint administration of a joint case or two or more cases is entered pursuant to this rule, while protecting the rights of the parties under the Code, the court may enter orders as may tend to avoid unnecessary costs and delay.

ADVISORY COMMITTEE NOTES

Subdivision (a) of this rule is derived from former Bankruptcy Rule 117(a). It applies to cases when the same debtor is named in both voluntary and involuntary petitions, when husband and wife have filed a joint petition pursuant to § 302 of the Code, and when two or more involuntary petitions are filed against the same debtor. It also applies when cases are pending in the same court by virtue of a transfer of one or more petitions from another court. Subdivision (c) allows the court discretion regarding the order of trial of issues raised by two or more involuntary petitions against the same debtor.

Subdivision (b) recognizes the propriety of joint administration of estates in certain kinds of cases. The election or appointment of one trustee for two or more jointly administered estates is

authorized by Rule 2009. The authority of the court to order joint administration under subdivision (b) extends equally to the situation when the petitions are filed under different sections, e.g., when one petition is voluntary and the other involuntary, and when all of the petitions are filed under the same section of the Code.

Consolidation of cases implies a unitary administration of the estate and will ordinarily be indicated under the circumstances to which subdivision (a) applies. This rule does not deal with the consolidation of cases involving two or more separate debtors. Consolidation of the estates of separate debtors may sometimes be appropriate, as when the affairs of an individual and a corporation owned or controlled by that individual are so intermingled that the court cannot separate their assets and liabilities. Consolidation, as distinguished from joint administration, is neither authorized nor prohibited by this rule since the propriety of consolidation depends on substantive considerations and affects the substantive rights of the creditors of the different estates. For illustrations of the substantive consolidation of separate estates, *see Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215 [61 S.Ct. 904, 85 L.Ed. 1293] (1941). *See also Chemical Bank N.Y. Trust Co. v. Kheel*, 369 F.2d 845 (2d Cir. 1966); Seligson & Mandell, Multi-Debtor Petition—Consolidation of Debtors and Due Process of Law, 73 Com.L.J. 341 (1968); Kennedy, Insolvency and the Corporate Veil in the United States in Proceedings of the 8th International Symposium on Comparative Law 232, 248-55 (1971).

Joint administration as distinguished from consolidation may include combining the estates by using a single docket for the matters occurring in the administration, including the listing of filed claims, the combining of notices to creditors of the different estates, and the joint handling of other purely administrative matters that may aid in expediting the cases and rendering the process less costly.

Subdivision (c) is an adaptation of the provisions of Rule 42(a) F.R.Civ.P. for the purposes of administration of estates under this rule. The rule does not deal with filing fees when an order for the consolidation of cases or joint administration of estates is made.

A joint petition of husband and wife, requiring the payment of a single filing fee, is permitted by § 302 of the Code. Consolidation of such a case, however, rests in the discretion of the court; see § 302(b) of the Code.

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