No. 19-1004

IN THE

SUPREME COURT OF THE UNITED STATES

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 Petitioners

Team 58 P
Counsel for Petitioners

QUESTIONS PRESENTED

I. Whether 11 U.S.C. § 365(c)(1) permits a debtor in possession to assume an executory contract over the objection of the non-debtor party to such contract when applicable nonbankruptcy law excuses the non-debtor party from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession.

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

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners disclose the following:

1. Petitioner Tumbling Dice, Inc. has no parent company, and no publicly held corporation owns 10% or more of its stock;
2. Petitioner Tumbling Dice Atlantic City, LLC, petitioner Tumbling Dice Chicagoland, LLC, petitioner Tumbling Dice Detroit, LLC, petitioner Tumbling Dice Lake Tahoe, LLC, petitioner Tumbling Dice Las Vegas, LLC, petitioner Tumbling Dice New Orleans, LLC, petitioner Tumbling Dice Palm Springs, LLC, and petitioner Tumbling Dice Tunica, LLC, are each a wholly-owned subsidiary of TDI and no publicly held corporation owns 10% or more of any above mentioned Petitioners stock; and
3. Petitioner Tumbling Dice Development, LLC is a subsidiary of TDI and no publicly held corporation owns 10% or more of its stock.

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In unreported opinions, the Bankruptcy Court for the District of Moot approved Tumbling Dice, Inc. and Affiliated Debtors Joint Plan of Reorganization, and the Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the Bankruptcy Court. (R. at 3.) The Thirteenth Circuit Court reversed as to both issues; its opinion is reproduced as the record in this appeal. *Id*.

JURISDICTION

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

STATUTORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in the Appendix to this brief. App., *infra*, 1A—21A; 1B—32B.

STATEMENT OF THE CASE

For over thirty years, Tumbling Dice, Inc. ("**TDI**") and its affiliates (collectively, the "**Debtors**") have owned and operated a major American hospitality conglomerate, providing jobs and opportunities throughout their eight resorts and casinos located across the United States. (R. at 2–4.) After falling on some difficult times, the Debtors were forced to seek Chapter 11 protection in January 2016, in order to get back on their feet so they can continue providing jobs and satisfying their liabilities. (R. at 6–7.) However, despite virtually unanimous creditor support, respondent Under My Thumb, Inc. ("**UMT**"), an unsecured creditor holding under 2% of the Debtors' total debt-load, now seeks to single-handedly prevent the Debtors reorganization efforts. (R. at 7–8.)

TDI is the lead bankruptcy case petitioner, and it operates as a holding company that owns the membership interests of its nine wholly owned debtor-subsidiaries. (R. at 4.) One of such debtor-subsidiaries is Tumbling Dice Development, LLC ("**Development**"), which serves the limited purpose of being the licensee under a non-exclusive software license agreement with UMT, "essential" to the Debtors' ongoing business. (R. at 4–5.)

Back in 2008, in an effort to remain competitive, Development contracted with UMT to modernize the loyalty program with which TDI's subsidiaries have rewarded their customers for nearly 30 years, Club Satisfaction. (R. at 4.) Under the new and improved program, TDI tracks Club Satisfaction member data through an integrated software system (the "**Software**"). (R. at 5.) TDI agreed to cover 70% of UMT's cost of developing the Software, pursuant to an unsecured $7 million promissory note (the "**R&D Note**"). (R. at 4.)

TDI's investment in modernizing Club Satisfaction was a tremendous success for both UMT and TDI. (R. at 5–6.) For TDI, the Software became "an essential part" of its ongoing business. (R. at 5.) UMT benefitted from the relationship through a license agreement with Development (the "**Agreement**"), which granted Development a non-exclusive license to use the copyrighted and patented Software in exchange for a monthly fee calculated based on the amount of spending activity by Club Satisfaction members. *Id*. UMT profited from the Software by licensing similar versions to third parties and by receiving higher-than-expected payments under the Agreement due to Club Satisfaction's success and popularity. (R. at 5–6.) Notably, the Agreement permitted Development to "extend the benefits of the Agreement to its affiliated entities" even though they were technically not parties to the Agreement. *Id.*

Despite its continued success with the modernized loyalty program and demonstrated dedication to the customer experience, the Debtors timely filed voluntary Chapter 11 bankruptcy petitions in 2016 after incurring a significant debt-load from a 2011 acquisition by Start Me Up, Inc. ("**SMU**"). *Id*. As of the petition date, the Debtors owed a syndicated group of lenders (the "**Lenders**") approximately $2.8 billion but, due to certain covenants in the loan agreement and the limited purpose of Development, the Lenders did not require Development to act as a borrower or guarantor under the credit facility. (R. at 6.) The Debtors also owed an estimated $120 million to unsecured creditors, including UMT, who was owed over $6 million under the R&D Note. *Id*. Of critical importance, however, the Debtors always remained current with respect to payments under the Agreement. (R. at 6.)

After prolonged negotiations between the Debtors, SMU, the Lenders, the unsecured creditors' committee, and certain other stakeholders (not including UMT), the Debtors announced that a deal had been reached and memorialized in a plan support agreement ("**PSA**"). (R. at 6–7.) The terms of the PSA allowed for the Debtors to restructure most of the secured indebtedness owed to the Lenders by agreeing to a lower interest rate and extended payments over twenty years. (R. at 7.) As a part of the PSA, SMU was required to inject new capital to fund a 55% distribution to unsecured creditors. In exchange, SMU would be entitled to retain their equity interest in the Debtors. *Id*. Without ever-changing to the Debtors' corporate structure, the PSA canceled the existing shares and membership interests of the Debtors and issued new shares and membership interests in the reorganized Debtors. *Id*. Consistent with the negotiated PSA, the Debtors filed the Joint Plan of Reorganization (the "**Plan**") and disclosure statement in August 2016. (R. at 7.) The Plan was filed jointly, on behalf of all the Debtors and expressly stated that "the Debtors' estates are not being substantively consolidated, and no Debtor is to become liable for the obligations of another." (R. at 7.)

The Plan proposed to assume the Agreement under §§ 365 and 1123(b)(2) and provided for a pro rata distribution of $66 million (*i.e.*, 55%) to the Debtors' unsecured creditors. *Id*. UMT timely appealed the confirmation of the Plan by indicating that they objected to the terms of the Plan. (R. at 8.) On the contrary, UMT initially viewed the Plan favorably because it would be allowed to continue receiving monthly payments for the use of the Software under the Agreement and because "its distribution on account of its unsecured claim greatly exceed[ed] the value of Development's assets." *Id.*

Notwithstanding, UMT now wishes to derail the entire confirmation of the Plan. (R. at 7–8.) Each of TDI and the Operating Debtors had at least one impaired accepting class of creditors. (R. at 8.) Development is the only entity with a class of creditors that refuses to accept the Plan. *Id*. Importantly, Development's only class of creditors is UMT. *Id*. UMT argues that its reversal is due to a provision by the Plan that Sympathy for the Devil, LP ("**SFD**"), a private equity group, would have receive 51% of the voting shares of reorganized TDI and several seats on the board of directors in exchange for funding most of the unsecured distributions to creditors. *Id*. SFD's portfolio of companies includes a competitor of UMT's. *Id.*

Debtors respectfully request that this Court vacate the decision by the United States Court of Appeals for the Thirteenth Circuit preventing effective reorganization of the Debtors and remand the proceeding to the United States Bankruptcy Court for the District of Moot for further proceedings in accordance with the opinion of the Supreme Court of the United States.

SUMMARY OF ARGUMENT

This Court should allow the Debtors to reorganize pursuant to their virtually universally accepted reorganization Plan because: (1) as corroborated by legislative history and sound policy, the plain meaning of § 365(c) does not bar a debtor from continuing to perform under its prepetition contracts simply because it sought bankruptcy protection in an effort to get back on its feet; and (2) and the Code requires § 1129(a)(10) to be applied on a per-plan basis and the legislative history further supports Debtors' assertion. Where an appeal only presents questions of law, as is the case for both issues, the entirely non-deferential de novo standard is applied.

The starting point for statutory interpretation is a careful reading of the statutory language. Absent a clearly expressed legislative intention to the contrary, the plain language of a statute must ordinarily be regarded as conclusive. Notwithstanding, where the literal application of a statute would produce a result demonstrably at odds with the intentions of its drafters, the intention of the drafters, rather than the strict language, controls. Where the text of the disputed provision is ambiguous, the Court must seek guidance from legislative history. Plainly-read, the language of § 365(c) is simply inoperable on the Debtors, who only seek to continue performing under their prepetition contract exactly as originally bargained for with the respondent, in accordance with "applicable law." The available legislative history corroborates that Congress intended what the language of the statute plainly states, to bar the *trustee* from assuming non-assignable contracts but to allow *debtors* to continue performing as originally promised. Moreover, the alternative reading proposed by the lower court is demonstrably at odds with the intentions of the drafters, since it sets § 365(c) insurmountably at war with itself and its companion statutory provisions and it contravenes both sound bankruptcy policy and clearly-expressed congressional intent. Finally, even if the plain meaning of the statute were ambiguous, the legislative history, as well as the overall structure of the Bankruptcy Code and the policy considerations underlying bankruptcy and intellectual property law, emphatically support the plain meaning interpretation here proposed by the Debtors. Accordingly, under the entirely non-deferential de novo standard, the Debtors should be allowed to continue performing under their prepetition Agreement, precisely as originally bargained for with the respondent.

Accordingly, under the entirely non-deferential de novo standard, the Court should support a per-plan interpretation of § 1129(a)(10) because: (1) the bankruptcy code requires § 1129(a)(10) to be applied on a per-plan basis; and (2) the legislative history of § 1129(a)(10) is corroborated by a per-plan interpretation. Identical to the first issue, any disputes regarding the Bankruptcy Code must begin with the language of the statute itself. Section 1129(a)(10) reads: (a) The court shall confirm a plan only if all of the following requirements are met: . . . (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. Under the plain language of the statute, only one class of claims that is impaired under the plan must accept the plan. On its face, the statute does not apply per-debtor basis. In the instant matter, *nine impaired classes* voted in favor of the plan. Once an impaired class has accepted the plan, § 1129(a)(10) is satisfied as to all debtors because all debtors are being reorganized under a joint plan of reorganization.

Further, nothing in § 1129(a)(10) legislative history suggests, or even remotely implies, that Congress intended the statute to be applied on a per-debtor basis. However, dating back to the Bankruptcy Act of 1938, *i.e.*, the Chandler Act, modernized bankruptcy law whereby making voluntary petitions more attractive to debtors. By far the most sweeping changes were under the rehabilitative provisions for business and consumer debtors set forth in Chapters X through Chapter 13 of the amended Act. By this act of Congress, the legislature had business debtors in mind and provided a forum for such business debtors to seek bankruptcy relief. The per-debtor interpretation is improper. Section 1129(a)(10) requires the per-plan interpretation because of the plain language and the corroborating legislative history and policy support such a finding.

ARGUMENT

The facts of this case are undisputed. (R. at 3, fn. 2.) This appeal only presents questions of law, which are reviewed de novo. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014).

I. Section 365(c)(1) Does Not Preclude a Debtor in Possession from Assuming a Non-Exclusive Intellectual Property License.

The first issue before this Court is whether Section 365(c) allows a debtor in possession to assume a non-exclusive intellectual property license absent nondebtor consent. The great majority of courts that have considered this issue have answered in the affirmative, broadly adhering to the so-called "actual test"; yet the circuit courts remain split, as some courts have answered this question in the negative, broadly adhering to the so-called "hypothetical test." *In re Footstar, Inc.*, 323 B.R. 566, 569 (Bankr. S.D.N.Y. 2005); *accord. Perlman v. Catapult*

Entm't (In re Catapult Entm't), 165 F.3d 747, 749 n.2 (9th Cir. 1999). This binary division is deceiving, however, because the opinions diverge widely in rationale. *See e.g., In re W. Elecs.*, Inc., 852 F.2d 79, 83 (3d Cir. 1988) [hereinafter *West*] (developing the hypothetical test based fatally on the overruled premise that, "in the context of the assumption and assignment of executory contracts, a solvent contractor and an insolvent debtor in possession going through bankruptcy are materially distinct entities."); *In re Footstar, Inc.*, 323 B.R. at 569–571 (answering the question in the affirmative, yet not fully adhering to any circuit court decision); *In re Hernandez*, 287 B.R. 795, 808 (Bankr. D. Ariz. 2002) (unsatisfied with, but bound by, the hypothetical test, holding that the issue of assumption under Section 365(c) could be avoided under the "ride through" doctrine).

The two circuit courts ever to have explicitly followed *West* have further explained that, while the available legislative history and sound bankruptcy policy may both point toward the adoption of the actual test, they are bound to rule otherwise based *exclusively* on what they interpret to be the plain meaning of the statute. *See e.g., Perlman v. Catapult Entm't*, 165 F.3d 747, 753–54 (9th Cir. 1999). Unfortunately, however, despite their admirable zeal to give effect to the plain language of § 365, these courts fatally misread the statute in a surprising number of critical ways. *See In re Footstar, Inc.*, 323 B.R. at 570–74.

Therefore, this Court should side with the majority of courts that have ruled on this issue and allow the Debtors to assume their license, because (1) the plain meaning of the statute unambiguously supports this holding; (2) the legislative history corroborates what the statute plainly states; (3) sound bankruptcy and intellectual property law policy harmonize perfectly with the plain meaning of the statute; (4) the lower court's reading of the statute leads to an absurd result necessitating reliance on extratextual considerations; and (5) even if the plain meaning were ambiguous, extratextual considerations still favor assumption.

A. The plain meaning of Section 365(c)(1) does not bar a debtor in possession from assuming a non-exclusive intellectual property license.

The plain meaning of § 365(c)(1) does not bar a debtor in possession from assuming a non-exclusive intellectual property license. The starting point for statutory interpretation is a careful reading of the statutory language. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). Section 365(c) states in relevant part:

> "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 …; and (B) such party does not consent to such assumption or assignment…."

11 U.S.C. § 365(c)(1) (2018).

The lower court's decision myopically focuses on the conjunction connecting the verbs "assume" and "assign" in the statute, overlooking the critical language for the plain meaning analysis. *See* R. at 10. While § 365(c)(1) plainly bars "[t]he *trustee*" from assuming or assigning a nondelegable contract, the provision makes no reference to the *debtor in possession* as being barred from so doing. 11 U.S.C. § 365(c)(1) (2018). Thus, any limitation on the debtor in possession stemming from § 365(c)(1) must instead arise by operation of § 1107(a). *In re Footstar, Inc.*, 323 B.R. at 576; *see* 11 U.S.C. § 1107(a) (2018).

Section 1107(a) provides in relevant part that, "subject to any limitations on a trustee … a debtor in possession shall have all the rights … and powers, and shall perform all the functions and duties … of a trustee serving in a case under this chapter." 11 U.S.C. § 1107(a) (2018). The oversight by the lower court occurs when it reads *into* § 1107(a) an equation of trustee with debtor in possession, even though a plain reading of the statute readily reveals such conclusion to be inaccurate. *See* 11 U.S.C. § 1107(a) (2018). In fact, simply changing the term "trustee" in § 365(c)(1) to "debtor in possession" *defies* the plain meaning of the statute as written by Congress and would suffer from precisely the kind of judicial legislation problem that the lower court is so zealously determined to prevent. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 517 n.2 (1984) (Explaining that, by a plain reading of § 1107(a), the term "debtor in possession" is *not* interchangeable with the term "trustee" under the Bankruptcy Code, but that, *with respect to* the narrow provision then before the Court, the provision was to apply to a debtor in possession as it was explicitly indicated to apply to the trustee); *In re Footstar, Inc.*, 323 B.R. at 573 (explaining that a mere substitution of "debtor in possession" for "trustee" in § 365(c) not only departs from the plain meaning of the statute, but it also fails to illuminate how the limitations set forth by Congress in that provision are to be applied to debtors in possession).

Thus, contrary to the lower court's oversimplification, at least the most basic level of critical thinking is actually required to determine whether and *how* substantive limitations on the trustee may be applied to a debtor in possession by operation of § 1107(a). *See Bildisco,* 465 U.S. at 517 n.2. At least one of the circuit courts supporting the lower court's position has shown its ability to effectuate this essential modicum of critical thinking in analogous cases. *See e.g., Maurice Sporting Goods v. Maxway Corp. (In re Maxway Corp.),* 27 F.3d 980, 982-83 (4th Cir. 1994). In *Maxway*, the Fourth Circuit examined § 546(a) of the Bankruptcy Code, which at the time read: "An action or proceeding under [§§] 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of – (1) two years after the *appointment of a trustee* under [§§] 702, 1104, 1163, 1302, or 1202 of this title; or (2) the time the case is closed or dismissed." 11 U.S.C. § 546(a) (1992) (emphasis added); *Maxway,* 27 F.3d at 982-

83. The issue presented to that court was whether, when a debtor was in possession of the Chapter 11 estate, the two-year statute of limitations for bringing avoidance actions began to run upon the "appointment of a debtor in possession," as the overly simplistic application of § 1107 now proposed by the same court would suggest. *See id.* at 982. The court sided with "the overwhelming majority of bankruptcy and district courts" in concluding that "the language of § 546(a)(1) [was] plain [in providing] that the two-year statute of limitations for bringing an avoidance action does not begin to run until the appointment of one of the *trustees* specified in § 546(a)(1)," instead of upon the filing of the bankruptcy petition as argued by those who favored the "appointment of the debtor in possession" interpretation. *Id.* at 982, 984 (emphasis added). The court concluded, much in line with what we urge the Court to conclude here, that "[a]pplication of the plain language … in Chapter 11 cases would not produce an absurd result, nor is it inconsistent with the language of or contrary to the legislative history of § 1107(a). And [our] interpreti[on] is consistent with the statutory scheme … without causing undue prejudice to [nondebtor parties]." *See id.* at 984.

Examining the plain meaning of the narrow provision here at bar, it is apparent that the substantive limitation in § 365(c)(1) becomes operative only "*if*" the nondebtor is excused by applicable law from further contractual relations with "an entity *other than* the debtor or the debtor in possession." 11 U.S.C. § 365(c)(1) (2018) (emphasis added). Since the trustee *is* an entity other than the debtor or the debtor in possession by operation of the Bankruptcy Code, it follows plainly from reading the statute that § 365(c) operates to bar the *trustee* from assuming or assigning contracts without nondebtor consent.

See In re Footstar, Inc., 323 B.R. at 573. In stark contrast, however, since mere assumption by a debtor in possession (without assignment) would not compel the nondebtor to accept performance from or render performance to "an entity *other than*" the debtor in possession, § 365(c)(1) is plainly inoperative on debtors who simply seek to continue performing under their prepetition contract exactly as originally bargained for with the nondebtor, *in accordance with* “applicable law”; and § 1107(a) simply does not have the power to change that. *See Id.* at 576; *Maxway*, 27 F.3d at 982-83.

Both the Bankruptcy Code and this Court further support this conclusion. *See* 11 U.S.C. § 1101 (2018); *Bildisco*, 465 U.S. at 528; *Lane & Bodley Co. v. Locke*, 150 U.S. 193, 196 (1893). Unlike § 1107, for instance, which never establishes an equivalence between the trustee and a debtor in possession, § 1101 explicitly states in relevant part that, “In this chapter – (1) ‘debtor in possession’ *means* debtor….” 11 U.S.C. § 1101 (2018) (emphasis added) (demonstrating the ability by Congress to plainly establish equality where it actually means to do so). Similarly, this Court provided in *Lane* that even the rule against assignability of nonexclusive intellectual property licenses is not without flexibility where the identity of the assignee is not materially different to that of the original assignor. *Lane*, 150 U.S. at 196 (holding that where a partnership was reformed as a corporation, the partnership’s nonexclusive license passed to the newly formed entity; the Court supported its reasoning with a ruling by a lower court holding that “a license, though not usually transferable, is transmissible by succession to a corporation formed by the union of two licensees succeeding to the obligations of both, for the reason that the consolidated company is the successor rather than the assignee of the original companies."); *accord.* 7 Collier Bankruptcy Practice Guide P 126.04[2][d][ii] (2019).

Moreover, in its previous analysis of § 365, this Court concluded that the debtor in possession *is* "the same 'entity' which existed before the filing of the bankruptcy petition but *empowered* by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have employed absent the bankruptcy filing." *Bildisco,* 465 U.S. at 528 (emphasis added). "Obviously," this Court expanded, "if the [debtor in possession] were a wholly 'new entity,' it would be unnecessary for the Bankruptcy Code to allow it to reject executory contracts, since it would not be bound by such contracts in the first place." *Id.* Accordingly, since the debtor in possession is the *same* entity as the prepetition debtor, only further *empowered* to deal with its prepetition contracts, the debtor in possession's ability to continue performing postpetition under the *same* terms originally contracted by the parties prepetition is in no way encumbered by the plain meaning of § 365(c). *See id.*; *see also Mission Prod. Holdings v. Tempnology, LLC*, 139 S. Ct. 1652, 1663 (2019) ("A debtor's property does not shrink by happenstance of bankruptcy …."); 3 Collier on Bankruptcy P 365.07[1][d][ii] (16th ed. 2019) ("for purposes of determining whether a debtor in possession may assume contracts that would not be assignable under nonbankruptcy law, the debtor in possession may be treated as the same entity as the debtor, entitled to assume the contract.").

B. The plain meaning of Section 365(c) is corroborated by the statute's legislative history.

The plain meaning of § 365(c) is corroborated by the statute's legislative history. Absent a "clearly expressed legislative intention to the contrary," the plain language of a statute must ordinarily be regarded as conclusive. *Albernaz v. United States*, 450 U.S. 333, 336 (1981) (citing *Consumers Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

The available legislative history is as conclusive as they come, for, in connection with a proposed amendment to § 365(c) in the Technical Amendments Act of 1980, Congress issued a report stating that "[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 a personal service contract will be the same as if no petition had been filed…." H.R. Rep. No. 96-1195, at 52 (1980) (emphasis added). The proposed amendment attempted to make the indicated Congressional intent plain by fixing § 365(c)(1)(A) to read "an entity other than the debtor or the debtor in possession" where it originally read "the trustee." *Id.* at 57. This amendment was enacted, exactly as originally proposed, in the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"). Pub. L. No. 98-353, 98 Stat. 333, § 362(a) (1984); *see* 3 Collier on Bankruptcy P 365.07[1][d][ii] (16th ed. 2019) ("there seems to be little reason for the amendment unless there was an intention to permit a debtor in possession to assume otherwise nonassignable contracts.")

BAFJA was enacted in 1984 "primarily to rectify [a] constitutional crisis … and to address [a Supreme] Court decision regarding the rejection of collective bargaining agreements…." *In re Cardinal Indus.*, 116 B.R. 964, 978 (Bankr. S.D. Ohio 1990). But Congress also used this "opportunity to incorporate several other acts… ,many of which had been pending in Congress for a few years but lacked the impetus to be enacted." *Id.* The Technical Amendments Act of 1980 is precisely one of such acts, seeking to "correct technical errors, clarify and make minor, substantive changes" to the Bankruptcy Reform Act of 1978. *Id.* (quoting H.R. Rep. No. 1195, to accompany S. 658, 96th Cong., 2d Sess. (1980)). Given the urgency with which BAFJA was passed, there is no authoritative legislative history for it;

therefore, the Technical Amendments Act provides the best guidance for interpreting the Congressional intent behind § 365. *Id.* at 978-79. Lastly, while the Technical Amendments Act was originally drafted by the Senate, it was the language of the House that eventually was adopted by BAFJA in 1984, and the Senate's approval of the House amendment can be inferred from the inclusion of the amendment's language in subsequent bills drafted and passed by the Senate during the interim years. *Id.* at 979.

An additional glance into Congress's intent is found in the legislative history of companion provision § 365(n), providing that "[§] 365 was [n]ever intended to be a mechanism for stripping innocent licensee[s] of rights." S. Rep. No. 100-505, pp. 2–4 (1988). Section 365(n) deals with the side of the coin opposite to § 365(c), where the debtor in possession is the licensor wishing to escape future contractual obligations and the nondebtor party is the licensee wishing to continue performing under the contract. *See* 11 U.S.C. § 365(n) (2018). Since "[n]o one disputes [that § 365(n)] came about … [to] ensure the continuation of … intellectual property … licensees' rights" postpetition, this result further elucidates Congress's intent with respect to § 365(c), given the various symmetries between these two provisions within the overall structural framework of § 365. *See Tempnology*, 139 S. Ct. at 1664; *Wachovia Bank, Nat'l Ass'n v. Schmidt*, 546 U.S. 303, 315–16 (2006) ("under the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read as if they were one law." (citations omitted)). Accordingly, the available legislative history confirms that Congress intended what the current language of § 365(c) plainly states, to bar the *trustee* from assuming non-assignable contracts but to allow *debtors* to continue performing as originally promised.

C. The plain meaning of Section 365(c)(1) is in harmony with sound bankruptcy and intellectual property law policy.

The plain meaning of § 365(c)(1) is in perfect harmony with bankruptcy and intellectual property law policy. In its recent analysis of § 365, this Court held that "both [§] 365's text and fundamental principles of bankruptcy law *command*[*ed*]" its decision to ensure that licensees' prepetition intellectual property rights would survive postpetition. *Tempnology*, 139 S. Ct. at 1661 (emphasis added). In acknowledging the importance of the issue at bar, this Court similarly noted that allowing the respondent to evade its contractual duties absent material breach would contravene "sound bankruptcy policy" by preventing the Debtors from continuing to exercise their contractual rights, invariably frustrating the Debtors' reorganization efforts, and providing a preferential windfall to the respondent. *See N.C.P. Mktg. Grp., Inc. v. BG Star Prods.*, 556 U.S. 1145, 1146–47 (2009) (reluctantly denying certiorari on other grounds, but highlighting the importance of resolving this question).

It is well established that "the 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." *Bildisco*, 465 U.S. at 528. This Court has further explained that,

> "[b]y permitting reorganization, Congress anticipated that the business would continue to provide jobs, to satisfy creditors' claims, and to produce a return for its owners. Congress presumed that the assets of the debtor would be more valuable if used in a rehabilitated business than if 'sold for scrap.' The reorganization effort would have small chance of success, however, if property *essential to running the business* were excluded from the estate. Thus, to facilitate the rehabilitation of the debtor's business, all the debtor's property must be included in the reorganization estate."

United States v. Whiting Pools, 462 U.S. 198, 203 (1983) (citations omitted) (emphasis added).

Pursuant to these bankruptcy purposes, Congress made the policy determination that "executory contracts are valuable assets of the estate, and that except in those relatively *rare* *cases* where the realization of their value gives rise to a *material prejudice* to the contract counterparty other than the loss of a prospective windfall, the economic value in such contracts should go not to the contract counterparty, but rather to the debtor's community generally." *In re Adelphia Communs. Corp.*, 359 B.R. 65, 73 (Bankr. S.D.N.Y. 2007) (emphasis added); *accord. In re Toys "R" Us, Inc.*, No. 17-34665-KLP, 2018 Bankr. LEXIS 1604, at *5-6 (Bankr. E.D. Va. May 31, 2018); *see* 11 U.S.C. §§ 365(a), (c), (f) (2018). However, when a debtor is barred from assuming its contracts, the nondebtor is granted a windfall at the detriment of the debtor's community. *BG Star Prods.*, 556 U.S. at 1147 ("If the debtor is outside of bankruptcy, then the nondebtor does not have the option to renege on its agreement; but if the debtor seeks bankruptcy protection, then the nondebtor obtains the power to reclaim -- and resell at the prevailing, potentially higher market rate -- the rights it [had already] sold to the debtor.").

Moreover, "[t]he theme of the Bankruptcy Act is 'equality of distribution' (*Sampsell v. Imperial Paper Corp.*, 313 U.S. 215, 219)[,] if one claimant is to be preferred over others, the *purpose* should be clear from the statute." *Nathanson v. NLRB*, 344 U.S. 25, 29 (1952) (emphasis added); *accord. Howard Delivery Serv. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 667–68 (2006) ("provisions allowing preferences must be tightly construed … Any doubt concerning the appropriate characterization … is best resolved in accord with the Bankruptcy Code's equal distribution aim. We therefore reject the expanded interpretation [the nondebtor] invites [u]nless and until Congress otherwise directs …."). Therefore, in line with this Court's previous holdings, § 365(c) is but a narrow carveout, whereby, "sensitive to the rights of the nondebtor party," the bankruptcy court must focus on the performance to be rendered by the debtor in possession with a view to ensuring that the nondebtor party will receive "the full benefit of [its] bargain." *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997) (citing S. Rep. No. 989, 95th Cong., 2d Sess. 59 (1978), reprinted in 1980 U.S.C.C.A.N. 5787, 5845); *Nathanson*, 344 U.S. at 29.

Consistent with bankruptcy law, intellectual property law is also concerned with economic success, as realized through the protection of incentives for creativity and invention. *See Everex Systems, Inc. v. Cadtrak Corp. (In re CFLC, Inc.)*, 89 F.3d 673, 679 (9th Cir. 1996); *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1334 (9th Cir. 1984). Notwithstanding, intellectual property antiassignment provisions do not prevent a license from effectively falling in the hands of a competitor of the licensor, because the sale of stock of a licensee to another company does not constitute an assignment of the license agreement. *See* 7 Collier Bankruptcy Practice Guide P 126.04[2][d][ii] (2019). In fact, licensors who want to fully protect themselves from their intellectual property winding up in the hands of a competitor must do so through a "change of control" provision that allows the licensor to terminate the contract if a majority of the stock in the licensee changes hands. *Id.*; *see VDF FutureCeuticals, Inc. v. Stiefel Labs., Inc.*, 792 F.3d 842, 846 (7th Cir. 2015); *Institut Pasteur*, 104 F.3d at 494. Hence, the crippling result that would obtain if the plain meaning of § 365(c) were to be contravened is met with not a single good argument for so doing. *See BG Star Prods.*, 556 U.S. at 1146–47 (contrasting the myriad policy concerns of the hypothetical test with the fact that the plain meaning interpretation herein advocated would prevent the "engendering [of] unwise policy."). In fact, assumption of the contract by the debtor does not materially prejudice the nondebtor, since it does not take away any right from the licensor that it would have otherwise enjoyed outside bankruptcy. *See In re Adelphia Commc'ns. Corp.*, 359 B.R. 73; 3 Collier on Bankruptcy P 365.07[1][d] (16th ed. 2019) ("This approach is troubling, as it may prevent a debtor in possession from being able to reorganize under circumstances that do not adversely affect the other party to the contract.”).

Here, the agreed-upon responsibilities that the respondent now seeks to evade are vital to the Debtors’ ongoing business operations, and the Debtors have always performed under the contract as originally agreed. R. at 5–6. So, preventing assumption by the Debtors would completely violate the “fundamental purpose of reorganization” by: robbing the Debtors of their prepetition contractual rights despite having performed in every way and at every time under the contract; forcing the Debtors to liquidate, with the attendant loss of jobs and misuse of economic resources, resulting from the *essential* nature of the Software for the Debtors’ ongoing business; and providing a preferential windfall to the respondent at the devastating detriment of other creditors, the Debtors, the Debtors’ employees, and the Debtors’ stakeholders. *See BG Star Prods.*, 556 U.S. 1147; *Bildisco*, 465 U.S. at 528; *Whiting Pools*, 462 U.S. at 203.

Furthermore, “with its Agreement being assumed, and its distribution on account of its unsecured claim greatly exceeding the value of Development’s assets, Under My Thumb initially viewed the Plan favorably.” R. at 7. In fact, the *exclusive* reason the respondent alleges for trying to evade its contractual responsibilities does not at all pertain to *assignability* but to a reasonably foreseeable “change of control”; only the former can be argued to fall within the scope of § 365(c), the latter relates to a separate issue in no way altered by the statute at bar. *See* 7 Collier Bankruptcy Practice Guide P 126.04[2][d][ii] (2019); *see also* 3 Collier on Bankruptcy P 365.07[1][d][ii] (16th ed. 2019) (“if all of the stock of the debtor … had been purchased by a third party, which then took control of the debtor, the [nondebtor] should not have been able to terminate the contract based on an assignment, because the contract itself would not have been assigned … Thus, there is little reason to bar the debtor in possession from assuming the contract.”). In other words, with assumption by the Debtors, the respondent here continues to receive the “full benefit of its prepetition bargain,” entirely removing the Debtors’ assumption of the contract from the narrow carveout to § 365(f) provided in § 365(c), and barring the respondent from the unfounded preferential treatment it seeks. *See Nathanson*, 344 U.S. at 29; *Institut Pasteur*, 104 F.3d at 493. Accordingly, the plain meaning of § 365(c)(1) could not be more in line with bankruptcy and intellectual property policy.

D. The lower court’s interpretation of Section 365(c) leads to an absurd result necessitating reliance on extratextual considerations that favor assumption.

The lower court’s interpretation of § 365(c) leads to an absurd result that would nonetheless necessitate reliance on extratextual considerations favoring assumption. Where the “literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, … the intention of the drafters, rather than the strict language, controls.” *Ron Pair*, 489 U.S. at 242 (citations omitted). This Court has elaborated further that

> “[w]hen [the plain] meaning has led to absurd or futile results … this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one ‘plainly at variance with the policy of the legislation as a whole’ this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no ‘rule of law’ which forbids its use, however clear the words may appear on ‘superficial examination.’ The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function. This duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said. Obviously there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body. A lively appreciation of the danger is the best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which

> withholds from the courts available information for reaching a correct conclusion."

United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543-44 (1940).

The lower court's reading of § 365(c) is absurd in three ways: it is entirely inconsistent with the well-established purposes of the Bankruptcy Code, it sets § 365(c) insurmountably at war with itself and its companion statutory provisions, and it is demonstrably at odds with clearly expressed congressional intent. *See Institut Pasteur, 104 F.3d at 493*; *contra RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.),* 361 F.3d 257, 265 (4th Cir. 2004).

What renders the aforementioned complete disconnect between the purposes of bankruptcy and the lower court's proposed interpretation of the statute patently absurd is that a debtor seeking Chapter 11 protection would be denied a right it held prepetition exclusively by reason of filing bankruptcy, while the nondebtor would be handed a preferential windfall in excess of its prepetition "applicable law" rights, to the ultimate sacrifice of all other stakeholders and for no single good reason. *See* Ralph Brubaker, *Assumption of Nonassignable Executory Contracts: Herein of Ambiguous "Applicable Law," Meaningless Statutory Amendments, and an Absurd View of the Absurd*, 24 BANKR. L. LETTER 10, Oct. 2004, at 10 [hereinafter *Brubaker*]; *c.f. BG Star Prods.*, 556 U.S. at 1147. What is even worse, the lower court's proposed interpretation would vest the nondebtor with an unprecedented extortive power that would unnecessarily impair, if not completely destroy, a debtor's opportunity to reorganize. *See* American Bankruptcy Institute Commission to Study the Reform of Chapter 11, 2012-2014 Final Report and Recommendations 122, 124 (2014) (citing David R. Kuney, *Intellectual Property in Bankruptcy Court: The Search for a More Coherent Standard in Dealing with a Debtor's Right to Assume and Assign Technology Licenses*, 9 AM. BANKR. INST. L. REV. 593 (2001)).

As if this level of absurdity were not enough, the lower court's proposed interpretation would set § 365(c) at war with itself and its companion statutory provisions. *See e.g.*, *In re Cardinal Indus.*, 116 B.R. at 978. This Court has repeatedly highlighted its "cardinal" duty to give effect to every clause and word of a statute, so as to prevent insignificant or superfluous language "in any setting", and "especially … when the term occupies [a] *pivotal* … place in the statutory scheme" being interpreted. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (emphasis added) (citations omitted). Yet, the lower court's proposal asks this Court to disregard what are probably the two most "pivotal" phrases plainly written by Congress directly into § 365(c): "or *assign*" and "or the *debtor in possession*"; the former would be rendered superfluous by § 365(f)'s requirement that assumption be a prerequisite of assignment, while the latter would be rendered superfluous by the inclusion of "the debtor" in § 365(c) itself. *See* 11 U.S.C. § 365(f) (2018); *Duncan*, 533 U.S. at 174; *In re Cardinal Indus.*, 116 B.R. at 978; *In re Hartec Enters., Inc.*, 117 B.R. 865, 872 (Bankr. W.D. Tex. 1990). The *Catapult* court, abandoning all sense of internal consistency even within its own reasoning, attempted to defend this fatal flaw by arguing for a *differential* (as between trustees and debtors in possession) and *extratextual* iterative application of § 365(c) that, almost comically (were it not for its consequences), still utterly failed to address the *surplusage* issue with respect to the phrase "or the debtor in possession," given the noted identity between "the debtor in possession" and "the debtor." *See Bildisco*, 465 U.S. at 528; *Catapult*, 165 F.3d at 752; *Brubaker*, at 8.

The internal inconsistency of the lower court's argument further extends to yet a third *pivotal* concept in § 365(c): "applicable law." *In re Cardinal Indus.*, 116 B.R. at 976–77. As even the circuit courts supporting the lower court's interpretation have acknowledged, "a literal reading of subsection (c)(1) appears to render subsection (f)(1) superfluous." *E.g.*, *Sunterra*, 361 F.3d at 267. In addressing this issue, the lower court extends its incongruity by subscribing to the dubious and entirely *extratextual* anlaysis in *In re Magness*. *See* 972 F.2d 689, at 695; Daniel J. Bussel & Edward A. Friedler, *The Limits on Assuming and Assigning Executory Contracts*, 74 AM. BANKR. L.J. 321, 329 (2000) ("The lack of any textual basis for this distinction in subsections (c) and (f) has made this a difficult position to articulate and defend."). But the real absurdity obtains when the analysis upon which the lower court relies for its argument states that "in determining whether an 'applicable law' … falls under [§ 365(f)], a court must ask *why* the 'applicable law' prohibits assignment. Only if the law prohibits assignment on the rationale that the identity of the contracting party is material to the agreement will subsection (c)(1) rescue it." *See Catapult*, 165 F.3d at 752. But if cases where "the identity of the contracting party is material to the agreement" is the distinction Congress was trying to make in § 365(c)(1), assumption of an executory contract by a debtor in possession would most certainly *not* be "rescue[d] by [§ 365(c)]," just as advanced by the plain meaning analysis presented here by the Debtors. *See Bildisco*, 465 U.S. at 528; *Catapult*, 165 F.3d at 752.

Naturally, the reason why the lower court so spectacularly fails to address any of these inconsistencies is due to the third level of absurdity resulting from its proposed interpretation of the statute: the legislative history of § 365(c) plainly and *explicitly* states that the words "or the debtor in possession" were added to the statute *precisely* to bar the lower court's misguided interpretation. *See supra* § I.B. Accordingly, the lower court's interpretation of § 365(c) is *demonstrably at odds* with the intentions of the drafters, and the intention of the drafters controls, allowing the Debtors to assume the contract; the lower court's holding to the contrary truly amounts to “an absurd view of the absurd.” *Brubaker*, at 10; *see Ron Pair*, 489 U.S. at 242.

E. Even if the meaning of Section 365(c) were ambiguous, the Debtors would still be allowed to assume their license.

Even if the meaning of § 365(c) were ambiguous, the Debtors would still be allowed to assume their license. Where the text of the disputed provision is ambiguous, the Court must seek guidance from legislative history. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 508-09 (1989). But the legislative history of § 365, as well as the overall structure of the Bankruptcy Code and the policy considerations underlying both bankruptcy and intellectual property law, emphatically support the plain meaning interpretation here proposed by the Debtors. *See supra* Parts B–D.

Also, in the particular case at bar, the license agreement explicitly states that the licensee is allowed to “extend the benefits of the Agreement to its affiliated entities,” even though such affiliated entities were technically not parties to the original Agreement. R. at 5 (quoting the Agreement). Absent a definition of “affiliated entities” in the contract, the Bankruptcy Code defines “affiliate” in relevant part as an “entity that operates the business or substantially all of the property of the debtor under a lease or operating agreement.” 11 U.S.C. § 101(2) (2018). Since the debtor in possession operates the business of the debtor, the respondent actually pre-consented contractually to extending the benefit of the Agreement to the debtor in possession and opted out of “applicable law” otherwise excusing it from accepting or rendering performance from or to the debtor in possession, bringing the Debtors’ assumption of the license outside the scope of § 365(c). *See Oliver v. Rumford Chem. Works*, 109 U.S. 75, 82 (1883) (“the instrument of license is not one which will carry the right conferred to anyone but the licensee personally, unless there are express words to show an intent to extend the right to an executor, administrator or assignee, voluntary or involuntary.") *accord. Murray v. Franke-Misal Techs. Grp., L.L.C. (In re Supernatural Foods, L.L.C.)*, 268 B.R. 759, 804-05 (Bankr. M.D. La. 2001).

II. Section 1129(a)(10) Only Requires Acceptance From One Impaired Class Under a Joint Plan of Reorganization.

Debtors second issue before this Court is based on an assertion that the Circuit Court erred by reversing the BAP and Bankruptcy Court notwithstanding Debtors and related Affiliates whom properly prosecuted a joint chapter 11 plan can be crammed down with the consent of a single impaired class (*i.e.*, the per-plan interpretation), regardless of UMT as Development's only creditor not having rendered a vote for the Plan. The lower court further erred in interpreting § 1129(a)(10) as requiring every debtor to satisfy the condition that at least one class of claims that is impaired under the Plan vote to accept the plan (*i.e.*, the per-debtor interpretation). However, as the Bankruptcy Court properly determined, the per-debtor interpretation is contrary to the plain language of the statute as evidence herein.

Few courts have addressed this specific question, but the majority of courts that have addressed the issue have ruled that § 1129(a)(10), the impaired accepting class rule, applies on a per-plan basis. To date, three Bankruptcy Courts (*In re Charter Communications*, 419 B.R. 221 (Bankr. S.D.N.Y.2009); *In re Enron Corp.*, 2004 Bankr. LEXIS 2549 (Bankr. S.D.N.Y. July 15, 2004); *In re SGPA, Inc.*, 2001 Bankr. LEXIS 2291 (Bankr. M.D. Pa. Sept. 28, 2001)), and one District Court (*JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props. Inc. (In re Transwest Resort Props., Inc.)*, 554 B.R. 894 (D. Ariz. 2016) (hereinafter "*Transwest II*"), *aff'd*, 881 F.3d 724, 729 (9th Cir. 2018)), affirmed by the Ninth Circuit Court of Appeals (hereinafter "*Transwest III*"), an issue of first impression at the Circuit level, held the impaired consenting class requirement of § 1129(a)(10) applied per-plan rather than a per-debtor basis. The impaired accepting class rule codified in § 1129(a)(10) is one of sixteen confirmation requirements for which the plan proponent bears the burden of proof; it states in relevant part: "(a) The court shall confirm *a plan* only if all of the following requirements are met . . . (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(a)(10) (2018) (emphasis added). *See also* § 101(31)(B) (2018) (defining "insider"); § 1124 (2018) (defining "impaired"); § 1126(c) (2018) (defining "accepted"). *See e.g., Buffalo Sav. Bank v. Marston Enters., Inc. (In re Marston Enters., Inc)*, 13 B.R. 514, 516-18 (Bankr. E.D.N.Y. 1981).

The application of the impaired accepting class rule is relatively straightforward in a single-debtor plan. Most large businesses, however, do not operate through a single entity. Thus, when a business encounters financial turbulence and seeks relief under title 11, bankruptcy petitions must typically be filed on behalf of multiple affiliated entities. To restructure the debts of the enterprise, the plan proponents will organize and negotiate amongst one another to prosecute a "joint plan." It is within this joint plan context that courts have disagreed about how the impaired accepting class rule should be applied. This disagreement over the interpretation of the Code has again produced two identifiable opposing camps of statutory interpretation of § 1129(a)(10): those advocating that §1129(a)(10) should be interpreted under a "per-plan" basis; and the alternative "per-debtor" interpretation. Under the minority view, "per-debtor" rule applies, meaning that an impaired accepting creditor class must be present for each debtor whose debts are to be restructured through a proposed joint Plan. *See e.g., In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293 (Bankr. D. Del. 2011); *In re Tribune Co.*, 464 B.R. 126 (Bankr.

D. Del. 2011), *on rec in part*, 464 B.R. 208, *aff'd*, 587 B.R. 606 (D. Del. 2018). By contrast, the emerging majority view is that the impaired accepting class rule codified in § 1129(a)(10) applies on a "per-plan" basis, *i.e.*, the joint plan need only garner the acceptance of a single impaired creditor class. *Transwest III*, infra at 729.

Therefore, Debtors respectfully request that this Court vacate the lower court's holding rejecting the "per-plan" interpretation and affirm the Bankruptcy Court because: (1) the plain meaning of the statues clear and concise language supports this finding; and (2) the legislative history corroborates the statute's minimal prerequisite to satisfy plan confirmation.

A. The Bankruptcy Code requires Section 1129(a)(10) to be applied on a "per-plan" basis.

The plain meaning of § 1129(a)(10) requires that, "*at a minimum*" per the Circuit Court majority (R. at 16), *at least* one impaired class of claims under the plan has accepted the plan. Debtors argue the lower court erred because the Plan at issue garnered nine impaired votes in favor, an overwhelming indicium of support of impaired classes.

Disputes over the meaning of the Code begin "where all such inquiries must begin with the language of the statute itself." *Ron Pair,* 489 U.S. at 249 (1989). When the language is clear, this Court does not need to look further than the language itself "because Congress says in a statute what it means and means in a statute what it says." *Hartford Underwriters Ins. Co. v. Union Planters Banks, N.A.*, 530 U.S. 1, 6 (2000). In *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1761 (2018), for example, this Court rejected the statutory interpretation argued by the debtor in that case, holding that it "must be rejected, for it reads [the word] respecting out of the statute." The *Lamar* Court held that "[a] statute ought . . . to be so construed that . . . no clause, sentence, or word shall be superfluous, void, or insignificant." (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). *Id*.

At first blush, § 1129(a)(10) textually appears neutral to both debtors and creditors alike on the premise that it requires only one impaired class to vote in favor of the plan. Well-settled statutory canons of interpretation require courts to "presume that Congress says in the statute what it means," especially when the statute is clear and unambiguous. *See King v. Burwell,* 135 S. Ct. 2480, 2489 (2015); *BedRoc Ltd., LLC v. United States,* 541 U.S. 176, 183 (2004). Thus, applying the statutory cannons to § 1129(a)(10) here, a simple reading renders that only *one* impaired class "under the plan" accept "the plan." *See* 11 U.S.C. § 1129(a)(10).

To reiterate, the Circuit Court majority noted that "[§] 1129(a)(10), *at a minimum*, requires one impaired class of claims to vote in favor of the reorganization plan before it can be confirmed." (R. at 16.) Debtors agree with the threshold requirement for the impaired accepting class rule and, thus, the Bankruptcy Court in the underlying matter correctly determined that § 1129(a)(10) was expressly satisfied because *nine impaired classes* under the Plan voted in favor of the Plan. The fact that UMT objected to the Plan holds no bearing nor could it prevent the Plan confirmation because the statute was clearly satisfied per a plain interpretation under a per-plan basis. It would behoove this Court to think that such Debtors, with authority of the Bankruptcy Court pursuant to § 1015(b) of the Federal Rules of Bankruptcy Procedure supplemented by § 105(a) of the Code could not afford affiliates access to a single forum. The statute does not distinguish between creditors of different debtors nor does it distinguish between single or joint plans. Instead, the lower court places a prepositional phrase in § 1129(a)(10) that is not found in a plain reading of the statute, and thus the lower court erred. *Contra Hartford Underwriters Ins. Co.*, 530 U.S. at 6.

Further, the lower court's absurd interpretation attempts to use § 102(7) (the singular includes the plural) to support the per-debtor approach by simply pluralizing the word "plan." 11 U.S.C. § 102(7) (2018). As creative as this legal construction may be, the application is improper, and Congress did not attempt to "hide elephants in mouseholes" here. *Whiteman v. Am. Trucking Ass'ns, Inc.*, 5313 U.S. 457, 468 (2001). Accordingly, Debtors urge this Court to follow the Ninth Circuit in *Transwest III* which noted the use of the singular form of "plan" was dispositive:

> The plain language of the statute supports the "[per-plan]" approach . . . It makes no distinction concerning or reference to the creditors of different debtors under "the plan," nor does it distinguish between single-debtor and multi-debtor plans. Under its plain language, once a single impaired class accepts a plan, [§] 1129(a)(10) is satisfied as to the entire plan. Obviously, Congress could have required plan approval from an impaired class for each debtor involved in a plan, but it did not do so.

Transwest III, infra at 729 ("this Court finds the plain language of the statute to be dispositive"); *Enron*, 2004 Bankr. LEXIS at *235. Therefore, this Court 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 § 1129(a)(10) for all debtors involved.

In the few cases that have addressed the issue involving multiple debtors in a single joint plan, bankruptcy courts seem hesitant to rely on § 102(7); instead the application of § 1129(a)(10) itself is sufficient without the need to include § 102(7) when a single class of impaired claims votes in favor of the plan. For example, in *In re SGPA, Inc.*, *infra*, at *6-7, the court approved a plan for multiple debtors who proposed a joint plan that had 57 classes of claims. One group of unsecured creditors objected to the plan on the ground that the requirement of § 1129(a)(10) was not satisfied as to each debtor in the plan. *Id.* at *9. The bankruptcy court overruled the objection, confirmed the plan, and held §1129(a)(10) was satisfied because "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." *Id.* at *21; accord *In re Charter Communications*, 419 B.R. at 266 ("[I]t is appropriate to test compliance with [§] 1129(a)(10) on a per-plan basis."); *In re Station Casinos, Inc.*, 2010 Bankr. LEXIS 5380, at *81-83 (Bankr. D. Nev. 2010) ("the plain language and . . . policy behind [§] 1129(a)(10) supports the view that the affirmative vote of one impaired class under the joint plan of multiple debtors is sufficient to satisfy [§] 1129(a)(10)"); *In re Enron Corp.*, 2004 Bankr. LEXIS at *234-235 (Bankr. S.D.NY. July 15, 2004) (finding that the "substantive consolidation component of the global compromise" allowed a joint plan for 177 jointly administered debtors to be confirmed where there was at least one impaired class under the plan to satisfy [§] 1129(a)(10)); *In re Dynegy Holdings, LLC*, 2013 WL 1874640, at *12 (Bankr. S.D.N.Y. May 2, 2013) (adopting the per-plan approach in *In re Charter Communications* in multiple debtor, multiple Chapter 11 jointly administered cases).

Despite § 1129(a)(10) being added to the Code in 1978 (Pub. L. 95-598, Nov. 6, 1978, 92. Stat. 2635), the few cases that have addressed the question of whether § 1129(a)(10) should be applied on a "per-plan" or "per-debtor basis" speak volumes to our assertion that the statute is clear and unambiguous as evidenced by the minimal litigation arising from the application of such standard. Based upon the express language of §1129(a)(10), the statute provides only one condition that must be satisfied: plan proponent must garner *at least one* impaired class under the plan to accept the plan; here, the requirement was satisfied when *nine impaired classes* favored the Plan. As such, the bankruptcy court's holding was correct as a matter of law and should be affirmed now by this Court.

A. The legislative history of Section 1129(a)(10) corroborates the per-plan interpretation.

The legislative history of § 1129(a)(10) corroborates the per-plan interpretation. First, nothing in § 1129(a)(10)'s legislative history suggests that Congress intended the statute to be applied on a "per debtor" basis. *See In re Bataa/Kierland, L.L.C.*, 476 B.R. 558, 577–78 (Bankr. D. Ariz. 2012). Section 1129(a)(10) did not exist under the Bankruptcy Act of 1938, (*i.e.*, the Chandler Act), and had no predecessor under the Act. *See* Hearings on the Revision of the Bankruptcy Act, H.R. 6439 Before the H. Comm. on the Judiciary, 75th Cong., 180–82 (1937). The Chandler Act amendments to the Bankruptcy Act did not expressly require that there be any accepting impaired class, so long as the treatment of all classes satisfied the best interests of creditors and the fair and equitable requirements for their treatment. *See e.g.*, *Id*.

Yet without any statutory authority, the Seventh Circuit's 1941 decision in *Herweg v. Neuses* held that acceptance by some creditors was inherent in the concept of a composition or arrangement, and therefore imposed that requirement. *Herweg v. Neuses (In re Herweg)*, 119 F.2d 941, 943 (7th Cir.1941) ("[w]e do not understand that this [§] [the cram down provision of Bankruptcy Act, § 461(11)] provides a substitute for an arrangement, nor that it contemplates dispensing with an arrangement when no creditors can be found to consent to it") (Chapter XII); *accord Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 585–86, (1935) ("[i]n no case of composition is a secured claim affected except when the holder is a member of a class; and then only when the composition is desired by the requisite majority and is approved by the court. Never, so far as appears, has any composition affected a secured claim held by a single creditor"); *Hamburger v. Dyer (In re Hamburger)*, 117 F.2d 932, 935 (6th Cir.1941) ("Although an arrangement . . . may include: the retention by the debtor of all or any part of his property this provision is not mandatory and cannot be availed of for the debtors' relief unless it is included in an arrangement approved by the requisite number of creditors affected") (Chapter XII); *Kyser v. MacAdam*, 117 F.2d 232, 238 (2d Cir.1941) (It is improper to deprive secured creditors of the right to vote by applying § 461(11) adequate protection.) (Chapter XII); *Meyer v. Rowen (In re Meyer)*, 195 F.2d 263, 266 (10th Cir.1952) ("But, it was obviously not the purpose of [§] 461, sub. 11 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.") (Chapter XII); *Taylor v. Wood*, 458 F.2d 15 (9th Cir.1972) (the court affirmed, without comment or analysis, the referee's conclusion that "debtor's plan was incapable of confirmation under [§] 467 or 468 of the Bankruptcy Act where the lone creditor affected refused to accept"); *see e.g. In re Northland Const. Co.*, 2 B.C.D. 1598, 1602 (E.D. Wis. 1976) (the *Herweg* analysis, although concerned with chapter XII, applies with equal force to chapter X).

In 1973, when the Commission on Bankruptcy Laws of the United States submitted a report recommending revision of the law consolidating Chapters X, XI and XII, it notably *did not* contain any provision expressly requiring an accepting class. Instead, the Commission's draft retained a structure similar to what had existed under the Act, permitting cramdown treatment of dissenting classes and determining acceptance "exclusive of those creditors and equity security holders who are [so] provided for." *See* Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, pt. ii, §§ 7–303(7) & (8) and 7–310(d)(1) (1973), reprinted in VOL. B COLLIER ON BANKRUPTCY App. Pt. 4(c) at 816 & 826 (Alan N. Resnik & Harry J. Sommer eds., 16th ed. 2012).

In 1977, however, while Congress was considering both the Bankruptcy Commission's draft of the Bankruptcy Code and the Judges' Bill, (*see In re Greystone III Joint Venture*, 102 B.R. 560, 562–66 (Bankr. W.D. Tex. 1989), *rev'd on other grounds*, 995 F.2d 1274 (5th Cir.1991)), two bankruptcy court decisions extensively analyzed the "judicial gloss" of *Herweg* and its progeny to concluded that it was unwarranted by the statutory language, legislative intent, or purposes of Chapter XII. *In re Hobson Pike Assocs., Ltd*., 1977 WL 182364, at *7 (Bankr. N.D. Ga. Sept. 20, 1977) ("[t]here is no specific or clear statutory authority in Chapter XII that the one and only creditor, which is provided 'adequate protection' . . . can defeat by mere opposition the plan and prevent confirmation just because the debtor has no other creditor to affirmatively accept the plan"); *In re Marietta Cobb Apartments Co.*, 1977 WL 182365 (Bankr. S.D.N.Y. Sept. 9, 1977) (the *Herweg* "reading of the [Chandler] Act would foreclose Chapter XII as a vehicle for the rehabilitation of a debtor with one mortgagee—the norm in a large percentage of today's cases"). Both cases therefore concluded that a plan could be confirmed when it satisfied the best interests, fair and equitable, and absolute priority rules for treatment, even if there was no class that accepted it, contrary to the lower court here.

In reaction to these two decisions, Congress considered an amendment to the proposed Code to require at least one accepting class. *See Greystone III Joint Venture*, 102 B.R. at 565–66; *In re Polytherm Indus., Inc.*, 33 B.R. 823, 834 (W.D. Wis.1983); *In re Barrington Oaks Gen. P'ship*, 15 B.R. at 969–70. All authorities agree that the intent and purpose of § 1129(a)(10) was merely to require "some indicia of creditor support for the debtor's schemes." P. Murphy, CREDITOR'S RIGHTS IN BANKRUPTCY, § 16.11, at 16–20 (1980). "This court cannot find any particular congressional intent, either expressed or implied in Congress' sausage-making exercise, that compels the court to read together the various Code provisions in such a way as to confer on secured creditors in cases such as these the veto power for which [the unsecured creditor] now lobbies." *Greystone*, supra, 102 B.R. at 566.

Section 1129(a)(10) is therefore a purely "technical requirement for confirmation," but "is not a substantive right of objecting creditors." *In re 7th Street and Beardsley P'ship*, 181 B.R. 426, 431 (Bankr. D. Ariz. 1994); *accord. Greystone III Joint Venture*, supra, 102 B.R. at 566 ("If any purpose can be divined from the Code's structure, it is that, in real estate cases . . . the ultimate confrontation will take place over whether the plan can satisfy the stringent requirements of cram-down imposed by [§] 1129(b), not whether it can satisfy the hyper-technical (and largely impractical) requirements of [§] 1129(a)(10) . . . [and] cannot find any particular congressional intent, either expressed or implied in Congress' sausage-making exercise, that compels this court to read together the various Code provisions . . . to confer on [unsecured creditors] in cases such as these the veto power for which [the unsecured creditor] now lobbies."). To further show the absurdity in the instant matter, *Anaheim, L & J Anaheim Assocs. v. Kawasaki Leasing Int'l, Inc. (In re L & J Anaheim Assocs.)*, 995 F.2d 940 (9th Cir.1993), is probably the most dramatic case in point. Although § 1129(a)(10) requires acceptance by an impaired class, the *Anaheim* Court there held that the accepting class could be deemed impaired because its rights were enhanced compared to what they would have been under state law. *Id.* (quoting 5 Collier on Bankruptcy ¶ 1124.03, at 1124-13 (15th ed. 1985)). Although the sole purpose of its decision was to determine whether there was the requisite acceptance for purposes of § 1129(a)(10), the *Anaheim* Court contained absolutely no analysis of the purposes of that requirement, any parties' interests it was meant to protect, or any substantive rights it conferred on anyone. *See e.g., Id.* The court's ultimate conclusion, that "impairment" for purposes of that provision can mean "improvement," necessarily implies that § 1129(a)(10) viewed the issue as highly technical one. As the *Anaheim* Court did not include any consideration beyond what the statute provides, the lower court here erred because it regarded § 1129(a)(10) not as a purely technical requirement but rather as one that conferred substantive rights that congress did not intend to provide.

For purposes of § 1129(a)(10), the lower court erred and should not have inquired into the motives of the votes so long as they are consistent with the party's proper role and capacity in the case. It is no more improper for a debtor to manufacture a class to provide that acceptance than it is for a creditor to manufacture its denial by purchasing and voting claims of creditors whose interests it does not share. Put another way, just as the outvoted creditors' interests were of so little concern to the lower court here that they did not merit any mention, UMT here has no cause to complain about how another class of creditors provided the satisfaction of § 1129(a)(10). Therefore, in applying its perspicacity derived from § 1129(a)(10)’s legislative history, this Court should find as a fact that the lower court committed grave error by reversing the BAP and Bankruptcy Court’s holding when *nine impaired classes voted in favor of the joint plan*.

CONCLUSION

For the foregoing reasons, this Court should reverse the lower court’s decision on both issues, and it should allow the Debtors to reorganize pursuant to their virtually universally accepted reorganization Plan.

PERTINENT STATUTORY PROVISONS

11 U.S.C. § 101 provides in pertinent part:

<u>11 U.S.C. § 101</u>

(1) – (30) [omitted]

(31) The term “insider” includes—

> **(A)** if the debtor is an individual—
>
> > **(i)** relative of the debtor or of a general partner of the debtor;
> >
> > **(ii)** partnership in which the debtor is a general partner;
> >
> > **(iii)** general partner of the debtor; or
> >
> > **(iv)** corporation of which the debtor is a director, officer, or person in control;
>
> **(B)** if the debtor is a corporation—
>
> > **(i)** director of the debtor;
> >
> > **(ii)** officer of the debtor;
> >
> > **(iii)** person in control of the debtor;
> >
> > **(iv)** partnership in which the debtor is a general partner;
> >
> > **(v)** general partner of the debtor; or
> >
> > **(vi)** relative of a general partner, director, officer, or person in control of the debtor;
>
> **(C)** if the debtor is a partnership—
>
> > **(i)** general partner in the debtor;
> >
> > **(ii)** relative of a general partner in, general partner of, or person in control of the debtor;
> >
> > **(iii)** partnership in which the debtor is a general partner;
> >
> > **(iv)** general partner of the debtor; or
> >
> > **(v)** person in control of the debtor;
>
> **(D)** if the debtor is a municipality, elected official of the debtor or relative of an elected official of the debtor;
>
> **(E)** affiliate, or insider of an affiliate as if such affiliate were the debtor; and
>
> **(F)** managing agent of the debtor.

(32) – (55) [omitted]

11 U.S.C. § 105 provides in pertinent part:

<u>11 U.S.C. § 105</u>

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) – (c) [omitted]

(d) The court, on its own motion or on the request of a party in interest—

> **(1)** shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and
>
> **(2)** unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, may issue an order at any such conference prescribing such

limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that—

(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

(B) in a case under chapter 11 of this title—

(i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

11 U.S.C. § 362 provides in pertinent part:

11 U.S.C. § 362

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

(b) – (o) [omitted]

11 U.S.C. § 365 provides in pertinent part:

<u>11 U.S.C. § 365</u>

(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.

(b) [omitted]

(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.

(d) – (f) [omitted]

(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.

(g) – (m) [omitted]

(n)

(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for—

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract—

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive—

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract or any agreement supplementary to such contract—

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

(o) – (p) [omitted]

11 U.S.C. § 507 provides in pertinent part:

<u>11 U.S.C. § 507</u>

(a) The following expenses and claims have priority in the following order:

(1) First:

(A) Allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition in a case under this title, are owed to or recoverable by a spouse, former spouse, or child of the debtor, or such child's parent, legal guardian, or responsible relative, without regard to whether the claim is filed by such person or is filed by a governmental unit on behalf of such person, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition shall be applied and distributed in accordance with applicable nonbankruptcy law.

(B) Subject to claims under subparagraph (A), allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition, are assigned by a spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative to a governmental unit (unless such obligation is assigned voluntarily by the spouse, former spouse, child, parent, legal guardian, or responsible relative of the child for the purpose of collecting the debt) or are owed directly to or recoverable by a governmental unit under applicable nonbankruptcy law, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition be applied and distributed in accordance with applicable nonbankruptcy law.

(C) If a trustee is appointed or elected under section 701, 702, 703, 1104, 1202, or 1302, the administrative expenses of the trustee allowed under paragraphs (1)(A), (2), and (6) of section 503(b) shall be paid before payment of claims under subparagraphs (A) and (B), to the extent that the trustee administers assets that are otherwise available for the payment of such claims.

(2) Second, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.

(3) Third, unsecured claims allowed under section 502(f) of this title.

(4) Fourth, allowed unsecured claims, but only to the extent of $12,850[(*)] for each individual or corporation, as the case may be, earned within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for—

(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or

(B) sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor in the sale of goods or services for the debtor in the ordinary course of the debtor's business if, and only if, during the 12 months preceding that date, at least 75 percent of the amount that the individual or corporation earned by acting as an independent contractor in the sale of goods or services was earned from the debtor.

(5) Fifth, allowed unsecured claims for contributions to an employee benefit plan—

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of—

(i) the number of employees covered by each such plan multiplied by $12,850[(*)]; less

(ii) the aggregate amount paid to such employees under paragraph (4) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

(6) Sixth, allowed unsecured claims of persons—

(A) engaged in the production or raising of grain, as defined in section 557(b) of this title, against a debtor who owns or operates a grain storage facility, as defined in section 557(b) of this title, for grain or the proceeds of grain, or

(B) engaged as a United States fisherman against a debtor who has acquired fish or fish produce from a fisherman through a sale or conversion, and who is engaged in operating a fish produce storage or processing facility—but only to the extent of $6,325[*] for each such individual.

(7) Seventh, allowed unsecured claims of individuals, to the extent of $2,850[*] for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided.

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for—

(A) a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition—

(i) for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days before the date of the filing of the petition, exclusive of—

(I) any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days; and

(II) any time during which a stay of proceedings against collections was in effect in a prior case under this title during that 240-day period, plus 90 days; or

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

(B) a property tax incurred before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

(D) an employment tax on a wage, salary, or commission of a kind specified in paragraph (4) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition;

(E) an excise tax on—

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

(F) a customs duty arising out of the importation of merchandise—

(i) entered for consumption within one year before the date of the filing of the petition;

(ii) covered by an entry liquidated or reliquidated within one year before the date of the filing of the petition; or

(iii) entered for consumption within four years before the date of the filing of the petition but unliquidated on such date, if the Secretary of the Treasury certifies that failure to liquidate such entry was due to an investigation pending on such date into assessment of antidumping or countervailing duties or fraud, or if information needed for the proper appraisement or classification of such merchandise was not available to the appropriate customs officer before such date; or

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss. An otherwise applicable time period specified in this paragraph shall be suspended for any period during which a governmental unit is prohibited under applicable nonbankruptcy law from collecting a tax as a result of a request by the debtor for a hearing and an appeal of any collection action taken or proposed against the debtor, plus 90 days; plus any time during which the stay of proceedings was in effect in a prior case under this title or during which collection was precluded by the existence of 1 or more confirmed plans under this title, plus 90 days.

(9) Ninth, allowed unsecured claims based upon any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution.

(10) Tenth, allowed claims for death or personal injury resulting from the operation of a motor vehicle or vessel if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance.

(b) [omitted]

11 U.S.C. § 546 provides in pertinent part:

<u>11 U.S.C. § 546</u>

(a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of—

(1) the later of—

(A) 2 years after the entry of the order for relief; or

(B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or

(2) the time the case is closed or dismissed.

(b) – (j) [omitted]

11 U.S.C. § 1101 provides in pertinent part:

<u>11 U.S.C. § 1101</u>

In this chapter—

(1) "debtor in possession" means debtor except when a person that has qualified under section 322 of this title is serving as trustee in the case;

(2) "substantial consummation" means—

(A) transfer of all or substantially all of the property proposed by the plan to be transferred;
(B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and
(C) commencement of distribution under the plan.

11 U.S.C. § 1107 provides in pertinent part:

<u>11 U.S.C. § 1107</u>
(a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.
(b) [omitted]

11 U.S.C. § 1114Click or tap here to enter text. provides in pertinent part:

<u>11 U.S.C. § 1114</u>
(a) For purposes of this section, the term "retiree benefits" means payments to any entity or person for the purpose of providing or reimbursing payments for retired employees and their spouses and dependents, for medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death under any plan, fund, or program (through the purchase of insurance or otherwise) maintained or established in whole or in part by the debtor prior to filing a petition commencing a case under this title.
(b)
(1) For purposes of this section, the term "authorized representative" means the authorized representative designated pursuant to subsection (c) for persons receiving any retiree benefits covered by a collective bargaining agreement or subsection (d) in the case of persons receiving retiree benefits not covered by such an agreement.
(2) Committees of retired employees appointed by the court pursuant to this section shall have the same rights, powers, and duties as committees appointed under sections 1102 and 1103 of this title for the purpose of carrying out the purposes of sections 1114 and 1129(a)(13) and, as permitted by the court, shall have the power to enforce the rights of persons under this title as they relate to retiree benefits.
(c)
(1) A labor organization shall be, for purposes of this section, the authorized representative of those persons receiving any retiree benefits covered by any collective bargaining agreement to which that labor organization is signatory, unless (A) such labor organization elects not to serve as the authorized representative of such persons, or (B) the court, upon a motion by any party in interest, after notice and hearing, determines that different representation of such persons is appropriate.
(2) In cases where the labor organization referred to in paragraph (1) elects not to serve as the authorized representative of those persons receiving any retiree benefits covered by any collective bargaining agreement to which that labor organization is signatory, or in cases where

the court, pursuant to paragraph (1) finds different representation of such persons appropriate, the court, upon a motion by any party in interest, and after notice and a hearing, shall appoint a committee of retired employees if the debtor seeks to modify or not pay the retiree benefits or if the court otherwise determines that it is appropriate, from among such persons, to serve as the authorized representative of such persons under this section.

(d) The court, upon a motion by any party in interest, and after notice and a hearing, shall order the appointment of a committee of retired employees if the debtor seeks to modify or not pay the retiree benefits or if the court otherwise determines that it is appropriate, to serve as the authorized representative, under this section, of those persons receiving any retiree benefits not covered by a collective bargaining agreement. The United States trustee shall appoint any such committee.

(e)

(1) Notwithstanding any other provision of this title, the debtor in possession, or the trustee if one has been appointed under the provisions of this chapter (hereinafter in this section "trustee" shall include a debtor in possession), shall timely pay and shall not modify any retiree benefits, except that—

(A) the court, on motion of the trustee or authorized representative, and after notice and a hearing, may order modification of such payments, pursuant to the provisions of subsections (g) and (h) of this section, or

(B) the trustee and the authorized representative of the recipients of those benefits may agree to modification of such payments, after which such benefits as modified shall continue to be paid by the trustee.

(2) Any payment for retiree benefits required to be made before a plan confirmed under section 1129 of this title is effective has the status of an allowed administrative expense as provided in section 503 of this title.

(f)

(1) Subsequent to filing a petition and prior to filing an application seeking modification of the retiree benefits, the trustee shall—

(A) make a proposal to the authorized representative of the retirees, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the retiree benefits that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (k)(3), the representative of the retirees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1), and ending on the date of the hearing provided for in subsection (k)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such retiree benefits.

(g) The court shall enter an order providing for modification in the payment of retiree benefits if the court finds that—

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (f);

(2) the authorized representative of the retirees has refused to accept such proposal without good cause; and

(3) such modification is necessary to permit the reorganization of the debtor and assures that all creditors, the debtor, and all of the affected parties are treated fairly and equitably, and is clearly favored by the balance of the equities;

except that in no case shall the court enter an order providing for such modification which provides for a modification to a level lower than that proposed by the trustee in the proposal found by the court to have complied with the requirements of this subsection and subsection (f): *Provided, however*, That at any time after an order is entered providing for modification in the payment of retiree benefits, or at any time after an agreement modifying such benefits is made between the trustee and the authorized representative of the recipients of such benefits, the authorized representative may apply to the court for an order increasing those benefits which order shall be granted if the increase in retiree benefits sought is consistent with the standard set forth in paragraph (3): *Provided further*, That neither the trustee nor the authorized representative is precluded from making more than one motion for a modification order governed by this subsection.

(h)

(1) Prior to a court issuing a final order under subsection (g) of this section, if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim modifications in retiree benefits.

(2) Any hearing under this subsection shall be scheduled in accordance with the needs of the trustee.

(3) The implementation of such interim changes does not render the motion for modification moot.

(i) No retiree benefits paid between the filing of the petition and the time a plan confirmed under section 1129 of this title becomes effective shall be deducted or offset from the amounts allowed as claims for any benefits which remain unpaid, or from the amounts to be paid under the plan with respect to such claims for unpaid benefits, whether such claims for unpaid benefits are based upon or arise from a right to future unpaid benefits or from any benefits not paid as a result of modifications allowed pursuant to this section.

(j) No claim for retiree benefits shall be limited by section 502(b)(7) of this title.

(k)

(1) Upon the filing of an application for modifying retiree benefits, the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and the authorized representative agree.

(2) The court shall rule on such application for modification within ninety days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the authorized representative may agree to. If the court does not rule on such application within ninety days after the date of the commencement of the hearing, or within such additional time as the trustee and the authorized representative may agree to, the trustee may implement the proposed modifications pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the retirees to evaluate the trustee's proposal and the application for modification, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(l) If the debtor, during the 180-day period ending on the date of the filing of the petition—

(1) modified retiree benefits; and

(2) was insolvent on the date such benefits were modified;
the court, on motion of a party in interest, and after notice and a hearing, shall issue an order reinstating as of the date the modification was made, such benefits as in effect immediately before such date unless the court finds that the balance of the equities clearly favors such modification.

the court, on motion of a party in interest, and after notice and a hearing, shall issue an order reinstating as of the date the modification was made, such benefits as in effect immediately before such date unless the court finds that the balance of the equities clearly favors such modification.

(m) This section shall not apply to any retiree, or the spouse or dependents of such retiree, if such retiree's gross income for the twelve months preceding the filing of the bankruptcy petition equals or exceeds $250,000, unless such retiree can demonstrate to the satisfaction of the court that he is unable to obtain health, medical, life, and disability coverage for himself, his spouse, and his dependents who would otherwise be covered by the employer's insurance plan, comparable to the coverage provided by the employer on the day before the filing of a petition under this title.

11 U.S.C. § 1123 provides in pertinent part:

<u>11 U.S.C. § 1123</u>

(a) [omitted]

(b) Subject to subsection (a) of this section, a plan may—

(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

(2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(3) provide for—

(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

(4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;

(5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and

(6) include any other appropriate provision not inconsistent with the applicable provisions of this title.

(c) – (d) [omitted]

11 U.S.C. § 1124 provides in pertinent part:

<u>11 U.S.C. § 1124</u>

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; or
>
> **(2)** notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default—
>
> > **(A)** cures any such default that occurred before or after the commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title or of a kind that section 365(b)(2) expressly does not require to be cured;
> >
> > **(B)** reinstates the maturity of such claim or interest as such maturity existed before such default;
> >
> > **(C)** compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law;
> >
> > **(D)** if such claim or such interest arises from any failure to perform a nonmonetary obligation, other than a default arising from failure to operate a nonresidential real property lease subject to section 365(b)(1)(A), compensates the holder of such claim or such interest (other than the debtor or an insider) for any actual pecuniary loss incurred by such holder as a result of such failure; and
> >
> > **(E)** does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest.

11 U.S.C. § 1125 provides in pertinent part

<u>11 U.S.C. § 1125</u>

(a) In this section—

> **(1)** "adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information; and
>
> **(2)** "investor typical of holders of claims or interests of the relevant class" means investor having—

(A) a claim or interest of the relevant class;

(B) such a relationship with the debtor as the holders of other claims or interests of such class generally have; and

(C) such ability to obtain such information from sources other than the disclosure required by this section as holders of claims or interests in such class generally have.

(b) – (g) [omitted]

11 U.S.C. § 1126 provides in pertinent part:

<u>11 U.S.C. § 1126</u>

(a) – (b) [omitted]

(c) A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

(d) – (e) [omitted]

(f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.

(g) Notwithstanding any other provision of this section, a class is deemed not to have accepted a plan if such plan provides that the claims or interests of such class do not entitle the holders of such claims or interests to receive or retain any property under the plan on account of such claims or interests.

11 U.S.C. § 1129 provides in pertinent part:

<u>11 U.S.C. § 1129</u>

(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) [omitted]

(*) Section 1228(b) Chapter 11 and Chapter 13 Cases. —The court shall not confirm a plan of reorganization in the case of in individual under chapter 11 or 13 of title 11, United States Code, unless requested tax documents have been filed with the court.

(**) Section 1221(d) Applicability. —The amendments made by this section shall apply for a case pending under title 11, United States Code, on the date of enactment of this Act, or filed under that title on or after that date of enactment, except that the court shall not confirm a plan under chapter 11 of title 11, United States Code, without considering whether this section would substantially affect the rights of a party in interest who first acquired rights with respect to the debtor after the date of the petition. The parties who may appear and may be heard in a proceeding under this section include the attorney general of the states in which the debtor is incorporated, was formed or does business.

28 U.S.C. § 1930 provides in pertinent part:

28 U.S.C. § 1930

(a) The parties commencing a case under title 11 shall pay to the clerk of the district court or the clerk of the bankruptcy court, if one has been certified pursuant to section 156(b) of this title, the following filing fees:

(1) For a case commenced under—

(A) chapter 7 of title 11, $245, and

(B) chapter 13 of title 11, $235.

(2) For a case commenced under chapter 9 of title 11, equal to the fee specified in paragraph (3) for filing a case under chapter 11 of title 11. The amount by which the fee payable under this paragraph exceeds $300 shall be deposited in the fund established under section 1931 of this title.

(3) For a case commenced under chapter 11 of title 11 that does not concern a railroad, as defined in section 101 of title 11, $1000.

(4) For a case commenced under chapter 11 of title 11 concerning a railroad, as so defined, $1,000.

(5) For a case commenced under chapter 12 of title 11, $200.

(6) In addition to the filing fee paid to the clerk, a quarterly fee shall be paid to the United States trustee, for deposit in the Treasury, in each case under chapter 11 of title 11 for each quarter (including any fraction thereof) until the case is converted or dismissed, whichever occurs first. The fee shall be $325 for each quarter in which disbursements total less than $15,000; $650 for each quarter in which disbursements total $15,000 or more but less than $75,000; $975 for each quarter in which disbursements total $75,000 or more but less than $150,000; $1,625 for each quarter in which disbursements total $150,000 or more but less than $225,000; $1,950 for each quarter in which disbursements total $225,000 or more but less than $300,000; $4,875 for each quarter in which disbursements total $300,000 or more but less than $1,000,000; $6,500 for each quarter in which disbursements total $1,000,000 or more but less than $2,000,000; $9,750 for each quarter in which disbursements total $2,000,000 or more but less than $3,000,000; $10,400 for each quarter in which disbursements total $3,000,000 or more but less than $5,000,000; $13,000 for each quarter in which disbursements total $5,000,000 or more but less than $15,000,000; $20,000 for each quarter in which disbursements total $15,000,000 or more but less than $30,000,000; $30,000 for each quarter in which disbursements total more than $30,000,000. The fee shall be payable on the last day of the calendar month following the calendar quarter for which the fee is owed.

(7) In districts that are not part of a United States trustee region as defined in section 581 of this title, the Judicial Conference of the United States may require the debtor in a case under chapter 11 of title 11 to pay fees equal to those imposed by paragraph (6) of this subsection. Such fees shall be deposited as offsetting receipts to the fund established under section 1931 of this title and shall remain available until expended.

An individual commencing a voluntary case or a joint case under title 11 may pay such fee in installments. For converting, on request of the debtor, a case under chapter 7, or 13 of title 11, to a case under chapter 11 of title 11, the debtor shall pay to the clerk of the district court or the clerk of the bankruptcy court, if one has been certified pursuant to section 156(b) of this title, a fee of the amount equal to the difference between the fee specified in paragraph (3) and the fee specified in paragraph (1).

(b) The Judicial Conference of the United States may prescribe additional fees in cases under title 11 of the same kind as the Judicial Conference prescribes under section 1941(b) of this title.

(c) Upon the filing of any separate or joint notice of appeal or application for appeal or upon the receipt of any order allowing, or notice of the allowance of, an appeal or a writ of certiorari $5 shall be paid to the clerk of the court, by the appellant or petitioner.

(d) Whenever any case or proceeding is dismissed in any bankruptcy court for want of jurisdiction, such court may order the payment of just costs.

(e) The clerk of the court may collect only the fees prescribed under this section.

(f)

(1) Under the procedures prescribed by the Judicial Conference of the United States, the district court or the bankruptcy court may waive the filing fee in a case under chapter 7 of title 11 for an individual if the court determines that such individual has income less than 150 percent of the income official poverty line (as defined by the Office of Management and Budget, and revised annually in accordance with section 673(2) of the Omnibus Budget Reconciliation Act of 1981) applicable to a family of the size involved and is unable to pay that fee in installments. For purposes of this paragraph, the term “filing fee” means the filing fee required by subsection (a), or any other fee prescribed by the Judicial Conference under subsections (b) and (c) that is payable to the clerk upon the commencement of a case under chapter 7.

(2) The district court or the bankruptcy court may waive for such debtors other fees prescribed under subsections (b) and (c).

(3) This subsection does not restrict the district court or the bankruptcy court from waiving, in accordance with Judicial Conference policy, fees prescribed under this section for other debtors and creditors.

RECORD OF APPEAL

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.

THE PETITION FOR A WRIT OF CERTIORARI IS GRANTED, LIMITED TO THE FOLLOWING QUESTIONS:

1. Whether 11 U.S.C. § 365(c)(1) permits a debtor in possession to assume an executory contract over the objection of the non-debtor party to such contract when applicable non-bankruptcy law excuses the non-debtor party from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession.

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

Written by the Hon. John T. Gregg and Paul R. Hage.

Recommended for Full Text Publication

UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

IN RE TUMBLING DICE, INC. *et al.*,

CASE NO. 18-0805

DEBTORS.

UNDER MY THUMB, INC.,

APPELLANT,

v.

TUMBLING DICE, INC. *et al.*,

APPELLEE.

Appeal from the Bankruptcy Appellate Panel
for the Thirteenth Circuit

Decided: March 4, 2019

Before: JONES, RICHARDS and WOOD, Circuit Judges

OPINION

RICHARDS, Circuit Judge:

This appeal arises out of the jointly administered chapter 11 bankruptcy cases of Tumbling Dice, Inc. and its affiliated debtors (collectively, the "Debtors"),[1] the owners and operators of eight

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

casino and resort properties located throughout the United States. It involves two different objections to the confirmation of the Debtors' *Joint Plan of Reorganization* (the "Plan") asserted by creditor Under My Thumb, Inc. ("Under My Thumb").

With respect to the first objection, we are asked to determine whether section 365(c)(1) of the Bankruptcy Code[2] precludes a debtor in possession from assuming a non-exclusive software license over the objection of the licensor where, as here, applicable non-bankruptcy law excuses the licensor from accepting performance from, or rendering performance to, an entity other than the debtor or the debtor in possession. The second objection requires us to determine whether section 1129(a)(10) requires the proponent of a joint, multi-debtor plan that impairs a class of creditors, such as the Plan in this case, to obtain acceptance from at least one impaired class of creditors of *each* debtor (*i.e.*, *per debtor* approach) or, alternatively, whether acceptance of a single impaired class of creditors under the plan (*i.e.*, *per plan* approach) is sufficient.

The bankruptcy court answered both questions in favor of the Debtors. The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the rulings of the bankruptcy court. Having considered the compelling arguments from both parties, we must reverse on both issues.

Factual Background and Procedural History[3]

On January 11, 2016, the Debtors commenced voluntary cases under chapter 11 of the Bankruptcy Code. Like many large, complex, multiple-debtor chapter 11 proceedings today, the Debtors' cases were jointly administered for the convenience of the parties and the court pursuant to Bankruptcy Rule 1015(b). As is common in multi-debtor chapter 11 cases, the Debtors were

[2] The Bankruptcy Code is set forth in 11 U.S.C. §§ 101 *et seq*. Specific sections of the Bankruptcy Code are identified herein as "section __." Similarly, specific rules from the Federal Rules of Bankruptcy Procedure are identified herein as "Bankruptcy Rule __."

[3] The facts, as set forth herein, are not disputed by the parties to this appeal.

authorized by the bankruptcy court to continue using the prepetition cash management system of their integrated business enterprise post-petition.

The lead bankruptcy case was filed by Tumbling Dice, Inc. ("TDI"), a holding company formed to own the membership interests of its nine wholly-owned debtor-subsidiaries. Eight of the debtor-subsidiaries each operate a luxury casino and resort (each an "Operating Debtor" and, collectively, the "Operating Debtors"). The remaining debtor-subsidiary, Tumbling Dice Development, LLC ("Development"), serves a more limited purpose in the overall corporate structure by acting as the licensee under a non-exclusive software license agreement with Under My Thumb. Together, the Debtors constitute one of the largest gaming operations in the country.

Nearly thirty years ago, the Debtors launched their casino loyalty program, Club Satisfaction. Casino loyalty programs are common in the gaming industry and, similar to frequent flyer miles and hotel rewards points, are aimed at creating brand loyalty. To incentivize and reward Club Satisfaction members who frequently engage in gaming and other activities at their properties, the Debtors offer free and discounted nights at their hotels; complimentary meals and drinks at their in-house chain of steakhouses, Beggars Banquet; VIP seating for concerts at their in-house concert venue, The Voodoo Lounge; private chefs' table dinners and other perks.

In 2008, Development contracted with Under My Thumb, a leading software designer that specializes in customer loyalty and reservations programs for the hospitality industry, to create a comprehensive, integrated software system that would modernize Club Satisfaction. Pursuant to a Research and Development Agreement between the parties, Under My Thumb incurred approximately $10 million in costs to create the Club Satisfaction software (the "Software"), a process which took nearly a year. Development agreed to reimburse Under My Thumb for a portion of these costs pursuant to an unsecured $7 million promissory note (the "R&D Note").

After the Software was completed, Under My Thumb and Development entered into a license agreement (the "Agreement") that granted Development a non-exclusive license to use its copyrighted and patented Software and permitted Development to "extend the benefits of the Agreement to its affiliated entities only" even though such affiliated entities were technically not parties to the Agreement. The Agreement otherwise broadly prohibited the Debtors from assigning or sublicensing their rights to others without Under My Thumb's express written consent. In exchange for the license, Development agreed to pay Under My Thumb a monthly fee that was calculated based on the amount of spending activity by Club Satisfaction members.[4]

Under the revamped loyalty program, each member of Club Satisfaction was given a player card, which they could swipe at gaming machines and tables, and use to make other purchases at the Debtors' properties. Through the Software, the Debtors learn what games members play, how often and for how long, and what types of food and beverages they purchase. With such data, the Debtors are able to track members' habits and capture their preferences so they can entice the members to return frequently, play for longer and spend more.

The new and improved version of Club Satisfaction was a tremendous success for the Debtors. Membership in Club Satisfaction tripled, and spending by each member increased as well. Indeed, the Debtors have acknowledged that, given the prevalence of casino loyalty reward programs in the industry in recent years, the Software is an essential part of the Debtors' ongoing business model. The relationship proved beneficial for Under My Thumb as well. Under My Thumb was permitted to, and did, license similar versions of the Software to third parties. It also received higher than expected payments under the Agreement each month due to the increased

[4] Development's obligations under the R&D Note are separate and independent from its obligations under the Agreement.

popularity of Club Satisfaction. Finally, the Debtors remained current under the R&D Note until June 2015 when they abruptly ceased making payments.

In December 2011, the stock of TDI was acquired by a hedge fund, Start Me Up, Inc., through a leveraged buy-out.[5] As part of the transaction, TDI and the Operating Debtors granted first priority liens on their assets to a syndicated group of lenders (the "Lenders") in exchange for a loan in the amount of $3 billion. In light of Development's limited purpose, the non-exclusive nature of the Software license, and certain restrictive covenants in the loan agreement, the Lenders did not require Development to act as a borrower or guarantor under the credit facility.

Saddled with a significant and unserviceable debt load from the leveraged buy-out transaction, the Debtors commenced these chapter 11 cases in January 2016. As of the petition date, TDI and each of the Operating Debtors jointly and severally owed the Lenders approximately $2.8 billion. The Debtors acknowledged in their first day filings that negotiating a deal with the Lenders to restructure or refinance this debt load was a primary goal in these bankruptcy cases.[6] The Debtors also owed an estimated $120 million more to their unsecured creditors, including Under My Thumb, who was still owed more than $6 million under the R&D Note. The Debtors were current, however, with respect to payments due under the Agreement.

After lengthy negotiations, including non-binding mediation ordered by the bankruptcy court involving the Debtors, Start Me Up, the Lenders, the unsecured creditors' committee and certain other stakeholders (but, notably, not Under My Thumb), the Debtors announced that a deal

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[5] The term leveraged buy-out is used to describe a transaction whereby the stock of one company is acquired by another using a significant amount of borrowed money to pay the purchase price. In a leveraged buy-out, the assets of the company being acquired are used as collateral for the loans. A leveraged buy-out transaction allows one company to purchase another without having to commit its own capital up front.

[6] Leveraged buy-out transactions are sometimes challenged as a fraudulent transfer under state or federal law. However, it is undisputed that, in the present case, no such cause of action was brought by any party before the expiration of the applicable fraudulent transfer lookback period.

had been reached, the terms of which were memorialized in a plan support agreement. Among other material terms, the plan support agreement contemplated that the Debtors would consensually restructure substantially all of the secured indebtedness owed to the Lenders by agreeing to a lower interest rate and extending payments over a period of twenty years. Start Me Up was required to inject new capital in order to fund a 55% distribution to unsecured creditors. In exchange for this new capital, Start Me Up would be entitled to retain its equity interest in the Debtors. In that regard, the plan support agreement called for the cancellation of the existing shares and membership interests in the Debtors and the issuance of new shares and membership interests in the reorganized Debtors, without changing the overall corporate structure.

Consistent with the plan support agreement, the Debtors filed the Plan and disclosure statement in August 2016. The Plan was a joint plan, meaning that one plan was filed on behalf of all of the Debtors. The Plan expressly stated that "the Debtors' estates are not being substantively consolidated and no Debtor is to become liable for the obligations of another."

With respect to Under My Thumb, the Plan proposed to assume the Agreement under sections 365 and 1123(b)(2). Under My Thumb would therefore continue to receive the monthly payments for the use of the Software under the Agreement. The Plan also provided for a pro rata distribution of $66 million (*i.e.*, 55%) to the Debtors' unsecured creditors, including the $6 million plus obligation owed by Development to Under My Thumb under the R&D Note. With its Agreement being assumed, and its distribution on account of its unsecured claim greatly exceeding the value of Development's assets, Under My Thumb initially viewed the Plan favorably.

Under My Thumb's perception of the Plan quickly changed. Upon careful review of the disclosure statement, it learned that Start Me Up was directly funding only $31 million of the unsecured distribution. The remaining $35 million was being invested by Sympathy for the Devil, LP ("SFD"), a private equity group. In return, SFD would receive 51% of the voting shares of reorganized TDI (Start Me Up would receive the remaining 49%) and several seats on its reconstituted board of directors. According to the record below, SFD's portfolio of companies includes a direct competitor of Under My Thumb who had, for several years, tried to replicate the Software. Under My Thumb was, therefore, immediately suspicious of SFD's involvement.

The Plan enjoyed near universal support from all creditor groups. After creditor ballots were reviewed and tallied, each of TDI and the Operating Debtors had at least one impaired accepting class of creditors. The same was not true for Development. Concerned with SFD's potential access to the Software, Under My Thumb, who controlled Development's only class of creditors, voted to reject the Plan. Development thus had no impaired accepting class of creditors.

Under My Thumb timely objected to the Plan on numerous grounds, only two of which it eventually pursued on appeal. First, relying on the so-called "hypothetical test," it argued that the proposed assumption of the Agreement by the Debtors was impermissible under section 365(c)(1) because applicable non-bankruptcy law excused performance by Under My Thumb in the absence of its consent, which it was not giving.[7] Second, it argued that the Plan was not confirmable under section 1129(a)(10) because no impaired class of creditors of Development had voted to accept it.

Noting the overwhelming creditor support that existed, the bankruptcy court overruled the objections and confirmed the Plan. With respect to Under My Thumb's first objection, the bankruptcy court adopted the so-called "actual test" and held that section 365(c)(1) contemplates a case-by-case inquiry into whether the non-debtor party (*i.e.*, Under My Thumb) actually was being forced to accept performance under its executory contract from someone other than the party

[7] The parties stipulated that the Agreement was non-assignable because, under applicable non-bankruptcy law, Under My Thumb was excused from rendering performance to an entity other than Development and its affiliates.

with whom it originally contracted (*i.e.*, Development). Concluding that Under My Thumb was being asked to do nothing more than honor its existing contractual obligation with Development, the bankruptcy court held that Development could assume the Agreement. With respect to the second objection, the bankruptcy court held that section 1129(a)(10) is satisfied where at least one impaired class in a joint, multi-debtor plan accepts the plan. Noting that all but one of the Debtors' impaired classes voted to accept the Plan, the court rejected Under My Thumb's argument that the Plan was not confirmable simply because no impaired class of Development voted in favor of it.

The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court on both issues. Under My Thumb timely appealed that ruling to this court.

Discussion

I. Legal Standard

We review a bankruptcy court's decision directly, not the appellate panel's review of the bankruptcy court's decision. *Charbono v. Sumski (In re Charbono)*, 790 F.3d 80, 84-85 (1st Cir. 2015) (citations omitted). The parties do not dispute the facts as set forth herein. Rather, the issues that we address involve questions of law. Thus, our review is de novo. *Texas v. Soileau (In re Soileau)*, 488 F.3d 302, 305 (5th Cir. 2007) (citation omitted). Under a de novo standard of review, the reviewing court decides an issue as if the court were the original trial court in the matter. *Razavi v. Comm'r of Internal Revenue*, 74 F.3d 125, 127 (6th Cir. 1996) (quotation omitted).

II. Section 365(c)(1) Precludes Assumption of a Non-Exclusive License of Intellectual Property Over the Objection of the Licensor

In chapter 11 cases, the financially distressed debtor and its management take on the role of debtor in possession. A debtor in possession performs the functions and duties that would fall to a trustee under other chapters of the Bankruptcy Code, "subject to any limitations on such trustee." 11 U.S.C. § 1107.[8] For this reason, it is well established that "[t]he terms 'trustee' and 'debtor in possession,' as used in the Bankruptcy Code, are … essentially interchangeable." *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery (In re Cybergenics Corp.)*, 226 F.3d 237, 243 (3d Cir. 2000).

Section 365 gives a debtor in possession the power to assume - that is, to continue to receive the benefits of, while also continuing to perform its obligations under - the executory contracts held by the debtor before bankruptcy. 11 U.S.C. § 365(a).[9] However, that power is expressly limited by section 365(c)(1), which provides that:

> 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 …, and
>
> (B) such party does not consent to such assumption or assignment….

11 U.S.C. § 365(c)(1). In this case, we are called upon to decide whether, pursuant to section 365(c)(1), a debtor in possession can assume, over the licensor's objection, a nonexclusive software license. With respect to that question, the Debtors ask us to conclude that the disjunctive term "or," as used in the "assume or assign" language of section 365(c)(1), should be construed in the conjunctive as "and." Adhering to the text of the Bankruptcy Code, as we must, we are unable to construe section 365(c)(1) in such a fashion.

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[8] The legislative history with respect to section 1107 states, in pertinent part:

> [t]his section places a debtor in possession in the shoes of a trustee in every way. The debtor is given the rights and powers of a chapter 11 trustee. He is required to perform the functions and duties of a chapter 11 trustee…. He is also subject to any limitations on a chapter 11 trustee....

S. Rep. No. 95-989, at 116 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5902.

[9] The Bankruptcy Code does not define the term "executory contract," but courts traditionally have adopted the so-called "Countryman" definition, which defines an executory contract for bankruptcy purposes as a contract under which "the obligation of both the bankrupt and the other party are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other." *Olah v. Baird (In re Baird)*, 567 F.3d 1207, 1211 (10th Cir. 2009) (citations omitted).

A majority of circuit courts of appeal have interpreted section 365(c)(1) to mean that a debtor in possession may assume an executory contract only if hypothetically it would be permitted to assign that contract to a third party. That is to say, if the debtor in possession lacks hypothetical authority to assign a contract, then it may not assume it - even if the debtor in possession has no actual intention of assigning the contract to another. *See, e.g.*, *RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257 (4th Cir. 2004); *Perlman v. Catapult Entm't, Inc. (In re Catapult Entm't, Inc.)*, 165 F.3d 747 (9th Cir. 1999); *In re West Elec., Inc.*, 852 F.2d 79 (3d Cir. 1988). This view of section 365(c)(1) has come to be known as the "hypothetical test." Other courts adopt an "actual test," whereby a chapter 11 debtor may assume an executory contract provided it has no actual intent to assign the contract to a third party. *See, e.g.*, *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489 (1st Cir. 1997). The Supreme Court itself has noted the circuit split on this issue, stating: "The division in the courts over the meaning of § 365(c)(1) is an important one to resolve for bankruptcy courts and for businesses that seek reorganization." *N.C.P. Marketing Grp., Inc. v. BG Star Prods., Inc.*, 129 S. Ct. 1577 (2009) (denying certiorari).

This case, which involves a debtor's attempt to assume a non-exclusive license of intellectual property, highlights the split between the "hypothetical test" and the "actual test." It is generally accepted that contracts conveying non-exclusive licenses of intellectual property, such as the Agreement, are executory contracts. *See, e.g.*, *In re Kmart Corp.*, 290 B.R. 614, 618 (Bankr. N.D. Ill. 2003). Under such a contract, a licensor (*i.e.*, Under My Thumb) permits the licensee (*i.e.*, Development) to use the licensor's intellectual property subject to various restrictions (*i.e.*, for a specified purpose, geographic region and time period) in exchange for a periodic fee.

Federal law on intellectual property licenses respects the right of the licensor to control who uses its intellectual property, and generally excuses a licensor from rendering performance to an entity different from its original licensee. Thus, a licensee is precluded from assigning a license of intellectual property absent the consent of the licensor. *See, e.g.*, *Unarco Indus., Inc. v. Kelley Co., Inc.*, 465 F.2d 1303, 1306 (7th Cir. 1972) ("[L]ong standing federal rule of law with respect to the assignability of [intellectual property licenses] provides that these agreements are personal to the licensee and not assignable unless expressly made so in the agreement."); *In re Trump Entm't Resorts, Inc.*, 526 B.R. 116, 123-25 (Bankr. D. Del. 2015). Because the Agreement is a license of intellectual property that is not assignable under non-bankruptcy law, resolution of this issue turns squarely on whether the "hypothetical test" or the "actual test" applies.

As in all statutory interpretation cases, we begin with the statutory language. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). The Supreme Court has instructed us to "presume that a legislature says in a statute what it means and means in a statute what it says there.... When the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). The language of section 365(c)(1) is unambiguous, and we are bound to follow it. A straightforward application of section 365(c)(1) prohibits a software licensee from assuming a license agreement without the licensor's consent. Section 365(c)(1) is drawn in the disjunctive and, by its plain language, prohibits a licensee from "assuming *or* assigning," rather than from "assuming *and* assigning," the agreement. It matters not that the licensee may have no intention of assigning the agreement to a third party. Therefore, we join the majority of our sister circuits in adopting the "hypothetical test."

Having done so, application of the statute to the facts of this case becomes relatively straightforward. That application is as follows:

> (c) *Development* may not assume ... *the Agreement*, ... if –
>
> > (1)(A) *federal intellectual property law* excuses *Under My Thumb* from accepting performance from or rendering performance to an entity other than *Development*...; and

(B) *Under My Thumb* does not consent to such assumption....

11 U.S.C. § 365(c)(1) (substitutions in italics). Since it is acknowledged that applicable intellectual property law makes the Agreement personal and nondelegable, and since Under My Thumb has not given its consent, section 365(c)(1) precludes assumption.

We reject the arguments of the Debtors that adoption of the "hypothetical test" would lead to a result that is absurd or demonstrably at odds with the Bankruptcy Code. Specifically, the Debtors contend that we should ignore the plain meaning of section 365(c)(1) because a literal reading of the statute renders inoperative and superfluous section 365(f)(1). That section provides:

> 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.

11 U.S.C. § 365(f)(1). The asserted inconsistency between sections 365(c)(1) and 365(f)(1) arises from use of the term "applicable law" in each provision. Subsection (c)(1) bars assumption (absent consent) when "applicable law" would bar an assignment. And subsection (f)(1) provides that, contrary provisions in applicable law notwithstanding, executory contracts may be assigned. Of course, the assumption of an executory contract is a necessary prerequisite to its assignment under section 365. 11 U.S.C. § 365(f)(2)(A). A literal reading of section 365(c)(1), therefore, initially appears to render section 365(f)(1) inoperative or superfluous.

The conflict between these two code provisions is illusory, however, because "each subsection recognizes an 'applicable law' of markedly different scope." *In re Catapult Entm't, Inc.*, 165 F.3d at 752 (citing *Rieser v. The Dayton Country Club Co. (In re Magness)*, 972 F.2d 689, 695 (6th Cir. 1992)). As the Fourth Circuit Court of Appeals explained in *In re Sunterra Corp.*:

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> First, § 365(f)(1) lays out the broad rule - "a law that, as a general matter, 'prohibits, restricts, or conditions the assignment' of executory contracts is trumped by the provisions of subsection (f)(1)." Section 365(c)(1), in contrast, creates a carefully crafted exception to the broad rule, under which "applicable law does not merely recite a general ban on assignment, but instead more specifically 'excuses a party ... from accepting performance from or rendering performance to an entity' different from the one with which the party originally contracted...." Therefore, under the broad rule of § 365(f)(1), the "applicable law" is the law prohibiting or restricting assignments as such; whereas the "applicable law" under § 365(c)(1) embraces "legal excuses for refusing to render or accept performance, regardless of the contract's status as 'assignable'...." In order to determine whether a law is overridden by § 365(f)(1) under the foregoing interpretation of § 365(f)(1) and § 365(c)(1), a court must ask why "applicable law" prohibits assignment. And only applicable anti-assignment law predicated on the rationale that the identity of the contracting party is material to the agreement is resuscitated by § 365(c)(1).

In re Sunterra Corp., 361 F.3d at 266-67 (internal citations omitted). Premised on this interpretation, we agree with those courts that apply section 365(c)(1) literally. The provisions of section 365(c)(1) are not inevitably at odds with the provisions of section 365(f)(1), because the applicable anti-assignment law in this case, federal intellectual property law, is predicated on the rationale that the identity of the licensee is material to the agreement.

The Debtors also posit that applying the statute's plain language would produce an absurd result that is inconsistent with the general bankruptcy policies of fostering a successful reorganization and maximizing the value of the debtor's assets. Courts should not assume, however, that "sections of the Bankruptcy Code unfavorable to the debtor were enacted in error." *Id.* at 268. Although the Bankruptcy Code is generally favorable to debtors, it contains many provisions preserving the rights of non-debtor parties. *See, e.g.*, 11 U.S.C. § 362(b) (listing various exceptions to the automatic stay). In any event, as the Supreme Court has repeatedly emphasized, "Achieving 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 (2000) (citations omitted). No matter how appealing the interpretation of the "actual test" courts may be from a policy standpoint, "we cannot adopt [such interpretation] as our own without trespassing on a function reserved for the legislative branch...." *Sigmon Coal Co., Inc. v. Apfel*, 226 F.3d 291, 308 (4th Cir. 2000). Our job is to interpret the statute as it *is* written, not as it perhaps *should be* written.

Because section 365(c)(1) precludes Development from assuming the Agreement absent the consent of Under My Thumb, which consent the Debtors have not obtained, we must reverse the decision of the bankruptcy court.

III. Section 1129(a)(10) Requires Acceptance From an Impaired Class of Claims of Each Debtor Under a Joint, Multi-Debtor Plan

For chapter 11 debtors who hope to emerge from bankruptcy, the ultimate goal is confirmation of a plan of reorganization. The statute sets forth relatively few requirements for chapter 11 plans. By limiting such requirements, Congress ensured that chapter 11 would remain flexible. This flexibility is designed to foster meaningful negotiations between management, creditors and shareholders regarding the terms of any plan.

Chapter 11 plans deal with creditor claims by placing them in classes. Pursuant to section 1122(a), "a plan may place a claim … in a particular class only if such claim … is substantially similar to the other claims … of such class." Once claims are placed into classes, a plan must specify which classes of claims are impaired, and identify the treatment for such classes. 11 U.S.C. §§ 1123(a)(2), (3). Impaired classes are classes of claims where the creditors' pre-bankruptcy legal, equitable or contractual rights are to be altered under the plan. 11 U.S.C. § 1124.

Impairment triggers important rights in chapter 11 including, notably, the right to vote on the plan. 11 U.S.C. §§ 1126(a), (f). Ballots are prepared and delivered to each creditor. Generally, a class of claims accepts a plan "if such plan has been accepted by creditors … that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class…."

11 U.S.C. § 1126(c). An impaired creditor's right to vote is one of its most powerful tools in the bankruptcy process. It is, in effect, its bargaining chip at the negotiating table.

Section 1129(a) contains a checklist of sixteen different requirements that must be satisfied in order for a plan to be confirmed. *See, e.g.*, *Buffalo Sav. Bank v. Marston Enters., Inc. (In re Marston Enters., Inc.)*, 13 B.R. 514, 516-18 (Bankr. E.D.N.Y. 1981) (Duberstein, J.). Relevant to the present case, section 1129(a)(10) provides:

> (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(a)(10) (emphasis added). Section 1129(a)(10), at a minimum, requires one impaired class of claims to vote in favor of the reorganization plan before it can be confirmed. It is applicable even in cases where a plan proponent seeks to confirm a plan over the objection of a class of creditors by way of cram down under section 1129(b). In this respect, section 1129(a)(10) represents a powerful and important safeguard for impaired, objecting creditors.

It is generally understood that section 1129(a)(10) was included in the Bankruptcy Code in part to encourage consensus in the reorganization process. The section ensures that, even in a cram down scenario, each debtor obtains at least a minimal level of support from its impaired creditors through the negotiation process before its plan can be confirmed. *See, e.g.*, *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 243-44 (3d Cir. 2004) (citations omitted) ("The purpose of [§ 1129(a)(10)] is 'to provide some indicia of support [for a plan of reorganization] by affected creditors and prevent confirmation where such support is lacking.'").

Under My Thumb asserts that section 1129(a)(10) requires acceptance by one impaired class of creditors for each debtor in a multi-debtor plan. In other words, it contends that section 1129(a)(10) is a *per debtor*, not a *per plan* requirement. Because no impaired class of creditors of

Development voted in favor of the Plan, it argues, the Plan did not meet the requirement for confirmation set forth in section 1129(a)(10) and, thus, should not have been confirmed. The Debtors disagree, arguing that section 1129(a)(10) merely requires an affirmative vote by a single impaired class of creditors of any one Debtor under the Plan. Here, they note, creditors overwhelmingly voted in favor of the Plan. Indeed, the only class of creditors that did not vote in favor of the Plan was the class of Development creditors controlled by Under My Thumb. Therefore, they urge us to affirm the bankruptcy court's confirmation of the Plan.

Again, there is a split of authority on this issue. In *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (In re Transwest Resort Props., Inc.)*, 881 F.3d 724 (9th Cir. 2018), the Ninth Circuit Court of Appeals held that chapter 11 neither explicitly nor implicitly requires each jointly administered, but non-substantively consolidated debtor to have an accepting impaired class. To the contrary, that court found that section 1129(a)(10) only requires that a plan have one accepting impaired class. *Id.* at 729-30. Conversely, a handful of opinions out of the District of Delaware, one of the country's most influential business bankruptcy courts, have held that, in the context of jointly administered cases, each debtor must be able to meet the requirements of section 1129(a), including the requirement in section 1129(a)(10) that the plan must contain an accepting class of non-insider impaired creditors. *See, e.g.*, *In re Tribune Co.*, 464 B.R. 126 (Bankr. D. Del. 2011); *see also In re Woodbridge Grp. of Cos., LLC*, 592 B.R. 761 (Bankr. D. Del. 2018); *In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293 (Bankr. D. Del. 2011). Based on the statute's plain language, we join the Delaware courts in holding that section 1129(a)(10) must be analyzed on a *per debtor*, not a *per plan*, basis. Because no impaired class of Development's creditors voted in favor of the Plan, the bankruptcy court's order confirming the Plan must be reversed notwithstanding the broad creditor support that exists for the Plan.

A debtor may reorganize only the assets and liabilities of its own bankruptcy estate. The one exception to this rule is if the bankruptcy court substantively consolidates the estates of multiple debtors. Substantive consolidation is a judicially created equitable remedy in bankruptcy where the assets and liabilities of technically distinct corporate entities are pooled together and such entities are treated as if they were, in fact, one single entity. Substantive consolidation is controversial because it violates one of the cornerstones of American corporate law, namely, that separate legal entities are to be treated separately, with each responsible for their own assets and liabilities. *See, e.g.*, *Skidmore, Owings & Merrill v. Canada Life Assurance Co.*, 907 F.2d 1026, 1027 (10th Cir. 1990) (citations omitted). Despite the foregoing, an extensive body of case law has developed that recognizes that a bankruptcy court can, in certain circumstances, substantively consolidate the assets and liabilities of two or more entities. *See, e.g.*, *In re Owens Corning*, 419 F.3d 195, 211 (3d Cir. 2005); *see also* 11 U.S.C. § 1123(a)(5)(C) (providing that a plan may provide for the "merger or consolidation of the debtor with one or more persons"). Because of the extraordinary nature of substantive consolidation, courts agree that the doctrine should be applied sparingly. *See, e.g.*, *Alexander v. Compton (In re Bonham)*, 229 F.3d 750, 767 (9th Cir. 2000).

In this case, the Debtors did not seek substantive consolidation but, rather, pursued one "joint" chapter 11 plan of reorganization for all ten debtors. Consequently, each of the Debtors were required to reorganize their individual bankruptcy estate separately under the joint Plan. *See In re Tribune Co.*, 464 B.R. at 181. Nevertheless, the Debtors proceeded to confirmation as though all ten bankruptcy estates had been substantively consolidated. They argued that the Plan satisfied each of the requirements for confirmation under section 1129, including the impaired accepting class requirement in section 1129(a)(10), because the impaired unsecured creditor classes of each of the Operating Debtors voted in favor of the Plan. But that interpretation cuts against the plain language of the statute, which requires that at least one impaired class of claims of each debtor accept a joint chapter 11 plan.

When considering the plain meaning of section 1129(a)(10), one must start with the Bankruptcy Code's own statutory rules of construction, which provide that "the singular includes the plural." 11 U.S.C. § 102(7). Therefore, the fact that section 1129(a)(10) refers to "the plan" in the singular is not a basis, alone, upon which to conclude that, in a multiple debtor case, only one debtor – or any number fewer than all debtors – must satisfy this standard. *See In re Tribune Co.*, 464 B.R. at 182. Because the Debtors were not substantively consolidated, the Plan actually consists of ten different plans, one for each of the Debtors. If separate plans did not exist for each debtor in a jointly administered proceeding then the substantive rights of the parties would undoubtedly be altered, for one impaired class of creditors would be able to speak for another impaired class of creditors who hold claims against an entirely different entity. Such an approach would vitiate the powerful voting rights that chapter 11 carefully preserves for each impaired class of creditors. To avoid this result, section 1129(a)(10) must be read, as section 102(7) allows it to be, to require the use of the *per debtor* approach.

A "cardinal rule" of statutory construction is that "a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) (citations omitted). With this principle of construction in mind, we interpret the language of section 1129(a)(10) by looking to its statutory context. Section 1129(a)(1) provides that a confirmable plan must comply with the applicable provisions of the Bankruptcy Code. Clearly, section 1129(a)(1) cannot be satisfied in a jointly administered bankruptcy case if only one or more, but fewer than all, debtors comply with the Bankruptcy Code. The same is true of section 1129(a)(3), which requires that the plan be proposed in good faith and not by any means forbidden by law. Further, subject to the cram down exception in section 1129(b), section 1129(a)(8) requires that *each* class of claims must either accept the plan or be unimpaired by the plan. These sections illustrate a consistent principle of application: all debtors must satisfy each of the confirmation requirements of section 1129(a) absent substantive consolidation. Application of this principle to section 1129(a)(10) requires that jointly administered plans be analyzed on a *per debtor*, not a *per plan*, approach.

Multi-debtor chapter 11 proceedings are often jointly administered for the convenience of the parties and the court. In some cases, the debtors are substantively consolidated. But, as noted, substantive consolidation is an equitable remedy to be used sparingly. Joint administration cannot be used to bypass the necessarily rigorous requirements for substantive consolidation. *See Reider v. Fed. Deposit Ins. Corp. (In re Reider)*, 31 F.3d 1102, 1109 (11th Cir. 1994).[10] It does not, and cannot be used to, alter or abridge parties' substantive legal rights. The *per plan* approach to section 1129(a)(10) conflates the two principles, ignores corporate separateness and allows an impaired class of claims for one debtor to speak for the creditors of another. It rests on the erroneous assumption that an enterprise of related debtors is, in fact, one debtor and, thus, a joint plan is a single plan. Such a view is contrary to long established principles of American corporate law. *See, e.g.*, *Kreisler v. Goldberg*, 478 F.3d 209, 213 (4th Cir. 2007) (citations omitted). In the absence of substantive consolidation, each debtor entity must stand on its own. And the Plan in this case expressly provided that the Debtors' estates were not being substantively consolidated.

The *per plan* approach admittedly paves a clearer path forward for confirmation. And that approach is arguably more consistent with certain acknowledged policies of chapter 11, such as

[10] Indeed, Bankruptcy Rule 1015(b), which authorizes joint administration, instructs the bankruptcy court to "give consideration to protecting creditors of different estates against potential conflicts of interest."

encouraging reorganizations and preserving jobs. Nevertheless, it is demonstrably inconsistent with the statutory text. Convenience and broad policy considerations cannot override specific chapter 11 statutory provisions. *See, e.g.*, *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 967 (2017) ("we cannot overrule Congress's judgment based on our own policy views"). In any event, the policy favoring successful reorganizations must be balanced against the substantive rights granted to creditors under the Bankruptcy Code.

Section 1129(a)(10) was intended to ensure that a debtor's plan have some creditor support. Voting plays an important role in chapter 11 proceedings, and an impaired creditor's vote is a powerful tool to force a debtor to negotiate. Adopting a *per plan* approach diminishes the value of that vote. Viewed through that lens, section 1129(a)(10) is not a technical requirement that can be glossed over, as the dissent suggests. Rather, it is a substantive protection afforded to objecting impaired creditors by Congress. If section 1129(a)(10) is interpreted as requiring only one impaired approving class *per plan* in a jointly administered case, then the statutory voting rights of objecting impaired creditors are, for all practical purposes, abrogated. Because we cannot condone such a result, we reverse the decision of the bankruptcy court.

Conclusion

For the reasons set forth herein, we REVERSE the decisions of the bankruptcy court below.

JONES, Circuit Judge, dissenting:

I respectfully dissent from both of the conclusions reached by the majority. With its holdings today, the majority allows a single creditor to dictate, if not circumscribe, the Debtors' reorganization efforts. The majority's decision is thus wholly at odds with the Debtors' ability to restructure their balance sheet while, in the process, preserving thousands of jobs and maximizing the value of their estates for the benefit of all creditors. I cannot subscribe to the majority's departure from this fundamental principle of bankruptcy jurisprudence.

I. Section 365(c)(1) Does Not Preclude a Debtor in Possession from Assuming a Non-Exclusive License of Intellectual Property

Relying on the "hypothetical test," the majority holds that a debtor in possession is precluded from assuming an executory contract under section 365(c)(1) as a matter of law where applicable law excuses the non-debtor party from performance, and the non-debtor party has not consented to assumption. The "actual test," which allows a court to determine whether the non-debtor party will *actually* be required to accept performance from, or render performance to, an entity other than the debtor or debtor in possession, better comports with well-established principles of statutory interpretation, the legislative history, and the underlying purpose of chapter 11. *See, e.g.*, *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489 (1st Cir. 1997); *accord Bonneville Power Administration v. Mirant Corp. (In re Mirant Corp.)*, 440 F.3d 238 (5th Cir. 2006) (adopting "actual test" for purposes of section 365(e)(2)).

The majority correctly identifies the plain meaning of section 365(c)(1) as the starting point. According to the majority, because the prefatory phrase "the trustee may assume or assign" in section 365(c) uses the disjunctive term "or," a debtor in possession can neither assume nor assign an executory contract under applicable law absent consent from the non-debtor party. Admittedly, when this prefatory phrase is read in isolation, the "hypothetical test" has some appeal. However, the majority's plain meaning interpretation offends a central tenet of statutory construction by producing an absurd result. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004).

By exclusively focusing on the term "or," the majority overlooks the identity of the estate representative who is actually seeking to assume the executory contract. Section 365(c)(1) provides that "the trustee" may not assume or assign an executory contract. It does not, however, say that "the debtor in possession" is precluded from doing so. *See, e.g.*, *In re Footstar, Inc.*, 323 B.R. 566, 570-71 (Bankr. S.D.N.Y. 2005). When the Bankruptcy Code refers to the trustee and the debtor in possession in the same statutory provision, as it does in sections 365(c), (e) and (f), the two terms are ascribed different meanings. The absurdity of the "hypothetical test" becomes apparent when the term "trustee" in section 365(c) is substituted with the term "debtor in possession." The statute would read, "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....*" *In re Footstar, Inc.*, 323 B.R. at 573. Section 365(c)(1) instead recognizes a distinction between the trustee and the debtor in possession by proscribing assumption by the former, but not the latter.

Even if a trustee and a debtor in possession are construed as one and the same for purposes of the prefatory phrase, the majority's interpretation fails to give effect to the statute's remaining text. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (citations omitted) (court has duty to "give effect, if possible, to every clause and word" of a statute). Section 365(c)(1) protects a non-debtor party who is protected under applicable non-bankruptcy law from having to render performance to a third-party assignee, including the trustee. The dispositive terms in section 365(c)(1) are "applicable law" and "an entity other than the debtor or debtor in possession." Where the debtor in possession seeks to assume, but not assign, an executory contract, the applicable law referenced in section 365(c)(1) is not triggered. *Summit Inv. & Dev. Corp. v. Leroux*, 69 F.3d 608, 613 (1st Cir. 1995). In the context of the present appeal, the anti-assignment exception under federal law never comes into play because Under My Thumb would not be required to render performance under the Agreement to an entity other than Development, the same entity with whom it contracted prepetition. *See, e.g.*, *Institut Pasteur*, 104 F.3d at 493-94.[11]

Given the divergence among courts as to the plain meaning, it may be that section 365(c)(1) is simply ambiguous. *See* Michelle Morgan Harner, *et al.*, *Debtors Beware: The Expanding Universe of Non-Assumable/Non-Assignable Contracts in Bankruptcy*, 13 AM. BANKR. INST. L. REV. 187, 239 (Spring 2005). The "hypothetical test" nevertheless violates a canon of construction repeatedly relied upon by the Supreme Court – the rule against surplusage. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal citations and quotations omitted) (courts should be "reluctant to treat statutory terms as surplusage in any setting" and should refrain from rendering statutory language "insignificant, if not wholly superfluous").

Section 365(f) provides that an executory contract cannot be assigned unless it is first assumed, meaning that assumption is a prerequisite to assignment. 11 U.S.C. § 365(f)(2)(A). Accordingly, Congress had no reason to include the words "or assign" in section 365(c)(1). If Congress had wanted to preclude assumption and assignment, all it needed to say in section 365(c)(1) was that the trustee "may not *assume*" (and by extension under section 365(f), may not assign) an executory contract. *See In re Cardinal Indus., Inc.*, 116 B.R. 964, 977 (Bankr. S.D. Ohio 1990). But Congress did not do that, instead electing to refer to assumption and assignment. So what exactly did Congress have in mind? The legislative history provides the answer.

When the Bankruptcy Code was initially enacted in 1978, section 365(c)(1) provided that the trustee could not "assume or assign an executory contract" if "applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering

[11] Unlike a trustee and a debtor in possession, a prepetition debtor and a debtor in possession are one and the same, meaning that an assignment from the debtor to the debtor in possession does not occur upon the commencement of a chapter 11 case. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984).

performance *to the trustee*…." Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, § 365(c)(1) (1978) (emphasis added). The legislative history to section 365(e), the companion to section 365(c), indicates that Congress was concerned with preserving the parties' benefit of their bargain. *See Institut Pasteur*, 104 F.3d at 493; S. Rep. No. 95-989, at 59 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5845. Congress, therefore, envisioned a case by case analysis, not the overly rigid and abstract "hypothetical test."

Two years later, Congress considered revisions to section 365(c) in the Bankruptcy Technical Correction Act of 1980. H.R. Rep. No. 96-1195, at 57 (1980). In conjunction with that legislation, the Committee on the Judiciary published a report in which it proposed to amend section 365(c)(1) to replace "the trustee" with "an entity other than the debtor or the debtor in possession." *Id.* The report explained that:

> This amendment makes 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. Although the Bankruptcy Technical Correction Act of 1980 was not enacted at that time, Congress returned to section 365(c)(1) in 1984 by making the exact revision to section 365(c)(1) that was contemplated in 1980. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, § 362(a) (1984). The legislative history thus confirms that Congress always intended to allow a debtor in possession to assume an executory contract, notwithstanding applicable law or the lack of consent from the non-debtor party.

Finally, the "actual test" closely aligns with the purpose and policy of chapter 11. *Bildisco & Bildisco*, 465 U.S. at 528 (stating that the "[f]undamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources").[12] By considering the facts and circumstances of each case to determine whether a debtor in possession intends to actually assign an executory contract, the "actual test" balances the goal of reorganization with the rights of a non-debtor party under a contract. The present appeal represents a case in point.

Prepetition, Development and Under My Thumb entered into the Agreement for a license of Software critical to the Debtors' ongoing business operations. Development's obligations under the Agreement were fairly straightforward. All it was required to do was pay a monthly fee and refrain from sharing the Software with anyone other than its affiliates. When the Debtors filed for bankruptcy, Development had neither missed a payment nor violated any covenants under the Agreement. Or, to put it another way, Development had *never* breached the Agreement. Quite logically, as part of their reorganization efforts, the Debtors proposed to continue using this vital Software license pursuant to the terms of the Agreement. This seems more than fair, as both parties would continue to receive the benefit of their bargain under applicable non-bankruptcy law.

Yet by adopting the "hypothetical test," the majority gives Under My Thumb a right not contemplated anywhere in the Bankruptcy Code – the right to rescind the Agreement for no reason other than Development's bankruptcy filing. By doing so, the majority prefers the interests of one creditor, Under My Thumb, to the detriment of the Debtors, its employees and its other stakeholders. To make matters worse, the majority's decision transcends the present appeal. It will undoubtedly have wide ranging consequences in future chapter 11 cases, as the majority invites a non-debtor party like Under My Thumb to extort concessions in exchange for its consent

[12] For many of the same reasons explained herein, a commission impaneled by the American Bankruptcy Institute, a highly respected organization of bankruptcy professionals, to study the reform of chapter 11 of the Bankruptcy Code recently recommended that section 365(c)(1) be amended to clarify that a debtor in possession is not precluded from assuming an executory contract. *See* American Bankruptcy Institute Commission to Study the Reform of Chapter 11, 2012-2014 Final Report and Recommendations 124 (2014).

to assumption. I cannot subscribe to a holding that will unnecessarily impair, if not destroy, a debtor's opportunity to reorganize under chapter 11.

For the foregoing reasons, I respectfully decline to adopt the "hypothetical test." I would affirm the decision of the bankruptcy court.

II. Section 1129(a)(10) Only Requires Acceptance from One Impaired Class of Claims Under a Joint, Multi-Debtor Plan

Relying on an approach adopted only by the Bankruptcy Court for the District of Delaware, the majority concludes that section 1129(a)(10) requires acceptance by one impaired class of creditors for each Debtor under their joint Plan. Because the majority's interpretation is inconsistent with the plain meaning of section 1129(a)(10) as well as the underlying purpose and policy of the Bankruptcy Code, I must respectfully dissent for the second time today.

The starting point, of course, is the statute itself. As the Supreme Court has repeatedly reminded us, "[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." *Lamie*, 540 U.S. at 534 (citation and internal quotations omitted). Section 1129(a)(10) provides that "[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…." 11 U.S.C. § 1129(a)(10) (emphasis added). The text of section 1129(a)(10) is clear and unambiguous. It requires that only *one* impaired class "under the plan" accept "the plan." *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (In re Transwest Resort Props., Inc.)*, 881 F.3d 724, 729 (9th Cir. 2018).

Notwithstanding the statute's express language, the majority strains to modify section 1129(a)(10) so that it reads "at least one class of claims *of each debtor* that is impaired under the plan has accepted the plan." The majority essentially expands section 1129(a)(10) to include a prepositional phrase not found anywhere in the text. *Contra Hartford Underwriters Ins. Co. v.*

Union Planters Bank, N.A., 530 U.S. 1, 6 (2000) (internal quotations omitted) (Congress "says in a statute what it means and means in a statute what it says there."). The majority's interpretation is therefore contrary to the plain meaning of section 1129(a)(10), which does not distinguish between creditors of different debtors or even between a single plan and a joint, multi-debtor plan, like the Plan at issue in this appeal. *In re Transwest Resort Props., Inc.*, 881 F.3d at 729.

In a further contortion of section 1129(a)(10), the majority imports section 102(7), which provides that when interpreting sections of the Bankruptcy Code, "the singular includes the plural." By changing the singular to the plural as the majority insists, section 1129(a)(10) reads "[i]f classes of claims are impaired under the plans, at least one of the classes that are impaired under the plans has accepted the plans…." The majority concludes that this modification requires each Debtor to obtain acceptance from one of its impaired classes of creditors. However, even if section 1129(a)(10) is modified to transform the singular to the plural, the result remains the same – "at least one" of the impaired classes of the Debtors' creditors has still accepted the plans.[13] The court's inquiry should end here.

Without any attempt to first explain why the *per plan* approach renders section 1129(a)(10) ambiguous or absurd, the majority seeks refuge in the canon of construction providing that a statute, and the Bankruptcy Code in particular, should be read as a comprehensive scheme. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (citations omitted). The majority proclaims that sections 1129(a)(1), (3) and (8) irreconcilably conflict with the *per plan* approach.

[13] Congress, after all, does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) (citations omitted).

The majority is generally correct that every effort should be made to preserve a statutory scheme. However, it is unnecessary to do so with respect to section 1129(a), as no conflict exists between section 1129(a)(10) and the other referenced subsections of section 1129. *See Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Executives Ass'n*, 491 U.S. 490, 510 (1989) (citation omitted) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."). Each subsection of section 1129(a) is phrased differently. Moreover, Congress clearly knew how to cross-reference the subsections of 1129(a), as evidenced by sections 1129(a)(8) and 1129(b). Yet Congress did not do so with respect to section 1129(a)(10), thereby establishing a mutually exclusive requirement for confirmation. *See In re Transwest Resort Props., Inc.*, 881 F.3d at 730. It is therefore difficult to understand why the majority concludes that the *per plan* approach renders the statutory scheme in irreconcilable conflict with any other subsection of 1129(a).

The majority further maintains that the *per debtor* approach is supported by the purpose of section 1129(a)(10). While I agree that section 1129(a)(10) is designed to ensure that at least some creditors support the plan, the majority "rewrit[es] the law under the pretense of interpreting it." *King v. Burwell*, 135 S. Ct. 2480, 2506 (2015) (Scalia, J., dissenting). For reasons already explained, the plain meaning contemplates creditor support by requiring that one impaired class accepts a joint, multi-debtor plan.[14] And, there is simply no evidence that Congress sought to give an unsecured creditor, like Under My Thumb, a confirmation veto power under section 1129(a)(10) solely because it controls the sole impaired class of Development. *See In re LOOP*

[14] The decision cited by the majority apparently in support of this conclusion, *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 243-44 (3d Cir. 2004), says nothing about creditor support from "each debtor" for purposes of satisfying section 1129(a)(10) in the context of a joint, multi-debtor plan.

76, LLC, 442 B.R. 713, 722 (Bankr. D. Ariz. 2010). Here, the *per plan* approach becomes even more compelling because all but one of the Debtors' impaired classes accepted the Plan.

The majority next turns to general corporate law as further support for the *per debtor* approach. The majority concludes that because the corporate formalities of each entity must be respected, the Debtors and their estates would need to be substantively consolidated in order to satisfy section 1129(a)(10). I disagree for several reasons.

First, substantive consolidation, a judicially-created, equitable doctrine, is irrelevant to a technical requirement like section 1129(a)(10). *See In re Rhead*, 179 B.R. 169, 177 (Bankr. D. Ariz. 1995) (finding that section 1129(a)(10) provides no substantive rights to creditors). To the extent that the majority is implicitly suggesting a joint, multi-debtor plan constitutes *de facto* substantive consolidation, it does no such thing. Second, the Debtors' business has always been managed on an integrated basis, thereby rendering it more than appropriate for the Debtors to propose a joint Plan. *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). In fact, all creditors, regardless of the Debtor against whom their claims arose, would receive distributions under the Plan from the Debtors' reorganized business enterprise on the whole. Third and finally, in the event that Under My Thumb was prejudiced under the Plan, Under My Thumb could have objected on numerous other grounds. Under My Thumb had no basis to do so, however, as it was in no way prejudiced under the Plan.

In an attempt to lend some credence to its holding, the majority emphasizes that its decision is consistent with a "handful of opinions" from one of the country's leading business bankruptcy courts. As innocent as the majority's syntax may be, it is somewhat misleading to imply that the *per debtor* approach has been widely accepted. In reality, only the Delaware bankruptcy court has endorsed the *per debtor* approach. Admittedly, the Delaware bankruptcy court is frequently cited with respect to complex issues of commercial bankruptcy law. *Accord Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1695 (2015) ("[B]ankruptcy courts … rule correctly most of the time."). However, the majority of courts, including a unanimous panel of the only circuit court to have addressed the issue, find the *per plan* approach more persuasive. *See In re Transwest Resort Props., Inc.*, 881 F.3d at 729-30; *In re Transwest Resort Props., Inc.*, 554 B.R. 894, 899-901 (D. Ariz 2016); *In re Charter Commc'ns*, 419 B.R. at 266; *In re Station Casinos, Inc.*, 2010 WL 11492265, at *23 (Bankr. D. Nev. Aug. 27, 2010); *In re SPGA, Inc.*, 2001 WL 34750646, at *6-7 (Bankr. M.D. Pa. Sept. 28, 2001).

Finally, the majority recognizes, but offers little to dispel, the purpose and policy considerations that favor the *per plan* approach. *See Toibb v. Radloff*, 501 U.S. 157, 163-64 (1991); H.R. Rep. No. 95-595, at 5 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6179 ("The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders."). Under My Thumb, like all stakeholders, is far better off under the Plan that it vehemently opposes than it would be in a liquidation scenario under chapter 7. Indeed, it is undisputed that the proposed 55% distribution greatly exceeds liquidation value. Moreover, the Plan permits Under My Thumb to retain its monthly revenue stream under the Agreement.

By adopting the *per debtor* approach, the majority has authorized Under My Thumb, a party with circumspect motives,[15] to hold the Debtors and their stakeholders hostage. *Contra*

[15] Because the Debtors did not seek to designate Under My Thumb's vote under section 1126(e), it is unnecessary to consider whether Under My Thumb lacked good faith when it voted to reject the plan.

Young v. Higbee Co., 324 U.S. 204, 211 (1945) (stakeholder should not be permitted to "obstruct a fair and reasonable reorganization in the hope that someone would pay them more…"). Ultimately, the majority's decision may render the Debtors' reorganization efforts impossible as a matter of law. The Debtors may be forced to liquidate in chapter 7 or, at the very least, dismiss Development's case to the detriment of the Debtors' business enterprise on the whole, as well as its thousands of employees, trade creditors and other stakeholders. This cannot be what Congress had in mind when it enacted section 1129(a)(10).[16]

For the foregoing reasons, I cannot adopt the majority's interpretation of section 1129(a)(10). I would therefore affirm the decision of the bankruptcy court on this issue.

[16] Indeed, the utility of section 1129(a)(10) has been called into doubt, as the ABI Chapter 11 Reform Commission recommended that it be abolished as part of any amendments to the Bankruptcy Code. *See* American Bankruptcy Institute Commission to Study the Reform of Chapter 11, 2012-2014 Final Report and Recommendations 257-61 (2014).