No. 19-1004

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

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

TUMBLING DICE, INC. *ET AL.*, PETITIONER

V.

UNDER MY THUMB, INC., RESPONDENT.

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

Brief for Petitioner

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Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether a debtor in possession may assume an executory contract under 11 U.S.C. § 365(c)(1) when the non-debtor party to the contract objects and applicable law relieves the non-debtor party from performance with an entity other than the debtor in possession.

II. Whether the Court may approve cramdown and confirm a joint, multi-debtor plan under 11 U.S.C. § 11129(a)(10) when all but one impaired class has voted to accept the plan.

TABLE OF CONTENTS

QUESTIONS PRESENTED.......... i

TABLE OF CONTENTS.......... ii

TABLE OF AUTHORITIES.......... iv

OPINIONS BELOW.......... viii

STATEMENT OF JURISDICTION.......... viii

STATUTORY PROVISIONS.......... viii

STATEMENT OF THE CASE AND FACTS.......... 1

SUMMARY OF ARGUMENT.......... 4

ARGUMENT.......... 7

I. SECTION 365(c)(1) ALLOWS A DEBTOR IN POSSESSION TO ASSUME A NON-EXCLUSIVE LICENSE OF INTELLECTUAL PROPERTY. 7

A. The plain meaning of section 365(c)(1) permits a debtor in possession to assume a non-exclusive license of intellectual property under the "actual test.".......... 7

1. The term "trustee" is not synonymous with the term "debtor in possession" under section 365(c)(1).......... 11

2. A debtor in possession's assumption, without assignment, of a non-exclusive license of intellectual property fails to trigger the "applicable law" referenced to in section 365(c)(1).......... 13

3. Application of the "hypothetical test" to interpret section 365(c)(1) is inconsistent with other provisions of the Bankruptcy Code.......... 14

B. Legislative history indicates that the "actual test" better comports with Congressional intent.......... 16

C. The underlying purpose of Chapter 11 is better served through allowing a debtor in possession to assume a non-exclusive license of intellectual property.......... 18

II. SECTION 1129(a)(10) ONLY REQUIRES ACCEPTANCE FROM ONE IMPAIRED CLASS OF CLAIMS IN A JOINT, MULTI-DEBTOR PLAN.......... 21

A. The plain language of section 1129(a)(10) provides for a per-plan approach of impaired creditors regardless of the number of debtors in a plan.......... 22

1. The language of section 1129(a)(10) does not create an exception for impaired classes of different debtors nor joint, multi-debtor plans. 23

2. Pluralizing the Code using section 102(7) does not require more than one impaired class to approve the plan. 25

3. The per-plan approach does not conflict with other sections of the Bankruptcy Code. 26

B. A per-plan approach is consistent with the purpose and policy of the Bankruptcy Code. 28

1. A per-debtor approach essentially grants veto power, undermining the role of the joint multi-debtor plans, and creates individual plans. 28

2. The acceptance requirement is only meant for a di minimus level of support for a plan and is not where creditors should seek additional protection. 30

3. A per-plan approach does not result in substantive consolidation and the Court can proceed with the joint plan with the approval of one impaired class. 32

CONCLUSION 34

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Bank of Am. Nat. Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434 (1999)..................29

Bedroc Ltd., LLC v. United States, 541 U.S. 176 (2004)..25

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1 (2000).................16, 18

King v. Burwell, 135 S. Ct. 2480 (2015)..32

King v. St. Vincent's Hospital, 502 U.S. 215 (1991) 24, 26

Lamie v. U.S. Tr., 540 U.S. 526 (2004) 22

Landreth Timber Co. v. Landreth, 471 U.S. 681 (1985) 7

Pittsburg & Lake Erie R.R. Co. v. Railway Labor Executives Ass'n, 491 U.S. 490 (1989)..........27

N.C.P. Marketing Grp., Inc. v. BG Star Prods., Inc., 556 U.S. 1145 (2009) 19

N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513 (1984)..19

RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639 (2012)................................26

Taggart v. Lorenzen, 139 S. Ct. 1795 (2019) 28

TRW, Inc. v. Andrews, 534 U.S. 19 (2001)...15, 16

United States v. Ron Pair Enters., Inc., 489 U.S. 235 (1989) 7

Washington Mkt. Co. v. Hoffman, 101 U.S. 112 (1879)..12

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Bonneville Power Administration v. Mirant Corp. (In re Mirant Corp.), 440 F.3d 238 (5th Cir. 2006) 8

Fustolo v. 50 Thomas Patton Drive, LLC, 816 F.3d 1 (1st Cir. 2016) 28

Hardemon v. City of Boston, No. 97-2010, 1998 WL 148382 (1st Cir. 1998)................................8

In re FirstEnergy Sols. Cor., 945 F.3d 431 (6th Cir. 2019)..28

In re Herweg, 119 F.2d 941 (7th Cir. 1941) 28

In re Owens Corning, 419 F.3d 195 (3d Cir. 2005)....23, 32

In re Meyer, 195 F.2d 263 (10th Cir. 1952)....28

In re Reider, 31 F.3d 1102 (11th Cir. 1994)....33

In re Trump Entm't Resorts, 810 F.3d 161 (3d Cir. 2016)....28

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RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.), 361 F.3d 257 (4th Cir. 2004)....8, 15

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In re Polytherm Indus., Inc., 33 B.R. 823 (W.D. Wis. 1983)....29

In re Rhead, 179 B.R. 169 (Bankr. D. Ariz. 1995) 31

In re SGPA, Inc., 2001 WL 34750646 (Bankr. M.D. Pa. 2001) .... *passim*

In re Tribune, 464 B.R. 126 (Bankr. D. Del. 2011) 25

Statutes

11 U.S.C. § 101(2)(A) 10

11 U.S.C. § 102(7) 26

11 U.S.C. § 365 .... *passim*

11 U.S.C. § 365(a) 7

11 U.S.C. § 365(c)(1) .... *passim*

11 U.S.C. § 365(f) 14-16

11 U.S.C. § 1124 21

11 U.S.C. § 1129(a) .... *passim*

11 U.S.C. § 1129(a)(1) 27, 28

11 U.S.C. § 1129(a)(3) 27, 28

11 U.S.C. § 1129(a)(8) 21, 23, 25, 27, 28

11 U.S.C. § 1129(a)(10) .... *passim*

11 U.S.C. § 1129(b) 22, 23, 31

Public Laws

Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, § 362(a) (1984) 17

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OPINIONS BELOW

The bankruptcy court found that Tumbling Dice, Inc. and its affiliated debtors could assume an executory contract under § 365(c)(1), in spite of Under My Thumb's objection and applicable federal intellectual property law which released Under My Thumb from performance under the contract with an entity other than Tumbling Dice and its affiliated debtors. (R. at 3). The bankruptcy court also found that approval of Tumbling Dice's reorganization plan only required acceptance of a single impaired class of creditors under the plan. (R. at 3). The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed on both issues. (R. at 3). In an opinion written by Judge Richards, the United States Court of Appeals for the Thirteenth Circuit reversed on both issues. (R. at 3, 9-21). Judge Jones issued a dissenting opinion, recommending that the decision of the bankruptcy court be affirmed on both issues. (R. at 21-32). The entirety of the Thirteenth Circuit's opinion is reproduced as the record in this appeal.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

11 U.S.C. § 101(2)(A) reads, in pertinent part, as follows:

> In this title the following definitions shall apply:
> (2) The term "affiliate" means—
> (A) entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities— . . .

11 U.S.C. § 102(7) reads, in pertinent part, as follows:

> In this title—
> . . .
> (7) the singular includes the plural; . . .

11 U.S.C. § 365(a) reads as follows:

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

11 U.S.C. § 365(c)(1) reads, in pertinent part, as follows:

(c) 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 contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession . . .; and
(B) such party does not consent to such assumption or assignment; . . . .

11 U.S.C. § 365(f) reads, in pertinent part, as follows:

(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; . . . .

11 U.S.C. § 1124 reads, in pertinent part, as follows:

Except as provided in section 1123(a)(4) of this title, a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan—
(1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest; . . . .

11 U.S.C. § 1129(a) reads, in pertinent part, as follows:

(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.
. . .
(3) The plan has been proposed in good faith and not by any means forbidden by law.
. . .
(8) With respect to each class of claims or interests--
(A) such class has accepted the plan;
. . .
(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider. . . .

11 U.S.C. § 1129(b) reads, in pertinent part, as follows:

(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. . . .

STATEMENT OF THE CASE AND FACTS

Tumbling Dice operates luxury casinos and resorts in eight cities across the United States[1]. (R. at 2). Tumbling Dice, Inc ("TDI") is a holding company which owns the operating interests of each of the eight casinos and Tumbling Dice Development, LLC ("Development"). (R. at 4). Each casino is owned by a separate operating subsidiary ("Operating Debtor") while Development's purpose is limited to acting as the licensee for the Software Agreement ("Agreement") with Under My Thumb. (R. at 4). On January 11, 2016, TDI and its affiliated debtors filed for Chapter 11 bankruptcy, and their cases are currently being jointly administered. (R. at 3).

Tumbling Dice launched a casino loyalty program, Club Satisfaction, roughly thirty years ago. (R. at 4.) These programs are commonplace in the gambling industry and offer members rewards for frequently making use of the Debtors' services. (r. at 4). Twelve years ago, in 2008, the Development subsidiary of TDI contracted with Under My Thumb, a software designer in the customer loyalty space, to create an integrated software system that would modernize Club Satisfaction (the "Software"). (R. at 4).

The Agreement between Development and Under My Thumb was for Under My Thumb to develop the Software and for Development to reimburse the software designer for a portion of the costs with an unsecured promissory note (the "R&D Note"). (R. at 4). Under My Thumb spent $10 million and a year designing the software, and the parties agreed on a reimbursement of $7 million for the R&D note. (R. at 4).

Under the Agreement[2], Development agreed to pay Under My Thumb a monthly fee based on spending from the Software's members. (R. at 5). In return, Under My Thumb granted

[1] TDI operates casinos in Atlanta, Chicago, Detroit, Lake Tahoe, Las Vegas, New Orleans, Palm Springs, and Tunica.

[2] Obligations under the Agreement such as the monthly licensing fee are separate from the R&D Note's obligations.

Development a non-exclusive license to use its copyrighted and patented software. (R. at 5). The Agreement also allowed Development to "extend the benefits of the Agreement to its affiliated entities only." (R. at 5). Beyond those entities, the Agreement barred the Debtors from assigning their rights without Under My Thumb's consent in writing. (R. at 5).

Both parties benefited from this relationship. (R. at 5-6.) The Debtors acknowledge that the Software is an essential part of their ongoing business mode as the new version of Club Satisfaction prompted increased membership and spending by members. (R. at 5). As such, Development paid out higher monthly sums to Under My Thumb under the Agreement. (R. at 5). Under My Thumb also received payment from third parties by licensing similar versions of the Software it created for Development. (R. at 5).

In December 2011, Start Me Up, Inc., a hedge fund, used a leveraged buy-out ("LBO") transaction to purchase TDI's stock. (R. at 6). An associated group of lenders ("Lenders") provided a $3 billion loan for the transaction in exchange for first priority liens on the assets of TDI and the Operating Debtors. (R. at 6). Development was purposefully a non-party to the loan agreement as the Lenders did not require Development to act as a borrower or guarantor. (R. at 6).

The $3 billion loan proved to be too much for Operating Debtors balance sheets to absorb, and the Operating Debtors struggled to service their debts. (R. at 6). The Debtors stopped making payments on the R&D Note in June 2015 and commenced this Chapter 11 case in January of 2016. (R. at 6). At the time the Debtors stopped making payment on the R&D note, Development still owed Under My Thumb $6 million. (R. at 6). However, the Debtors remained current with the monthly payments due under the Agreement. (R. at 6).

Under the loan, TDI and each of the eight Operating Debtors jointly and severally owed the Lenders around $2.8 billion. (R. at 6.) In addition to the secured debt, the Debtors owed roughly

$120 million to unsecured creditors, including the money due to Under My Thumb under the R&D Note. (R. at 6). The Debtors' primary goal in the Chapter 11 is restructuring the secured loan with Lenders to keep the business afloat. (R. at 6).

The Debtors' preliminary Chapter 11 plan lowered their monthly debt service by restructuring the debt owed to the Lenders through lowering the interest rate and extending the repayment period by twenty years. (R. a 7.) Unsecured creditors were to receive a 55% of their debts funded by an equity infusion. (R. at 7.) At this rate, Under My Thumb is positioned to receive $3.3 million for the money it is owed under the R&D Note. (R. at 7). This amount exceeds what an unsecured creditor would have obtained under Chapter 7 liquidation, as the payout from the new cash infusion far exceeds what assets would have been available to unsecured creditors after a liquidation. (R. at 7.)

Keeping with the new value exception, the equity of the restructured company would belong to a joint ownership group in exchange for $66 million. (R. at 7). Existing shares were to be cancelled and new shares issued to the joint ownership group without changing the overall corporate structure. (R. at 7). This joint plan was filed on behalf of all the Debtors in August 2016, and the Plan expressly stated that the Debtors' estates were not being consolidated and that no Debtor was to become liable for the obligations of another. (R. at 7).

The proposed new ownership group of TDI and all of its subsidiaries was to consist of Start Me Up and a private equity group, Sympathy for the Devil, LP ("SFD"). (R. at 7-8). Start Me Up was to contribute $31 million of the new capital in exchange for 49% of the new enterprise's voting share, and SFD would contribute $35 million in exchange for 51% of the voting shares on the new board.[3] (R. at 7-8).

[3] The proposed board size for reorganized company is unknown.

The reorganization plan received nearly unanimous approval from all the creditors, as TDI and each Operating debtor had at least one impaired class accept the proposed plan. (R. at 8). The solitary holdout of the ten groups was Development, the sole creditor of which was Under My Thumb. (R. at 8). Leary of SFD's involvement in the reorganization[4], Development voted to reject the plan, leaving a class of impaired claims without an accepting vote. (R. at 8).

Under My Thumb objected to the Plan on two grounds, but the bankruptcy court overruled the objections and confirmed the plan. (R. at 8). On appeal, the Bankruptcy Appellate Panel affirmed the decision of the bankruptcy court on both issues, and Under My Thumb subsequently appealed to the Thirteenth Circuit. (R. at 9).

SUMMARY OF ARGUMENT

This case involves a clash between a debtor in possession's ability to reorganize under Chapter 11 and a creditor's power to prevent the debtor's reorganization. A debtor in possession's reorganization under Chapter 11 is imperative to the continuation of the debtor's business, consequentially affecting the retention of jobs and economic resources. To allow a creditor to prevent the debtor's reorganization efforts through giving the creditor de facto veto power and refusing the debtor's assumption of an executory contract would undermine the essential purpose of Chapter 11. Accordingly, this Court should hold that TDI can assume the License Agreement between Development and Under My Thumb, and that TDI's reorganization plan only requires acceptance from one impaired class of creditors. Therefore, this Court should reverse the decision below.

[4] SFD, a private equity firm, operates a portfolio of private companies. One of these companies competes with Under My Thumb and for several years had been trying in to develop a similar version of the Software. (R. at 8).

The circuit courts of appeal are split on their interpretation of 11 U.S.C. § 365(c)(1). Some circuit courts have used the hypothetical test, while other circuit courts have instead applied the actual test. In looking to the plain meaning of 11 U.S.C. § 365(c)(1), the legislative history behind that section, and the purpose of Chapter 11, this Court should find that the actual test is the proper interpretation of 11 U.S.C. § 365(c)(1).

The plain meaning of 11 U.S.C. § 365(c)(1) favors the application of the actual test. The terms “trustee” and “debtor in possession” must be accorded their respective meanings within the section, in effect allowing a debtor in possession to assume an executory contract, while prohibiting a trustee from doing the same. This approach is supported by the legislative history, which reveals overwhelming evidence that Congress intended for a case-by-case analysis to be performed in determining whether a trustee is actually attempting to assign an executory contract, or whether a debtor in possession is merely attempting to assume the contract. However, regardless of the meanings of the terms, a debtor in possession can assume an executory contract without triggering the “applicable law” denoted in 11 U.S.C. § 365(c)(1).

Because TDI’s assumption of the contract would not force Under My Thumb to perform with a party other than the entity it contracted with, federal intellectual property law—the applicable law in this case—is not triggered. This Court should avoid applying the hypothetical test and instead find that the actual test is the proper interpretation of 11 U.S.C. § 365(c)(1) under the plain meaning of the statute. This approach comports with the purpose of Chapter 11, which is to encourage the reorganization of a debtor’s business and prevent liquidation. Accordingly, this Court should reverse the decision below and find that 11 U.S.C. § 365(c)(1) allows TDI to assume the Agreement.

Additionally, 11 U.S.C. § 1129(a)(10) only requires that one impaired class of claims accepts a joint, multi-debtor plan. While the circuit courts have only required acceptance from one impaired class of claims under this type of plan—the "per-plan" approach, other courts have incorrectly required acceptance from an impaired class of claims for each debtor in a joint, multi-debtor plan—the "per-debtor" approach. The plain meaning of 11 U.S.C. § 1129(a)(10) favors application of the per-plan approach because it merely requires that at least one impaired class accepts the plan. Furthermore, the per-plan approach is not inconsistent with the remainder of Chapter 11, as other sections of the Code were put in place to provide necessary protection to creditors. The per-plan approach also furthers the purpose of Chapter 11 by encouraging the reorganization of a debtor's business and avoiding liquidation, while the per-debtor approach subverts the purpose of Chapter 11 by essentially giving a creditor de facto veto power.

Because TDI's reorganization plan received the necessary acceptance from impaired classes of claims, this Court should approve the plan. While 11 U.S.C. § 1129(a)(10) only requires acceptance from one impaired class of claims under a joint, multi-debtor plan, TDI received acceptance from every single impaired class of claims under the plan except for claims against Development, whose sole creditor was Under My Thumb. To give effect to Under My Thumb's holdout would effectively overlook the plain meaning of 11 U.S.C. § 1129(a)(10) and ignore the purpose of Chapter 11 in rehabilitating debtors.

For the aforementioned reasons, through examining the plain meanings of 11 U.S.C. §§ 365(c)(1) and 1129(a)(10) in the context of the overall purpose of Chapter 11, this Court should reverse the decision below.

ARGUMENT

I. SECTION 365(c)(1) ALLOWS A DEBTOR IN POSSESSION TO ASSUME A NON-EXCLUSIVE LICENSE OF INTELLECTUAL PROPERTY.

Section 365 of Chapter 11 allows a debtor in possession to assume an executory contract held by the debtor prior to filing for bankruptcy. 11 U.S.C. § 365(a) (2018). More simply, this means that, subject to certain limitations, a Chapter 11 debtor in possession may continue to perform its obligations under an executory contract while also continuing to receive benefits flowing from the contract.

A. The plain meaning of section 365(c)(1) permits a debtor in possession to assume a non-exclusive license of intellectual property under the "actual test."

Section 365(a)'s general grant of power to a debtor in possession to assume an executory contract is not unlimited. In narrowing the scope of a debtor in possession's power to assume, section 365(c) states that:

> (c) 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 contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession . . .; and
>
> (B) such party does not consent to such assumption or assignment; . . . .

11 U.S.C. § 365(c)(1) (2018). Several provisions within this section are the subject of disputed interpretation. "The task of resolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (citing *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985)).

The circuit courts of appeals are split between two major interpretations of section 365(c)(1). Some of the circuit courts have adopted an analysis known as the "hypothetical test."

Under the hypothetical test, a court determines whether or not a debtor in possession has the power to assign an executory contract. If not, then the debtor in possession may not assume the executory contract, regardless of whether the debtor in possession intended to assign the contract. *See, e.g.*, *RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257, 267 (4th Cir. 2004); *Perlman v. Catapult Entm't, Inc. (In re Catapult Entm't, Inc.)*, 165 F.3d 747, 749 (9th Cir. 1999); *In re West Elec., Inc.*, 852 F.2d 79, 83 (3d Cir. 1988).

Conversely, other circuit courts have adopted the "actual test." This test involves a case-by-case approach analyzing whether a debtor in possession is merely assuming an executory contract, or whether the debtor in possession actually intends to assign the contract to another party. *See, e.g.*, *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997); *Bonneville Power Administration v. Mirant Corp. (In re Mirant Corp.)*, 440 F.3d 238, 248 (5th Cir. 2006). In *Institut Pasteur*, the First Circuit Court of Appeals addressed whether a debtor was properly authorized to assume a licensing agreement pursuant to a Chapter 11 plan which purported to sell the debtor's stock to a company in direct competition with the non-debtor party.[5] The first circuit's cogent analysis using the actual test, coupled with striking similarities to the case at hand, necessitate the inclusion of *Institut Pasteur* in analyzing the plain meaning of section 365(c)(1).

In *Institut Pasteur*, a biotechnical manufacturer and a research patent holder entered into mutual nonexclusive license agreements, allowing each of them to use the patented or licensed technology of the other. 104 F.3d 489 at 490. These license agreements prohibited assignment or sublicensing but included an exception for affiliated companies. *Id.* Around five years after

[5] This case was later abrogated by *Hardemon v. City of Boston*, No. 97-2010, 1998 WL 148382, at *1 (1st Cir. 1998), but that abrogation was solely the product of a jurisdictional issue and had nothing to do with the merits of the case.

entering into these agreements, the biotechnical manufacturer filed for Chapter 11 bankruptcy under a reorganization plan which proposed that the manufacturer assume the license agreements. *Id*. However, the reorganization plan also proposed to sell all the biotechnical manufacturer's stock to the research patent holder's direct competitor in biotechnology sales. *Id*. The research patent holder objected to the plan, claiming that the biotechnical manufacturer's proposed sale amounted to an assignment in violation of both applicable federal patent law and the license agreement which they had entered into. *Id*. at 491. The bankruptcy court disagreed, finding that the proposed sale under the reorganization plan was simply an assumption of the license agreements by the biotechnical manufacturer under new ownership. *Id*. The research patent holder timely appealed. *Id*.

On appeal, the research patent holder argued that the biotechnical manufacturer's reorganization sale plan was effectively an assignment in violation of section 365(c)(1). *Id*. at 492. The First Circuit Court of Appeal dispelled that argument and rejected use of the hypothetical test, instead holding that the proper analysis involves a "case-by-case inquiry into whether the non-debtor party *actually* was being 'forced to accept performance under its executory contract from someone other than the debtor party with whom it originally contracted. *Id*. at 493 (citing *Summit Inv. & Dev. Corp. v. Leroux (In re Leroux)*, 69 F.3d 608, 612 (1st Cir. 1995)). The court reasoned that because the stock sale involved no transfer of title or ownership of the biotechnical manufacturer's assets or patent licenses to the acquiring corporation, the biotechnical manufacturer was the same legal entity that the research patent holder entered into the license agreements with. *Id*. at 494.

Like the court in *Institut Pasteur*, this Court should find that the plain meaning of section 365(c)(1) favors use of the actual test. *See* 104 F.3d at 493. Similar to the research patent holder

in *Institut Pasteur*, Under My Thumb disapproves of the proposed reorganization plan because of the sale of TDI stock to one of Under My Thumb's direct competitors, SFD. (R. at 7, 8). However, like the stock sale in *Institut Pasteur*, TDI's sale to Start Me Up and SFD entails no change in the title or ownership of TDI assets or licenses. This is because while the Lenders did have first priority liens on TDI assets in exchange for the $3 billion loan, Development was not required to act as a borrower or guarantor under the credit facility and thus, the License Agreement between Development and Under My Thumb was not subject to the Lenders' first priority liens. (R. at 6). Since TDI's stock sale to Start Me Up and SFD does not involve a transfer of the ownership of the License Agreement between Development and Under My Thumb, no third party—notably including SFD—would have access to the copyrighted and patented Software developed by Under My Thumb. *See* 104 F.3d at 493.

Additionally, in analyzing this case under the actual test it is evident that Under My Thumb would not be obligated to deliver performance to any party other than it had specifically contemplated in the License Agreement. The Agreement specifically permitted Development to "extend the benefits of the Agreement to its affiliated entities . . ." (R. at 5). According to the Bankruptcy Code, an affiliate is an "entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor . . ." 11 U.S.C. § 101(2)(A) (2018). TDI is a holding company which was formed to own the membership interests of all of its subsidiaries, including Development. (R. at 4). Thus, TDI is an affiliated entity of Development, and could enjoy the benefits of the License Agreement between Development and Under My Thumb. Because Under My Thumb had already contracted to allow Development's affiliated entities—including TDI—to use Under My Thumb's patented Software, no third party

would be gaining access to the Software, and Development would simply be assuming the Agreement, rather than assigning it to a third party.

1. The term "trustee" is not synonymous with the term "debtor in possession" under section 365(c)(1).

Another point of dispute in the interpretation of section 365(c)(1) revolves around the treatment of the terms "trustee" and "debtor in possession" within the section. Section 365(c)(1) provides that the trustee may not assume or assign any executory contract of the debtor, but nowhere does it state that the debtor in possession may not assume or assign any executory contract. Some courts have held that "[t]he terms 'trustee' and 'debtor in possession,' as used in the Bankruptcy Code, are . . . essentially interchangeable." *See Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery (In re Cybergenics Corp.)*, 226 F.3d 237, 243 (3d Cir. 2000). This is likely because the Bankruptcy Code states that, subject to certain limitations, "a debtor in possession shall have all the rights . . . and powers, and shall perform all the functions and duties . . . of a trustee serving in a case under [Chapter 11]." 11 U.S.C. § 1107 (2018). However, just because a debtor in possession has the rights, powers, functions and duties of a trustee does not mean that they are synonymous for the purposes of section 365(c)(1) of the Bankruptcy Code. In fact, "[n]owhere does the Bankruptcy Code define 'trustee' as synonymous with 'debtor' or 'debtor in possession.'" *In re Footstar, Inc.*, 323 B.R. 566, 571 (Bankr. S.D.N.Y. 2005).

In *Footstar*, the bankruptcy court for the Southern District of New York held that section 365(c)(1) did not apply to prevent a debtor in possession—as a distinct entity from a trustee—from assuming, without assigning, its executory contract. *Id.* at 566. The court noted that in that case there was no trustee and it was the debtors who were seeking to assume the agreements. *Id.* at 570. The court explained that "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.* at 571. To show that giving the two terms the same meaning makes no logical sense, the court rephrased section 365(c)(1) to read 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* . . ." *Id.* at 573 (emphasis added). Because simply assuming a contract, without assigning it, would not force the counterparty to interact with any party other than the debtor, substituting trustee for debtor in possession is illogical and reveals the importance of giving the two terms their respective meanings. *Id.*

In applying the holdings of *Footstar*, this Court should find that under the plain meaning of the Bankruptcy Code and section 365(c)(1), the terms trustee and debtor in possession must retain their own distinctive meanings. "It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word." *Washington Mkt. Co. v. Hoffman*, 101 U.S. 112, 115 (1879). If debtor in possession and trustee are given the same meaning under section 365(c)(1), then the term trustee would be rendered insignificant in contradiction of this cardinal rule of statutory construction. Thus, because trustee and debtor in possession are two distinct terms under section 365(c)(1), a debtor in possession—as opposed to a trustee—is not prevented from assuming, without assigning, an executory contract. *See* 323 B.R. at 571-73.

In this case, much like *Footstar*, Development was merely a debtor in possession and was never appointed as a trustee. (R. at 6). Development's assumption of the License Agreement, without assigning it to a third party, fails to create a situation in which Under My Thumb would be required to accept performance from or render performance to a party other than the party with whom it entered into the Agreement. *See, e.g.*, *Institut Pasteur*, 104 F.3d at 493. For this reason, Development should not be prohibited from assuming, without assigning, the License Agreement.

To find otherwise would set dangerous precedent enabling a creditor, such as Under My Thumb, to avoid its contractual obligations to a debtor in possession, simply because of the debtor's Chapter 11 status.

2. A debtor in possession's assumption, without assignment, of a non-exclusive license of intellectual property fails to trigger the "applicable law" referenced to in section 365(c)(1).

Regardless of whether or not a debtor in possession is determined to be synonymous with a trustee under the Bankruptcy Code, it is possible for a debtor in possession to assume, but not assign, an executory contract without triggering the "applicable law" provision of section 365(c)(1). In *In re. Leroux*, the First Circuit Court of Appeals dispelled the notion that a prepetition debtor can effectively assign itself contract rights simply by virtue of its position as a postpetition debtor in possession. 69 F.3d at 613 (1st Cir. 1995). Similarly, in *Footstar*, the bankruptcy court for the Southern District of New York stated that in "applying the limitation of applicable law to the debtor, the debtor in possession *can* assume because by the limitation's express terms it can have no consequence or effect as to a debtor in possession, which is *not* 'an entity other than' itself." 323 B.R. 566 at 575. The applicable law in this case, federal intellectual property law, is based upon the premise that the identity of the parties is material to the agreement. (R. at 14). Therefore, the applicable law in this case excuses the non-debtor party from accepting performance from or rendering performance to an entity other than the debtor in possession.

Fortunately for Development and TDI, because the identity of the parties to the License Agreement did not change as a result of TDI's status as a Chapter 11 debtor, the applicable law in this case is not triggered. While it is undisputed that Under My Thumb does not consent to Development's assumption of the License Agreement under the reorganization plan (R. at 8), Under My Thumb would be receiving benefits from and rendering performance to Development—

the same entity which it originally entered into the licensing contract with. *See, e.g.*, *Footstar*, 323 B.R. 566 at 575. Thus, Under My Thumb would not be accepting performance from or rendering performance to an entity other than Development—the debtor in possession. Because federal intellectual property law, in this case the "applicable law," is not violated, Under My Thumb could not rightfully terminate the contract under federal licensing law, and thereby could also not evade its contractual duties as a result of Development's debtor status.

Additionally, using the hypothetical test to find that Development effectively assigned the License Agreement to a third party could have dangerous repercussions. Due to the crucial nature of the identity of parties to every intellectual property agreement, use of the hypothetical test would seemingly never allow a debtor in possession to assume an intellectual property agreement. This would create a situation in which every time one party to an intellectual property agreement declares bankruptcy, the other party can terminate performance under the agreement, even if the bankrupt party is the one attempting to assume the agreement. Allowing non-debtors to terminate performance under an agreement simply because the debtor party sought reorganization cannot be allowed.

3. Application of the "hypothetical test" to interpret section 365(c)(1) is inconsistent with other provisions of the Bankruptcy Code.

Another flaw in using the hypothetical test to interpret section 365(c)(1) becomes apparent upon examining the relationship between sections 365(c)(1) and 365(f). Section 365(f) states, in relevant part:

> (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 . . .

11 U.S.C. § 365(f) (2018). Using the hypothetical test, the assignability of an executory contract is crucial under section 365(c)(1), because if a debtor cannot assign the contract, then it also cannot assume the contract. *See In re Sunterra Corp.*, 361 F.3d at 267. However, this interpretation of section 365(c)(1) would render section 365(f) meaningless, which is unacceptable. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (advising against statutory construction which renders a provision insignificant or superfluous). If a debtor's power to assume a contract is contingent on its ability to assign that contract, then the inclusion of "or assign" in section 365(c)(1) is insignificant because section 365(f) already requires that a debtor have the ability to assume a contract before assigning it. *In re Cardinal Indus., Inc.*, 116 B.R. 964, 977 (Bankr. S.D. Ohio 1990). "The inclusion of the words 'or assign' in section 365(c)(1) would not be superfluous, however, if the nonassignability of a contract under applicable state law does not necessarily preclude a debtor from assuming the contract . . ." *Id.* Instead, "[t]he inclusion of the words 'or assign' to subsection (c)(1) serves the function of clarifying that the debtor in such circumstances may be able to *assume* but not *assign* an executory contract." *Id.*

In the present case, the problem with using the hypothetical test to interpret section 365(c)(1) is readily apparent. Under the hypothetical test, because Development is prohibited from assigning the License Agreement, Development would also be barred from assuming it. *See, e.g.*, *In re Sunterra Corp.*, 361 F.3d at 267. Using this hypothetical approach is purportedly justified in that it would protect Under My Thumb against receiving performance from or rendering performance to an entity other than Development. However, section 365(f) already requires that

Development be able to assume the License Agreement before assigning it. 11 U.S.C. § 365(f). Thus, the hypothetical test creates a confusing and illogical situation in which Development cannot assume the License Agreement unless it can assign the Agreement under section 365(c)(1), but also cannot assign the License Agreement unless it can assume the Agreement under section 365(f). This hypothetical interpretation renders the phrase "or assign" in section 365(c)(1) wholly irrelevant, which is impermissible. *See TRW*, 534 U.S. at 31.

Conversely, use of the actual test to interpret section 365(c)(1) avoids the confusing result of the hypothetical test and leads to a clearer, more logical outcome. Under the actual test, the court would look to whether Development actually intended to assign the License Agreement to a third party, thereby requiring Under My Thumb to accept performance from and render performance to that third party. *See Institut Pasteur*, 104 F.3d at 493. Application of the actual test therefore gives effect to the phrase "or assign" in section 365(c)(1), avoiding any confliction with section 365(f).

B. Legislative history indicates that the "actual test" better comports with Congressional intent.

This Court has consistently held that "[a]chieving a better policy outcome . . . is a task for Congress, not the courts." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13-14 (2000). Because Congress elected to include both the terms trustee and debtor in possession in section 365(c)(1), we must conclude that it intended for both terms to have effect. Legislative history supports this assertion. When the Bankruptcy Code was originally drafted, section 365(c)(1) stated, in relevant part:

> (c) The trustee may not assume or assign an executory contract . . . of the debtor . . . 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 *the trustee* . . .

Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, § 365(c)(1) (1978) (emphasis added). Legislative history from the same time indicates that Congress understood the importance of courts performing case-by-case analyses of assumption and assignment by a debtor. Congress advised that the courts be "sensitive to the rights of the non-debtor party to executory contracts" and "insure that the trustee's performance under the contract or lease gives the other contracting party the full benefit of his bargain." S. Rep. No. 95-989, at 59 (1978), *as reprinted in* 1980 U.S.C.C.A.N. 5787, 5845. Congress subsequently proposed to revise the Bankruptcy Code in the Bankruptcy Technical Correction Act of 1980. H.R. Rep. No. 96-1195, at 57 (1980). In revising section 365(c)(1), the Committee on the Judiciary proposed replacing "the trustee" with "an entity other than the debtor or the debtor in possession." *Id.* The Committee reasoned that:

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

Id. at 12. While Congress did not enact the proposed changes immediately, in 1984 it did make the exact changes to section 365(c)(1) proposed by the Bankruptcy Technical Correction Act of 1980. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, § 362(a) (1984).

From a holistic view of the legislative history, it is evident that Congress intended for a debtor in possession to be able to assume an executory contract, regardless of whether or not the debtor in possession is authorized to assign that contract. H.R. Rep. No. 96-1195, at 57 (1980). This is the hallmark of the actual test. *See Institut Pasteur*, 104 F.3d at 493. Because Congress emphasized to the courts the importance of ensuring that a non-debtor party receives the full benefit of its bargain, it is apparent that Congress expected courts to conduct case-by-case analyses

on debtor assumption and assignment, rather than adhere to a rigid and unforgiving test like the hypothetical test. *See* S. Rep. No. 95-989, at 59. Additionally, Congress' revision of section 365(c)(1) to substitute "the trustee" with "an entity other than the debtor or the debtor in possession," along with the Committee's report explaining the rationale for the revision, reveal that Congress perceived a trustee and a debtor in possession to be two distinct entities. *See* H.R. Rep. No. 96-1195, at 57 (1980). Thus, where no trustee is appointed but rather there is merely a debtor in possession seeking assumption of an executory contract, legislative history suggests that Congress intended for the debtor in possession to have the power to assume the contract.

Applying this analysis to the present case, there was no trustee appointed in TDI's reorganization plan. (R. at 6). Development is merely a debtor in possession, and therefore the court should look to whether Under My Thumb is being required to engage with a party that it did not contract with. Since Under My Thumb would be interacting with Development—the same entity it contracted with—Development should have the power to assume the License Agreement it entered into with Under My Thumb. *See* 104 F.3d at 493. This analysis comports far better with Congress' intent that the courts conduct a case-by-case analysis into whether the creditor is being required to accept performance from or render performance to a party not contemplated in the agreement, while also ensuring that the creditor retain the benefit of its bargain. *See* S. Rep. No. 95-989, at 59. Because the legislature, not the courts, shapes the law in light of policy considerations, the courts should defer to Congress' intended approach for analyzing assumption by a debtor—the actual test—rather than fashion their own law through the hypothetical test. *See* *Hartford*, 530 U.S. at 13-14.

C. The underlying purpose of Chapter 11 is better served through allowing a debtor in possession to assume a non-exclusive license of intellectual property.

"The object of Chapter 11 of the Bankruptcy Code is to empower a debtor with going concern value to reorganize its operations to become solvent once more." *N.C.P. Marketing Grp., Inc. v. BG Star Prods., Inc.*, 556 U.S. 1145, 1145 (2009) (denying certiorari). In Chapter 11 cases, "[t]he fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources. *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). By balancing the goal of reorganization with the rights of a non-debtor party under a contract, the actual test effectively serves the purpose of Chapter 11 while ensuring that the non-debtor receives the full benefit of the bargain. *See Institut Pasteur*, 104 F.3d at 493; S. Rep. No. 95-989, at 59 (1978), *as reprinted in* 1980 U.S.C.C.A.N. 5787, 5845. Therefore, the goal of debtor reorganization is satisfactory to debtors and creditors alike.

Conversely, interpreting section 365(c)(1) under the hypothetical test acts against the purpose of Chapter 11. By prohibiting a debtor from assuming an executory contract simply because the debtor could not also assign the executory contract, courts using the hypothetical test effectively counter the purpose of reorganization. If a debtor is unable to assume an executory contract, it is more likely that the debtor will have to liquidate, which in turn, could result in a loss of jobs and resources for the debtor. *See Bildisco*, 465 U.S. at 528. Disallowing a debtor to assume an executory contract could also adversely affect creditors by preventing the continuation of a mutually beneficial agreement—such as the License Agreement between Development and Under My Thumb. Furthermore, interpreting section 365(c)(1) under the hypothetical test would, in effect, give a creditor the power to terminate a contract strictly by virtue of the debtor's bankruptcy filing. Struggling companies and entities are encouraged to file for Chapter 11 reorganization in order to prevent liquidation and retain jobs and resources. *See N.C.P.*, 566 U.S. at 1145. However, interpreting section 365(c)(1) through the hypothetical test, and thereby allowing a creditor to

terminate a pre-existing agreement by virtue of the debtor's bankruptcy, would have significant consequences in that debtors might be far less likely to file for Chapter 11 reorganization. Debtors, fearing the worst, could reasonably believe that their potential contractual liabilities outweigh the prospect of a successful reorganization. Allowing a non-debtor party to escape its contractual obligations simply due to a debtor party's bankruptcy filing would severely reduce debtors' appeal of using Chapter 11 bankruptcy to reorganize their struggling businesses because debtors might feel as though courts favor the interests of creditors over the interests of debtors. As a result, these debtors might resort to liquidation under Chapter 7, in which both the debtor and creditor may be worse off.

In the case at hand, using the actual test to interpret section 365(c)(1) serves the purpose of reorganization under Chapter 11, while also ensuring that the creditor—Under My Thumb—receives the full benefit of its bargain. *See, e.g.*, *Institut Pasteur*, 104 F.3d at 493. Before Under My Thumb became concerned with the identity of SFD as a purchasing shareholder, Under My Thumb viewed the reorganization plan favorably. (R. at 7). Under My Thumb would continue to receive monthly payments from Development for use of the Software under the Agreement and would receive the balance exceeding $6 million owed by Development under the R&D Note. *Id.* In fact, the record further reveals that Under My Thumb's proposed distribution on account of its unsecured claim greatly exceeded the value of Development's assets. *Id.* Thus, it is evident that Under My Thumb was in a position to receive a larger distribution under Chapter 11 reorganization than it would receive under Chapter 7 liquidation. All things considered, Under My Thumb's disapproval of the reorganization plan stems primarily from the fact that SFD—Under My Thumb's direct competitor in intellectual property—purports to become a majority shareholder of TDI as a reorganized entity. (R. at 7-8). However, as noted earlier, SFD's status as a shareholder

does not give it title or ownership to Development's assets, including the License Agreement between Development and Under My Thumb. (R. at 6). Using the actual test to interpret section 365(c)(1), and thereby allowing Development to assume the License Agreement, satisfies the purpose of Chapter 11 by promoting TDI's reorganization while also ensuring that Under My Thumb receives the full benefit of the bargain.

II. SECTION 1129(a)(10) ONLY REQUIRES ACCEPTANCE FROM ONE IMPAIRED CLASS OF CLAIMS IN A JOINT, MULTI-DEBTOR PLAN.

Businesses over-encumbered with debt that wish to continue operating may file for bankruptcy protection under Chapter 11. Instead of liquidation, the end of the business enterprise in Chapter 7, the business will have a chance to reduce some of its debt obligations and to continue operating. As the business is often worth more as a continuing enterprise than its liquidation value, creditors will likely accept the plan as they are better off in Chapter 11 than in Chapter 7. Any claimholder who has had their legal, contractual, or economic rights altered by the plan is considered impaired, and impaired creditors receive special considerations under the Code—namely the right to vote on the plan. 11 U.S.C. §§ 1124, 1129 (2018).

The plan sorts similarly impaired creditors into classes for the purpose of voting to confirm the plan. For the Court to confirm the plan, each class of impaired claims must accept the plan. 11 U.S.C. § 1129(a)(8) (2018). However, if a plan cannot obtain acceptance from all impaired classes, then the Court may proceed anyway if at least one class of impaired claims has accepted the plan. 11 U.S.C. § 1129(a)(10) (2018). In practice, this is referred to as "cramdown," as the plan is being forced upon all classes of impaired creditors so long as the plan secured an acceptance from at least one class of impaired claims.

Cramdown exists to ensure at least some support from an impaired creditor exists before proceeding with a plan. Here, the Code balances the considerations of paying the creditors with

the importance an efficient resolution to Chapter 11 that preserves the business. While support from only one impaired class seems minimal, especially considering that a class can consist of a sole creditor, the Code provides other protections for impaired classes in a cramdown scenario. Section 1129(b) allows cramdown provided all other elements of section 1129(a) are met, that the plan does not discriminate unfairly, and the plan is fair and equitable with respect to each class of impaired claims. 11 U.S.C. § 1129(b) (2018).

The instant case revolves around how many impaired classes in a joint administration must accept the plan to satisfy section 1129(a)(10). TDI and its subsidiaries are all debtors, creating multiples classes of impaired claims. Development has an impaired class comprised of a single entity, Under My Thumb. As Under My Thumb is the only debtor in Development's impaired class, reading section 1129(a)(10) to require assent on a per-debtor basis would give Under My Thumb veto power over the plan. This ties the fate of entire multi-debtor plan to Under My Thumb as they presumably hold out for a higher payout, or an alternative source of equity.[6] Alternatively, the correct reading of section 1129(a)(10) only requires one class of impaired claims to accept the plan—regardless of the number of debtors in the plan. This would allow the reorganization of a TDI to go forward over the objections of a single impaired class.

A. The plain language of section 1129(a)(10) provides for a per-plan approach of impaired creditors regardless of the number of debtors in a plan.

When 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. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004). The plain language of section 1129(a)(10) is clear and

[6] Under My Thumb originally favored the plan as the 55% distribution was considerably more than what would be paid from a sale of the assets in Chapter 7. (R. at 7). It is unlikely they seek to force TDI into Chapter 7, but instead are looking for more favorable terms in a Chapter 11.

unambiguous, and enforcing the acceptance requirement on a per-plan basis is consistent with purpose cramdown in the Code.

1. The language of section 1129(a)(10) does not create an exception for impaired classes of different debtors nor joint plans.

Section 1129(a) states the "[c]ourt shall confirm a plan only if all of the following requirements are met," and considers two scenarios for the level of acceptance from impaired creditors a plan must meet, sections 1129(a)(8) and (10). If all impaired classes are deemed to accept the plan, the Court may confirm with no additional requirements outside section 1129(a). However, without unanimous acceptance from the impaired classes, the plan may be confirmed "[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 the acceptance of the plan by and insider." 11 U.S.C. § 1129(a)(10). If only one impaired class provides support for the plan, the Court may proceed anyway under the cramdown process so long as the plan meets the additional safeguards of section 1129(b). A recent split in authority involving jointly administered multi-debtor plans has raised the question of whether section 1129(a)(10) only requires any impaired class from one of the debtors to approve the plan or if the Code requires an impaired class from each debtor. Alexander J. Gacos, *Reconciling the "Per-Plan" Approach to 11 U.S.C. S 1129(a)(10) with Substantive Consolidation Principles Under in Re Owens Corning*, 14 SETON HALL CIRCUIT REV. 295, 310 (2018).

The Ninth Circuit Court of Appeals has grappled with whether to apply the "per-plan" or "per-debtor" approach to section 1129(a)(10). *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc (In re Transwest Resort Props., Inc.)*, 881 F.3d 724, 726 (9th Cir. 2018). In *Transwest*, a holding company owned two mezzanine debtors that each owned the operating company for a resort property, for a total of five debtors filing jointly for Chapter 11.

Id. Multiple impaired classes voted in favor of the plan, but the only claimholder for one of the impaired classes of mezzanine debt rejected the plan. *Id*. The bankruptcy court approved the plan over that lender's objections, and the lender appealed to the district court claiming that section 1129(a)(10) requires acceptance from at least one impaired class for *each* debtor in joint, multi-debtor plan. *Id*. at 724. The district court rejected the "per-debtor" approach, requiring approval from only one impaired class under the entire plan to proceed with cramdown. *Id*. at 727.

On subsequent appeal, the Ninth Circuit approved the per-plan approach. *Id*. at 729. The Court held that the plain language of section 1129(a)(10) supports the per-plan approach, noting that the Code makes no distinction between single-debtor and multi-debtor plans. *Id*. at 729. Had Congress intended the plan to require acceptance from an impaired creditor from each class, they could have modified the Code to do so. *Id*. at 730. However, absent any language suggesting the need for acceptance from more than one impaired class, the court refused to modify the language of the statute through interpretation. *Id*. at 729 (quoting *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991)).

The Ninth Circuit is not alone in this reading of section 1129(a)(10) as other bankruptcy courts have also found the plain meaning to apply on a per-plan basis. *See 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 that an artificial impairment analysis was unnecessary given that the Code only requires acceptance on a per-plan basis and an impaired class had already accepted); *In re SGPA, Inc.*, 2001 WL 34750646, at *6-7 (Bankr. M.D. Pa. Sept. 28, 2001) (rejecting bondholders' argument that a joint plan involving multiple corporations and debtors was infeasible without an accepting impaired class from every debtor).

Well-settled statutory interpretation canons require courts to presume that Congress says in the statute what it means, especially when the text is unambiguous. *See Bedroc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). Section 1129(a)(10) is unambiguous and only requires a per-plan approach to impaired class acceptance. 11 U.S.C. § 1129(a)(10). The Code explicitly considers two distinct scenarios for the voting of impaired creditors under a plan. *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 224 (Bankr. S.D.N.Y. 2007). Section 1129(a)(8) considers approval by all impaired classes, and section 1129(a)(10) considers approval of reorganization with the consent of only one impaired class. The language in section 1129(a)(8) only differentiates between impaired and unimpaired claims, and section 1129(a)(10) only creates special treatment for insider claims.

Neither section has any language suggesting distinct treatment for different debtors under the plan so there can be no ambiguity regarding how many classes must accept under section 1129(a)(10). Only the per-debtor approach advanced by Under My Thumb suggests that each debtor must have an accepting class. Under My Thumb improperly reads the Code to extend section 1129(a)(10) beyond its plain meaning. The Code already contemplates scenarios for insider claims and whether unanimous acceptance or a single class will suffice. Had Congress intended section 1129(a)(10) to require more than a single accepting class to there would be some text supporting this reading.

2. Pluralizing the Code using section 102(7) does not require more than one impaired class to approve the plan.

While a host of bankruptcy courts and a circuit court have had no trouble interpreting the plain meaning of section 1129(a)(10) as per-plan, *See In re Charter Commc'ns.*, 419 B.R. at 266; *In Re SPGA, Inc.*, 2001 WL 34750646, at *6-7; *In re Transwest Resort Props., Inc.*, 881 F.3d at 724., the Delaware Court held that the per-debtor approach was the correct application. The panel

relied on section 102(7) which states: "the singular includes the plural." Using this cannon of construction, the court interprets section 1129(a)(10) as requiring acceptance from at least one creditor from each debtor in a multi-debtor filing. *In re Tribune*, 464 B.R. 126 (Bankr. D. Del. 2011).

Even after amending the word "plan" to "plans," the Code still asserts that *"at least one class of claims that is impaired* under the plans has accepted the plans." 11 U.S.C. § 1129(a)(10) (emphasis added). As such, courts should be hard-pressed to read the words "at least one class of claims" as requiring anything more than one impaired assenting class to satisfy section 1129(a)(10) for all debtors involved. To achieve the per debtor interpretation advanced by the Delaware court, the Code would need to include language indicating that at least one class *per debtor* must accept. The Code includes no such sections cabining off claims on a per debtor basis. Had the Code's drafters wanted this interpretation, Congress would have included a phrase indicating so, especially given the care to include a phrase separating insider votes from those allowed to accept the plan.

3. The per-plan approach does not conflict with other sections of the Bankruptcy Code.

Indeed, in resolving statutory ambiguity, courts are to follow, "[the] cardinal rule that a statute is to be read as a whole, since the meaning of statutory language plain or not, depends on context." *King*, 502 U.S. at 221. While courts should make a concerted effort to preserve the statutory scheme, "[i]t is a commonplace of statutory construction that the specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)). This cannon is most frequently applied where a specific permission is construed as an exception to the more general. *Id*. at 645. Reading the specific as an exception to the general avoids making the except provision

superfluous. Further, absent clear congressional intent to the contrary "when two statutes are capable of co-existence . . . it is the duty of the Courts to regard each as effective" *Pittsburg & Lake Erie R.R. Co. v. Railway Labor Executives Ass'n*, 491 U.S. 490, 510 (1989).

Under My Thumb claims that given the context of section 1129(a), a per-debtor is the correct interpretation of the Code. They claim that sections 1129(a)(1), (3), and (8) irreconcilably conflict with the per-plan approach—so the Code must apply a per-debtor approach. However, looking at the statutory context, no other subsections indicate that section 1129(a)(10) must apply on a per-debtor basis. Relevant to Under My Thumb's argument, section 1129(a) provides in part:

> (1) The plan complies with applicable provisions of this title.
> . . .
> (3) The plan has been proposed in good faith and not by any means forbidden by the law.
> . . .
> (8)With respect to each class of claims or interests--
> (A)Such class has accepted the plan; or
> (B) such class in not impaired under the plan.

11 U.S.C. § 1129(a).

Under My Thumb provides no support for the contention that the subsections must be read uniformly on the per-plan basis given the role of section 1129(a)(10). While subsections (a)(1) and (a)(3) apply generally, subsection (a)(10) is a specific provision for dealing with cramdown, it is an exception within section 1129. As such it is natural that this provision would not impose the same requirements as the other parts of section 1129(a).

Further, reading the section to apply per-debtor would effectively render section 1129(a)(10) superfluous. If each debtor must have an accepting class, subsection (a)(10) no longer resembles the exception to the general voting requirement of subsection (a)(8), but a scenario not considered by the Code. As an exception, it follows that even if other sections should apply to each component plan in a joint plan, this is not necessary under the unique circumstances of subsection

(a)(10). As such, sections 1129(a)(1), (3), and (8) do not irreconcilably conflict with a per-plan approach to section 1129(a)(10).

B. A per-plan approach is consistent with the purpose and policy of the Bankruptcy Code.

When the statutory language is clear, then the Court must read the Code literally unless this produces an absurd result. In the revised Code Congress sought to protect debtors by allowing liberal restructuring in bankruptcy. *E.g., In re FirstEnergy Sols. Cor.*, 945 F.3d 431, 451 (6th Cir. 2019); *In re Trump Entm't Resorts*, 810 F.3d 161, 173 (3d Cir. 2016). Effective restructuring must be expeditious, but this creates a distinct possibility the process may be unfair to some parties. *See In re FirstEnergy Sols. Cor.*¸ 945 F.3d at 451; *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1803 (2019); *Moses v. CashCall, Inc.*, 781 F.3d 63, 72 (4th Cir. 2015). While a per-plan approach ties the fate of some creditors to creditors of different debtors, this is no different than the dissenting classes of creditor in cramdown involving a single debtor. This reflects that the Code sometimes serves two masters as it must balance the prospect of a quick, successful reorganization with fair payment to creditors. *Fustolo v. 50 Thomas Patton Drive, LLC*, 816 F.3d 1, 6 (1st Cir. 2016).

1. A per-debtor approach essentially grants veto power, undermining the role of the joint multi-debtor plans, and creates individual plans.

Section 1129(a)(10)'s requirement that at least one class accept the plan was a late edition to the revised Code. *In re Loop 76, LLC*, *442* B.R. 713, 722 (Bankr. D. Ariz. 2010). Before the 1980 revision of the Code, case law suggested that one impaired class must accept the plan before the court confirmed the plan. *See Herweg v. Neuses (In re Herweg),* 119 F.2d 941, 943 (7th Cir. 1941); *Meyer v. Rowen (In re Meyer)*, 195 F.2d 263, 266 (10th Cir. 1952) ("But, it was obviously not the purpose of [cramdown] to dispense with an arrangement when no creditors can be found to consent to it; nor does it authorize the bankruptcy court to force secured creditors, unanimously

opposed to the plan, to accept it simply because adequate protection is provided."). However, in 1977, two Chapter 11 plans were confirmed without any level of impaired creditor support. See *In re Hobson Pike Assocs., Ltd.,* 1977 WL 182364, at *7 (Bankr. N.D. Ga. Sept. 20, 1977); *Mass. Mut. Life Ins. Co. v. Marietta Cobb Apartments Co. (In re Marietta Cobb Apartments Co.),* 1977 WL 182365, at *7 (Bankr. S.D.N.Y. Sept. 9, 1977). In response, Congress added section 1129(a)(10) to serve as a procedural gatekeeper to derive some minimal level of support before confirming a plan. *In re Polytherm Indus., Inc.*, 33 B.R. 823, 834–35 (W.D. Wis. 1983).

While intended to provide some minimal level of support, nothing in section 1129(a)(10) suggests creating a substantive right for creditors. *In re Loop*, 442 B.R. at 722. (holding that "[t]here is no evidence of any legislative intent to confer on undersecured creditors a veto power by requiring that their deficiency claims always be classified with other unsecured debt so they could defeat confirmation simply by causing the plan to fail to satisfy section 1129(a)(10).")

The per-plan approach is thus consistent with the flexibility of Chapter 11 that the Code intended. Most relevant to this case, the Code created a path of approval for reorganization plans that relied on class approval, unlike early pre-Code practice where plan confirmation depended on unanimous creditor approval and could be hijacked by a single holdout. *Bank of Am. Nat. Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 461–62 (1999) (Thomas, J., concurring).

This Chapter 11 involves ten debtors operating throughout the United States. (R. at 2). The secured creditors for the eight operating debtors have all approved a plan that has significantly impaired their rights. (R. at 6). The Lenders have accepted a payout with a lower interest rate prolonged over a period of twenty years and the private capital has invested $66 million dollars for equity that would be worthless in a liquidation. (R. at 5-6). The unsecured creditors have already accepted the plan predicated on a payout of 55% as this is more than they would receive

in a liquidation. (R. at 6-7). These compromises evidence the parties' belief in the future prospects of this business. While the LBO may have saddled the firm with an unserviceable amount of debt, Chapter 11 will allow the enterprise to continue, preserving the value and jobs of its many stakeholders. To attain these important benefits, Chapter 11 is designed to be flexible, and when necessary, to approve a reorganization without the approval of every creditor.

Given that every other impaired class has accepted, it seems contrary to the purposes of the Code to reject the plan on per-debtor reading of section 1129(a)(10). The per-debtor approach would give an unsecured creditor with only 5% of the total unsecured debt total veto power over a plan that has well surpassed the one class threshold of section 1129(a)(10). Under My Thumb is essentially holding the process ransom until they receive a higher payout for their unsecured claims, or the removal of a venture fund that has committed millions to keep this enterprise afloat. When Congress changed the Code to prevent any future cases of a single impaired creditor blocking an entire reorganization effort, surely a case like the one before us is what the drafters envisioned.

2. Section 1129(a)(10) only seeks a di minimums level of support for a plan and is not a section where impaired creditors should seek additional protection.

While the term is found nowhere in the Code, cramdown is the process of approving a plan over the objections of the impaired parties when certain statutory guidelines are met.

> Section 1129(a)(10) operates as a statutory gatekeeper barring access to cramdown where there is absent even one impaired class accepting the plan. Cramdown is a powerful remedy available to plan proponents under which dissenting classes are compelled to rely on difficult judicial valuations, judgments, and determinations. The policy underlying Section 1129(a)(10) is that before embarking upon the tortuous path of cramdown and compelling the target of cramdown to shoulder the risks of error necessarily associated with a forced confirmation, there must be some other properly classified group that is also hurt and nonetheless favors the plan.

One Times Square Assocs. Ltd. P'ship v. Banque Nationale de Paris (In re One Times Square Assocs. Ltd. P'ship), 165 B.R. 773, 776–77 (S.D.N.Y. 1994). Indeed, section 1129(a)(10) creates a statutory bar to confirming a plan, but it does not create any substantive rights for impaired classes. *In re Rhead*, 179 B.R. 169, 177 (Bankr. D. Ariz. 1995). The Code leaves these protections to section 1129(b) which ensures creditors are not treated unfairly in the event of a cramdown. This section provides that plans can be approved without approval of all creditors so long as the plan does not "discriminate unfairly" is "fair and equitable" with respect to each class of impaired claims that has not accepted the plan. 11 U.S.C. § 1129(b). In seeking protection, Under My Thumb must do what all other creditors in cramdown must do—turn to section 1129(b).

Under My Thumb correctly observes that joint administration cannot be used to abridge the parties' substantive legal rights. However, section 1129(a)(10) is not a right, but a technical requirement for confirmation. *In re Rhead*, 179 B.R. at 177. It is an obligation for the proponent of the plan to fulfill; it is not a substantive right of objecting creditors. *Id*. Section 1129(a)(10) does not guarantee each class of impaired creditors a right to veto a proposed plan. *Id.* So once a single impaired class has affirmed the plan, the Court shall affirm it. *Id*. Thus the per-plan approach is consistent with obtaining the desired minimal level of support from creditors that section 1129(a)(10) requires.

If Under My Thumb believes the proposed plan treats them unfairly, there are other avenues of seeking protection under the Code. If respondent believes that the plan improperly comingles estates, they should have challenged the plan on the grounds of improper de facto consolidation, or challenge that the plan had not been proposed in good faith under section 1129(a)(3). *In re Transwest*, 881 F.3d at 733. As there are other proper methods for challenging a plan the creditor disagrees with, expanding the statutory protections of section 1129(a) is not the

correct solution. *Id.* As the Debtors in the instant case note, reading section 1129(a)(10) as providing a substantive voting right to all classes of creditors "rewrites the law under the pretense of interpreting it." *King v. Burwell*, 135 S. Ct. 2480, 2506 (2015) (Scalia, J., dissenting).

3. A per-plan approach does not result in substantive consolidation and the Court can proceed with the joint plan with the approval of one impaired class.

The majority below contends that confirming the plan on a per-plan approach to section 1129(a)(10) improperly blurs the line between joint plans and substantive consolidation. They assert that a joint plan *requires* a per-debtor acceptance and holding otherwise would violate the tough guidelines for substantive consolidation and principles of corporate separateness. However corporate entities can be appropriately be kept separate under a joint plan using the per-plan approach.

Indeed, great care must be taken to avoid confusing the attributes of a joint administration and substantive consolidation. The Third Circuit held that one principal when considering a joint case is "[l]imiting the cross-creep of liability by respecting entity separateness." *In re Owens Corning*, 419 F.3d 195, 211 (3d Cir. 2005). There, the Court noted that substantive consolidation was improper given that given testimony that both creditor and debtor made plain their intent to treat the parties separately. *Id.* The panel further noted there was no "hopeless comingling of assets and liabilities," and the analysis emphasized the separation of assets and liabilities, not other business attributes. *Id.* at 214. Even with such showings, the corporations post-filing structure remained the same. *Id.* at 216.

Integration of multiple corporations or subsidiaries under a single entity does not entail a violation of separateness amounting to substantive consolidation. The court allowed the reorganization case of Charter Communications—at the time the fourth largest cable television provider, stacked with multiple intermediate LLC holding companies—to proceed as a joint plan

on the basis of per-plan approval. *In re Charter Commc'ns*, 419 B.R. at 266. The Court held that "the evidence supports a finding that the business of Charter is managed by CCI on an integrated basis making it reasonable and administratively convenient to propose a joint plan." *Id.* Even though the creditors objected that this amounted to de facto consolidation, the court disregarded this argument. *Id*. at 269-270, n46. *See also In re SGPA, Inc.*, 2001 WL 34750646, at *6-7, (proceeding with per-plan approach to 1129(a)(10) where the debtors only real complaint was not substantive consolidation but the amount of the payout.)

Used as a matter of convenience and cost saving, substantive consolidation does not create substantive rights. *Reider v. Fed. Deposit Ins. Corp. (In re Reider)*, 31 F.3d 1102, 1109 (11th Cir. 1994). Under My Thumb accurately notes that joint plans cannot be used to alter the rights of the parties but the per-debtor approach they suggest does just such a thing. It creates an additional section 1129(a)(10) requirement that requires each debtor in a plan to accept before the Court approves the plan.

The de facto consolidation argument also rings hollow as in the instant case, principles of corporate separateness are readily observed. The lenders in the LBO did not require Development to act as a borrower or guarantor under the loan, this keeps their business with Under My Thumb separate. (R. at 6). Unlike the majority's assertion, the businesses here are not consolidated but integrated. The corporate separateness observed in making the original loan agreement and preserved post-petition. (R. at 6). The Debtors do not conflate or comingle the liabilities of Development with the operating debtors as the $2.8 billion is only jointly and severally liable for TDI and the operating debtors. (R. at 6) Development is properly included with all other unsecured creditors and the harm that they claim is potential access of an outside firm to their intellectual property. (R. at 8). This presupposes that Sympathy for the Devil will violate their Licensing

Agreement but the plan itself states that there will be no changes to the overall corporate structure. (R. at 7).

Further, while Under My Thumb frames the joint plan as a violation of corporate separateness, the only comingling of entities they claim is the proper integration of the preexisting business. A hallmark of Chapter 11 is creditors being lumped into like classes, had there been other lenders for Development Under My Thumb would not have been the only impaired claim for that subsidiary. The claimed harm would thus have been the same as the instant case, their vote being disregarded because of other affirmative votes from impaired classes. This lack of financial harm to Under My Thumb renders their improper consolidation argument even less compelling.

CONCLUSION

Chapter 11 was designed with the purpose of assisting a debtor in reorganizing its business, so as to avoid liquidation and an accompanying loss of jobs and resources. In its interpretation of sections 365(c)(1) and 1129(a)(10) below, the Thirteenth Circuit wrongly gave precedence to the interests of a creditor over that of a debtor in possession. First, the court prevented TDI from assuming the License Agreement in contravention of the plain meaning and purpose of section 365(c)(1). Second, the court incorrectly allowed Under My Thumb to single-handedly foil TDI's reorganization attempts in spite of the plain meaning and purpose of section 1129(a)(10). As a result, TDI's reorganization efforts were thwarted, presumably leading TDI to resort to Chapter 7 liquidation, in which all parties would be worse off. This Court should avoid ignoring the plain meanings of sections 365(c)(1) and 1129(a)(10), as well as the overarching purpose of Chapter 11. Accordingly, this Court should reverse the decision below.