IN THE

Supreme Court of the United States

OCTOBER TERM, 2019

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

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

V.

UNDER MY THUMB, INC., *RESPONDENT*.

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

BRIEF FOR RESPONDENT

59R

Counsel for Respondent

QUESTIONS PRESENTED

1. Whether 11 U.S.C. § 365(c)(1) permits a debtor in possession to assume an executory contract over the objection of the non-debtor party to such contract 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.

LIST OF PARTIES

The caption of the case identifies: Respondent/Creditor Under My Thumb, Inc. and Petitioner/Debtors Tumbling Dice, Inc. *et al*. The Debtors in this case include: (i) Tumbling Dice, Inc., (ii) Tumbling Dice Atlantic City, LLC, (iii) Tumbling Dice Chicagoland, LLC, (iv) Tumbling Dice Detroit, LLC, (v) Tumbling Dice Lake Tahoe, LLC, (vi) Tumbling Dice Las Vegas, LLC, (vii) Tumbling Dice New Orleans, LLC, (viii) Tumbling Dice Palm Springs, LLC, (ix) Tumbling Dice Tunica, LLC, and (x) Tumbling Dice Development, LLC.

Corporate Disclosure Statement for the Respondent: Under My Thumb, Inc. has no parent company. Under My Thumb, Inc. is privately owned, there is no publicly held company owning 10% or more of Under My Thumb, Inc.'s stock.

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The United States Bankruptcy Court for the District of Moot and the Bankruptcy Appellate Panel for the Thirteenth Circuit ruled in favor of the Debtor on both issues. R. at 3. The Thirteenth Circuit Court of Appeals held in favor of Under My Thumb, Inc. on both issues. *Id*. Specifically, the court found that: (I) Section 365(c)(1) precludes assumption of a non-exclusive license of intellectual property over the objection of the licensor; and (II) Section 1129(a)(10) requires acceptance from an impaired class of claims of each debtor under a joint, multi-debtor plan. *Id*. This Court then granted Debtor's petition for writ of certiorari. R. at 1.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS INVOLVED

The relevant federal statutes involved in this case are 11 U.S.C. § 365(c) and 11 U.S.C. § 1129(a)(10) of the United States Bankruptcy Code. The pertinent text of these provisions are attached in Appendix A.

STATEMENT OF THE CASE

I. Factual Background

Development, LLC ("Development") is a subsidiary of Tumbling Dice, Inc. ("TDI") and serves the limited purpose of acting as the licensee under a non-exclusive software license agreement with Under My Thumb ("UMT" or the "Respondent"). R. at 4. In 2008, Development entered into a contract with UMT to create a software system that would modernize the Debtor's loyalty program. *Id*. Under My Thumb incurred approximately $10 million in costs to create the software. *Id*. As part of the contract, Development agreed to reimburse Under My Thumb $7 million of the $10 million cost incurred pursuant an unsecured promissory note ("R&D Note"). *Id*. In June 2015, payments on the R&D Note abruptly stopped; UMT is still owed more than $6 million on the $7 million R&D Note. *Id*. at 6.

After completion of the software, Development entered into a license agreement ("the Agreement") with UMT. *Id*. at 5. Under the Agreement, UMT granted Development a non-exclusive license to use UMT's copyrighted, patented software. *Id*. The Agreement, which only allowed Development to extend the benefits to its affiliated entities (who were not parties to the Agreement), broadly prohibited Development from assigning or sublicensing without UMT's express written consent. *Id*. In exchange for the license, Development agreed to pay UMT a monthly royalty based on the amount of revenue generated by the loyalty program. *Id*.

TDI is a holding company formed to own the membership interests of its nine wholly owned subsidiaries. In addition to Development, TDI has eight subsidiaries; each of which operates a separate luxury casino and resort in a different geographic region. (each an "Operating Debtor" and, collectively, the "Operating Debtors") *Id*. at 4. In December 2011, Start Me Up, Inc. ("SMU") acquired the stock of TDI through a leveraged buy-out. As part of the transaction, TDI

and the Operating Debtors received a $3 billion loan from a group of syndicated lenders (the "Lenders"). *Id*. at 6. In order to obtain the loan, TDI and the Operating Debtors granted first priority liens on their assets. *Id*. Notably, Development is not liable to the Lenders; Development did not grant liens on its assets or participate in the transaction as a borrower or guarantor. *Id*.

On January 11, 2016, TDI, the Operating Debtors, and Development (collectively "the Debtors" or "Petitioners"), each commenced voluntary chapter 11 cases. *Id*. at 3. After considering potential conflicts of interest to creditors of the separate bankruptcy estates, each of the Debtors' individual cases were jointly administered pursuant to Bankruptcy Rule 1015(b). *Id*. As of the petition date, TDI and each of the Operating Debtors—but not Development— jointly and severally owed the Lenders approximately $2.8 billion as a secured debt obligation. *Id.* The Debtors also owed an estimated $120 million to their unsecured creditors, including UMT. *Id*. During pre-plan negotiations, the bankruptcy court ordered non-binding mediation involving the Debtors, SMU, the Lenders, the unsecured creditors committee, and other stakeholders. *Id*. Notably, Under My Thumb was not given the opportunity to participate in the court ordered mediation process. *Id*.

The mediation resulted in a deal, which was detailed in a plan support agreement. *Id*. at 6-7. The plan support agreement provided that TDI and the Operating Debtors would restructure their secured debt obligation to the Lenders by extending payments over twenty years at a lower interest rate. *Id*. at 7. As part of the plan support agreement, SMU would retain its equity interest in exchange for providing $66 million to fund a 55% distribution to the Debtors' unsecured creditors, including Development's unsecured obligation to UMT. *Id*.

In August 2016, the Debtors filed the disclosure statement, a single joint plan (the "Plan") on behalf of all 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." *Id*. The Plan also proposed assumption of UMT's licensing agreement with Development under sections 365 and 1123(b)(2) of the Bankruptcy Code. *Id*.

Contrary to the plan support agreement, which detailed SMU's promise to provide $66 million for distribution to unsecured creditors, the disclosure statement revealed that SMU would only provide $31 million to fund the unsecured distribution. *Id*. The Plan further provided that SMU would only retain 49% of the voting shares in TDI upon confirmation. *Id*. at 8. A private equity group that owns a direct competitor of UMT, Sympathy for the Devil LP ("SFD"), would receive the remaining 51% of shares and several seats on TDI's board of directors in exchange for funding the remaining unsecured distribution. *Id*. at 7-8.

II. Procedural History

This appeal concerns the jointly administered chapter 11 bankruptcy cases of Tumbling Dice, Inc. and its affiliated debtors. On January 11, 2016, the Debtors commenced voluntary cases under chapter 11 of the Bankruptcy Code. *Id*. at 3. The cases were jointly administered for the convenience of the parties and the court pursuant to Bankruptcy Rule 1015(b). *Id*. Under My Thumb timely objected to the Plan. *Id*. at 8. The bankruptcy court held in favor of the Debtors on both questions. *Id*. at 9. The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the rulings of the bankruptcy court. *Id*. The Thirteenth Circuit Court of Appeals reversed on both issues in favor of UMT. *Id*. at

STANDARD OF REVIEW

The facts of the case are not in dispute by the parties. *Id*. at 3 n.3. The Thirteenth Circuit held first, that § 365(c) of the United States Bankruptcy Code precludes a debtor in possession from assuming a non-assignable executory contract over the non-debtor party to the contract's objection and second, that when a class of claims is impaired under a joint multi-debtor plan, § 1129(a)(10) requires acceptance from at least one impaired class of each debtor are both conclusions of law, which are reviewed *de novo*. *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit Court of Appeals correctly held that § 365(c) prohibits assumption of an executory contract over the objection of a non-debtor party when the parties stipulated that the contract could not be assigned under otherwise applicable non-bankruptcy law. Under the plain language of § 365(c), a debtor in possession may not assume an executory contract when applicable non-bankruptcy law would excuse a non-debtor party to the contract from rendering performance to or accepting performance from an entity that was not a party to the original contract. Therefore, the literal text of § 365(c) creates a "hypothetical test" which provides that a debtor in possession cannot assume an executory contract it cannot assign, absent non-debtor party consent. In the present case, Under My Thumb has not consented to assignment or assumption when the Agreement broadly prohibited assignment and Under My Thumb objected to the Debtors' proposed assumption of the license.

The literal text of § 365(c) should be applied using the "hypothetical test" because the text of the statute is unambiguous and its literal application does not violate the statutory construction rules against surplus and ineffective language. The legislative history of § 365(c) does not warrant deviating from the plain language of the statute to form a judicially created "actual test," which

alters the language of the statute to read "a trustee may assume, but not assign an executory contract." Bankruptcy policy is formed by Congress, who is tasked with enacting the provisions of the Bankruptcy Code. Additionally, the Bankruptcy Code seeks to balance competing interests rather than simply facilitating easy reorganizations.

Furthermore, the Thirteenth Circuit Court correctly held that § 1129(a)(10) requires acceptance from an impaired class of claims of each debtor under a joint, multi-debtor plan. Under the Bankruptcy Code, a court may confirm a plan of reorganization only if the plan meets certain statutory requirements, and among these requirements is that if a class of claims is impaired, at least one impaired class accepts the plan. The plain language of § 1129(a)(10) supports the "per debtor" approach requiring each debtor in a joint administered, multi-debtor plan to fulfill the statutory requirement. First, while the term "plan" is referred to in the singular in § 1129(a)(10), this does not mean it is always interpreted in the singular form because of the statutory canon of construction in § 102(7) "the singular includes the plural." Second, other provisions in the Bankruptcy Code and the legislative history indicate that § 1129(a)(10) was written with the intent to apply on a "per debtor" basis.

Finally, while the policy favoring smooth reorganization is desirable, it cannot override the text of the statute or the substantive rights of the parties. The "per plan" approach does just that. Substantive consolidation and joint administration are two different courses of action. Substantive consolidation pools all debtors' assets together and then directs all creditors claims towards the "new" debtor, while joint administration is a tool for administrative and procedural convenience where the parties retain their separateness. The "per plan" approach renders this distinction meaningless by allowing the Debtors to ignore entity separateness. It also assumes that all impaired creditors are similarly situated regardless of which debtor they are related. This removes all

protections of the creditors' rights from the process, which goes against the structure and intent of the statute.

ARGUMENT

I. THE THIRTEENTH CIRCUIT PROPERLY HELD THAT THE DEBTOR MAY NOT ASSUME OR ASSIGN THE LICENSE ABSENT UMT'S CONSENT.

Subject to court approval, the Bankruptcy Code (the "Code") authorizes a bankruptcy trustee to assume executory contracts. 11 U.S.C. § 365(a) (2018).[1] The Code also allows a trustee to assign an assumed executory contract. 11 U.S.C. § 365(f). Both rights, however, are subject to the limitations placed upon them by section 365(c). *See In re Catapult Ent., Inc.*, 165 F.3d 747, 749 (9th Cir. 1999) (explaining the mechanics of 11 U.S.C. § 365) ; *see also In re West Electronics, Inc.*, 852 F.2d 79, 82 (3d Cir. 1988).

Section 365(c) restricts the trustee's right to "assume or assign" an executory contract when applicable law "excuses a party, other than the debtor . . . from accepting performance from . . . an entity other than the debtor or debtor in possession." 11 U.S.C. § 365(c). The subsection applies when otherwise applicable non-bankruptcy law provides that, regardless of contractual provisions, an executory contract may only be assigned with the non-debtor party's consent. *See In re West Electronics, Inc.*, 852 F.2d at 83 (explaining that "applicable law" means non-bankruptcy law).

In the present case, the chapter 11 debtor in possession is attempting to assume UMT's non-exclusive software license with Development over UMT's objection. R. at 8. The Agreement is an executory contract because "performance remains due to some extent on both sides." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1658 (2019) (citing *NLRB v. Bildisco*

[1] Unless otherwise indicated, "sections" or "subsections" refer to sections of the United States Bankruptcy Code, found in Title 11 of the United States Code, most recently published in 2018.

& Bildisco, 465 U. S. 513, 522 n.6 (1984)).[2] Even though the Agreement contains a provision broadly prohibiting Development from assigning or sublicensing its interest without UMT's express written consent (R. at 8), subsection 365(c)(1) instructs that the trustee's power to "assume or assign" is determined by "applicable law" rather than contractual provisions. 11 U.S.C. § 365(c). The relevant applicable non-bankruptcy law is federal intellectual property law because the Agreement concerns a non-exclusive license of Under My Thumb's copyrighted, patented software. Significantly, federal patent law protects the right of Under My Thumb, as a patent holder, to control which entities can use its patented software. *See In re Supernatural Foods, LLC*, 268 B.R. 759, 798 (Bankr. M.D. La. 2001) (discussing 35 U.S.C. § 154, which provides: "Every patent shall contain . . . the right to exclude others from making, using, or selling" the patented invention.")

Importantly, Petitioner has conceded that the Agreement is non-assignable because applicable non-bankruptcy law excuses Under My Thumb from accepting performance under the Agreement from any entity other than Development and its affiliates. R. at 8 n.7. Therefore, the issue before the court is the proper interpretation and application of the text of section 365(c). (the "statute" or the "subsection"). Significantly, the overwhelming majority of circuit courts to address this issue—all but one—favor the "hypothetical test" created by applying the literal text of the statute. *See In re Sunterra Corp.*, 361 F.3d 257 (4th Cir. 2004); *In re Catapult Entertainment, Inc.*, 165 F.3d 747 (9th Cir. 1999); *In re James Cable Partners, L. P.*, 27 F.3d 534 (11th Cir. 1994) (per curiam); *In re West Electronics, Inc.*, 852 F.2d 79 (3d Cir. 1988); *but see Summit Invest. & Dev.*

[2] Under the Agreement, Under My Thumb has an ongoing obligation to allow Development and its affiliates to use its software; Development and its affiliates have an ongoing obligation to pay Under My Thumb a royalty.

Corp. v. Leroux, 69 F.3d 608 (1st Cir. 1995).[3] Following the weight of circuit court authority, the Thirteenth Circuit properly interpreted and applied the language of section 365(c).

A. The plain language of Section 365(c)(1) provides that a non-exclusive intellectual property license cannot be assumed or assigned.

The Court has repeatedly noted that statutory interpretation analysis begins with the language of a statute. *See Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253–54 (1992) (noting that the statutory language is the "cardinal canon" to be addressed "before all others"). In relevant part, Section 365(c) provides:

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

11 U.S.C. § 365 (2018) (emphasis added).

Several bankruptcy courts and one circuit court depart from the plain language of section 365(c). These courts interpret the statute's disjunctive "or" as if it were conjunctive; applying the statute as if it read "the trustee may not assume *and* assign any executory contract…." *See In re Sunterra Corp.*, 361 F.3d at 268–69 (reversing lower court's application of the "actual test"). Under this approach, which is referred to as the "actual test," courts consider, on a case-by-case basis, whether a non-debtor party to an executory contract is actually being forced to accept performance from an entity other than the original party to the contract. *Institut Pasteur v.*

[3] The Fifth Circuit has adopted the "actual test" for section 365(e)(2). *See In re Mirant Corp.*, 440 F.3d 238 (5th Cir. 2006).

Cambridge Biotech Corp., 104 F.3d 489, 493 (1st Cir. 1997). The actual test essentially treats 365(c) as if the statute provided that a "trustee may assume, but not assign" rather than giving effect to the actual language of the statute, a "trustee may not assume or assign." *In re Catron*, 158 B.R. 629, 635 (E.D. Va. 1993), *aff'd*, 25 F.3d 1038 (4th Cir. 1994).

Courts applying the "actual test" overlook principles of statutory interpretation and improperly distort the language of section 365(c).

i. A literal reading of § 365 (c) prohibits Petitioner from assuming the Agreement.

The Thirteenth Circuit properly interpreted and applied the text of 365(c). In a statutory interpretation case, the Court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004). Moreover, "when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Est. of Cowart v. Nicklos Drilling Co*., 505 U.S. 469, 475 (1992).

The plain language of 365(c) creates an objective "hypothetical test" for determining whether a trustee can assume an executory contract, rather than a case-by-case approach. *See In re James Cable Partners, L.P.*, 27 F.3d at 537. (noting that section 365(c) poses a 'hypothetical question'). Specifically, a literal application of the statute prohibits the trustee from assuming an executory contract when: 1) the contract cannot be assigned under applicable law, and 2) the non-debtor party to the contract does not consent to its assumption. *In re Catron*, 158 B.R. at 633. Therefore, the text of the statute prohibits a debtor in possession from assuming an executory contract if it lacks the authority to assign the contract. *See In re Catapult Ent., Inc.*, 165 F.3d at 748 (holding that under 11 U.S.C. § 365(c), a debtor in possession could not assume non-exclusive patent licenses over a non-debtor party's objection); *see also In re Sunterra Corp.*, 361 F.3d at 260

(holding the same with respect to a non-exclusive license of copyrighted software). In other words, the debtor in possession may not assume an executory contract if it lacks the authority to assign the contract to a hypothetical third party, even if the debtor in possession has no actual intention of assigning the contract. *Id*.

The facts of the present case are almost identical to the *Sunterra* and *Catapult* cases. Petitioner, similar to the debtor in possession in the *Sunterra* and *Catapult* cases, is attempting to assume a non-exclusive license of Under My Thumb's copyrighted and patented software, over Under My Thumb's objection. R. at 8. There is one notable difference between the present case and the *Sunterra* and *Catapult* cases; here, as noted above, Petitioner has already conceded it would not have the power to assign the Agreement outside of bankruptcy. R. at 8 n.7. As in *Sunterra* and *Catapult*, both elements prohibiting assumption under the hypothetical test have been satisfied. *See In re Catapult Ent., Inc.*, 165 F.3d 748; *see also In re Sunterra Corp.*, 361 F.3d 260. The Agreement is non-assignable and UMT has not consented to assumption. R. at 8.

Therefore, a literal application of 365(c) prohibits Petitioner from assuming the Agreement. The Thirteenth Circuit properly applied the statute to the facts of this case.

ii. The restriction of § 365(c) applies to a chapter 11 debtor in possession.

The term "trustee" as used in § 365(c) includes a chapter 11 debtor in possession. The term "debtor in possession" refers to a debtor in a chapter 11 case for which a trustee has not been appointed. *In re Cybergenics Corp.*, 226 F.3d 237, 243 (3d Cir. 2000); *See* 1101(1). "The terms 'trustee' and 'debtor in possession,' as used in the Bankruptcy Code, are essentially interchangeable". *In re Cybergenics Corp.*, 226 F.3d at 243 (internal citations omitted). It is appropriate to read the term "trustee" to include a debtor in possession because a "debtor in possession generally has all the rights, powers, and duties of a trustee." *In re James Cable Partners,*

L.P., 27 F.3d at 537; *see Wolf v. Weinstein,* 372 U.S. 633, 649 (1963) ("Moreover, the duties which the corporate Debtor in possession must perform during the proceeding are substantially those imposed upon the trustee....").

The Bankruptcy Code is replete with examples of provisions where the use of "trustee" includes a debtor in possession. For example, the sections governing avoidance power only authorizes "the trustee" to avoid certain transactions. Nevertheless, courts generally accept that a debtor in possession also has those powers. *See In re PWS Holding Corp.*, 303 F.3d 308, 314 (3d Cir. 2002) (noting that although Section 544(b) refers only to a trustee, and does not include a "debtor in possession," the provision necessarily refers to both trustees and debtors in possession.)

Courts applying section 365(c) in a chapter 11 context generally assume that the statute applies to debtors in possession and trustees alike. *See In re Catapult Ent., Inc.*, 165 F.3d at 750 (noting that it is "well-established that § 365(c)'s use of the term 'trustee' includes Chapter 11 debtors in possession"); *see also In re Pioneer Ford Sales, Inc*., 729 F.2d 27, 28 (1st Cir. 1984) (providing the relevant language of 365(c): "The trustee [or debtor in possession] may not assume or assign . . ."). Significantly, the only circuit court to expressly apply the "actual test" to section 365(c), the First Circuit Court of Appeals, recognized section 365(c)'s use of the term trustee includes a chapter 11 debtor in possession. *See Institut Pasteur*, 104 F.3d at 492 n.7.

Nevertheless, at least one bankruptcy court applied the actual test, relying on section 365(c)'s use of "trustee" rather than "debtor in possession." *In re Footstar, Inc.*, 323 B.R. 566, 570 (Bankr. S.D.N.Y. 2005); *see In re Aerobox Composite Structures, LLC,* 373 B.R. 135 (Bankr. D.N.M. 2007) (applying similar reasoning). Petitioner may attempt to argue that it is absurd to interpret the term trustee to include a debtor in possession in section 365(c). *See* R. at 23 (The Thirteenth Circuit dissent below: reasoning that the application of 365(c) to a debtor in possession

produces an absurd result and citing the *Footstar* case). However, when the plain language of section 365 is considered in context, it is reasonable to interpret the section's use of the term trustee to include a debtor in possession.

A debtor in possession may exercise the rights of a trustee, "[s]ubject to any limitations on a trustee serving in a case under" chapter 11 of the bankruptcy code. 11 U.S.C. § 1107(a). The "limitations" referred to in section 1107(a) mean that a "debtor in possession must meet the same substantive criteria as a trustee" when exercising the rights of a trustee under the Bankruptcy Code. *In re Pullman Const. Industries, Inc.*, 132 B.R. 359, 363 (Bankr. N.D. Ill. 1991).

In the present case, the Debtors are attempting to exercise the trustee's right to assume an executory contract provided by section 365(a). 11 U.S.C. § 365(a). In relevant part, section 365(a) states "[e]xcept as provided . . . in *subsections* (b), ***(c)***, and (d) of this section, *the trustee* . . . may assume or reject any executory contract . . . of the debtor." *Id.* (emphasis added). Significantly, section 365(a) grants authority solely to "the trustee." Thus, the Debtors may only attempt to assume an executory contract because section 1107(a) authorizes a debtor in possession to exercise the rights and powers of a trustee. *See In re James Cable Partners, L.P.*, 27 F.3d at 537 (reasoning that a debtor in possession may assume executory contracts under section 365(a) because the bankruptcy code grants a debtor in possession the rights, powers, and duties of a trustee). Therefore, the Debtors are "subject to the limitations" that section 365(c) places on a trustee's right to assume an executory contract. *See In re Catron*, 158 B.R. at 632 (concluding that "[s]ection 1107(a) makes clear that Section 365(c) also applies to a DIP."); 11 U.S.C. § 1107(a); 11 U.S.C. § 365(a) (providing a trustee may assume any executory contract of the debtor "except as provided in . . . subsection (c)" of section 365).

Moreover, the Debtors proposed assumption of Under My Thumb's executory contract with Development as part of the Plan. R. at 7. Section 1123 dictates permissible contents of a chapter 11 Plan. 11 U.S.C. § 1123. Specifically, assumption, rejection, or assignment of an executory contract in a chapter 11 Plan is expressly subject to section 365. 11 U.S.C. § 1123(b)(2). As the proponent of this chapter 11 Plan, the Debtors must ensure that the proposed assumption of the Agreement satisfies the requirements of 365.

In conclusion, the restrictions of section 365(c) apply to a debtor in possession attempting to assume an executory contract by operation of 1107(a). The Debtors' proposed assumption of the Agreement is subject to the requirements of subsection (c).

iii. Development must satisfy the requirements of § 365(c) to assume the Agreement over Under My Thumb's objection.

Under My Thumb has not consented to assignment or assumption of the Agreement. Petitioner may attempt to argue that UMT pre-consented to assignment in the Agreement. Several courts have held that section 365(c)(1) is not effective when a non-debtor party pre-consents to assignment. *See In re Midway Airlines, Inc.*, 6 F.3d 492 (7th Cir. 1993); *see also Supernatural Foods,* 268 B.R. at 804–805. Notably, the contracts at issue in those cases permitted assignment *without regard to the identity of assignees* in situations involving a sale of substantially all assets, in the *Supernatural Foods* case, or by a bankruptcy trustee, in the *Midway Airlines* case. *In re Hernandez*, 285 B.R. 435, 441 (Bankr. D. Ariz. 2002) (emphasis added). Arguably, the non-debtor parties in *Supernatural Foods* and *Midway Airlines* "gave up any interest in the identity of the assignees, thereby effectively removing the contracts from the protections otherwise afforded to them under 'applicable law' and § 365(c)(1), to control the identity of assignees." *Id*.[4]

[4] Respondent still asserts that a prospective contract provision cannot override applicable law that prohibits assignment under section 365(c). However, the Agreement is still distinct from even the broadest consent definition.

There is no circumstance where the Agreement permits assignment regardless of the identity of the proposed assignee. R. at 5. Unlike the cases of *Supernatural Foods* and *Midway Airlines*, the Agreement prohibits Development from assignment or sub-licensing without UMT's express written consent. *Id*. Moreover, the Agreement only allows Development to "extend the benefits" of the software license to its affiliates. *Id*.

The present case is more similar to *In re Hernandez*. In *Hernandez*, the licensee had the power to assign his rights to an entity he "wholly-owned or controlled." *In re Hernandez*, 285 B.R. at 441. The court concluded that there was "no indication that in pre-consenting to [such a limited] assignment the Licensor waived its rights under federal patent law to control the identity of its licensees." *Id*. The court held that 365(c) applied to the license at issue because the licensor merely permitted the debtor to change the form in which the license was held; not the identity of the licensee. *Id*. at 435. Essentially, allowing the debtor to assign his rights to a corporation he owned did not provide consent to an outright assignment.

The facts of the present case are even stronger than *Hernandez*. The Agreement does not allow Development to "assign" rights to its affiliates; it merely allows Development's affiliates to benefit from using UMT's software without being sued for patent infringement. Even if Development could assign the Agreement to an affiliated entity, that would only evidence consent to a change in the form in which the license was held, not the identity of the licensee. *See In re Hernandez*, 285 B.R. at 441.

Similarly, UMT has not consented to Petitioner's proposed assumption of the Agreement. R. at 8. As noted above, the present case is not like *Midway Airlines*, where the contract expressly contemplated "assumption or assignment" by a bankruptcy trustee. *In re Midway Airlines*, *Inc.*, 6 F.3d at 496. In *Midway Airlines*, the contract explicitly allowed "valid assumption or assignment"

under section 365 by a bankruptcy trustee or the airline as a debtor in possession. *Id*. The *Midway Airlines* court did not find implied pre-consent. The court instead reasoned that an express contract provision waived non-assignment protections available under otherwise applicable law and section 365(c). The Agreement contains no such provision; rather than providing consent to this assumption, UMT has objected.

In sum, UMT has only consented to allow Development's affiliates to benefit from the Agreement. UMT has not waived its protections against assignment under applicable law. To the contrary, UMT explicitly reserved the right to control the identity of its licensee under the Agreement by requiring Development to obtain express written consent to assign or sublicense. R. at 5. Therefore, Petitioner must satisfy the requirements of section 365(c) to assume the Agreement.

B. The text of Section 365(c) is clear on its face.

Where the words of the statute are unambiguous, the judicial inquiry is complete. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) (internal citations omitted). A natural reading of section 365(c) reveals that the statute is unambiguous. The language of the subsection (c) is drawn in the disjunctive, rather than the conjunctive. By its plain unambiguous language, the statute prohibits a licensee from "assuming or assigning," not "assuming and assigning" an executory contract. The text of the statute should be applied as written.

B. Each term used in section 365(c) has an operative meaning under the hypothetical test.

The Court has a duty to construe a statute to give effect to every clause and word, if possible. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001). Relying on this statutory interpretation rule, Petitioner may argue that deviation from the plain text of 365(c) is necessary to avoid conflict within subsection (c). However, a close reading of section 365(c) reveals that applying the plain

language of the statute is consistent with the rule against surplusage. *In re Catapult Ent., Inc.*, 165 F.3d at 752.

The terms of the statute make clear that it addresses two legally distinct events; "the trustee may not assume or assign . . ." *Id.* Additionally, an executory contract must be assumed before it can be assigned. 11 U.S.C. § 365(f)(2)(A). Some courts conclude that if Congress intended to prohibit assumption, the phrase "or assign" would be unnecessary because a bar on assumption already prohibits subsequent assignment. These courts reason that Congress employed the "assume or assign" language to accommodate different treatment of a bankruptcy trustee and a debtor in possession. *See* R. at 24 (dissent below citing *In re Cardinal Indus. Inc.*, 116 B.R. at 977). Relying on the reasoning of these courts, Petitioner may attempt to argue that the inclusion of "or assign" only makes sense if the plain language of 365(c) is abandoned in favor of the case-by-case analysis of the actual test.

However, that argument ignores the language of 365(c) in favor of a result oriented approach. Specifically, "[the] argument founders on its initial assumption: that nonassignability of a contract is sufficient as a matter of law to preclude assumption by the trustee or the debtor in possession" under the hypothetical test. *In re Catron*, 158 B.R. at 636. The text of section 365(c) precludes assumption of an executory contract "if" two conditions are met: 1) the contract is non-assignable, AND; 2) the non-debtor contract party "does not consent *to such assumption* . . ." *Id.* at 633; 11 U.S.C. § 365(c)(1)(B) (emphasis added). While non-assignability is necessary to preclude assumption under the "hypothetical test," it is not sufficient; the non-debtor party can still consent to the assumption. *In re Catron*, 158 B.R. at 636. If the non-debtor party consents to the assumption of a non-assignable executory contract, the effectiveness of the "or assign" language

under the hypothetical test becomes apparent. *Id*. The "or assign" language protects the non-debtor party's ability to object to the assignment of a previously assumed contract. *See id*.

The plain language of 365(c) demonstrates that Congress intended for the subsection to address both assumption and assignment. As noted above, assumption and assignment are legally distinct events. *See In re Catapult Ent., Inc.*, 165 F.3d at 752.[5] The use of the phrase "or assign" coupled with the express language of 365(c)(1)(B) makes clear that separate consent is required for the assignment of a previously assumed executory contract. *See id*. Not only does the "assume or assign" language appear in the prefatory clause of the statute, it also appears in the subpart detailing non-debtor party consent. *See* 11 U.S.C. § 365(c) ("The trustee may not *assume or assign* any executory contract . . . if . . . [the non-debtor] party does not consent to such *assumption or assignment*") (emphasis added). Accordingly, the hypothetical test requires the trustee or debtor in possession to obtain consent for both actions separately. *See id.*; *see also In re Catron*, 158 B.R. at 636. Therefore, the hypothetical test gives full effect to the phrase "or assign" because the non-debtor party may consent to assumption of a contract, while objecting to its subsequent assignment. *See In re Catron*, 158 B.R. at 636 (reasoning that the "or assign" language comes into play after a non-debtor consents to assumption under the hypothetical test).

The actual test deviates from the text of 365(c) based on the premise that the language of the statute is ambiguous or that its literal application renders statutory phrases ineffective. However, the plain language of section 365(c) leads to an unambiguous result that gives effect to each phrase in the subsection; the hypothetical test. The text should be applied as written because the statute is unambiguous and does not render statutory language ineffective.

[5] The Ninth Circuit followed analogous reasoning to *Catron*, holding that the hypothetical test does not render the phrase "or debtor in possession" from subsection (c)(1) surplus. *In re Catapult Ent., Inc.*, 165 F.3d at 752 (noting that "a literal reading of subsection (c)(1) dovetails neatly" with the subsection's disjunctive introductory language [assume or assign].); *See In re Sunterra Corp.*, 361 F.3d 257, 267 (4th Cir. 2004) (adopting the same reasoning.)

i. A literal reading of subsection (c) is consistent with the rest of § 365.

The plain language of 365(c) gives full effect to the rest of section 365. Petitioner may assert that the plain language of section 365(c) is ambiguous because it creates a perceived inconsistency with 365(f)—which governs assignment of executory contracts. Section 365(f) allows the trustee to assign contracts in bankruptcy where "applicable law" would otherwise prohibit assignment. At first glance, subsection (c) seems to prevent the same assignments that subsection (f) allows. *In re Sunterra Corp.*, 361 F.3d at 266.

Nevertheless, the alleged conflict between the subsections completely disappears upon closer evaluation because the scope of "applicable law" addressed by each section is different. Deciding a case involving a proposed assignment, Circuit Judge, now Justice Breyer reasoned: "As a matter of logic, however, we see no conflict . . ." between 365(c)(1)(A) and (f)(1). *In re Pioneer Ford Sales, Inc.*, 729 F.2d at 29. The plain language of 365(c) does not render subsection (f) superfluous.

Specifically, the term "applicable law" as used in section 365(c) is consistent with subsection (f). Section 365(f)(1) provides:

> *Except as provided in subsection (c)*, 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) (emphasis added).

At first glance, section 365(c)—the recognized exception to § 365(f)—seems to "resuscitate in full the very anti-assignment 'applicable law' which 365(f) nullifies." *In re Magness*, 972 F.2d at 698 (Guy, J., concurring). While the phrase "applicable law" appears in both provisions, each provision's use of the phrase refers to laws that apply in different circumstances.

In re Magness, 972 F.2d at 695 (noting that each subsection recognizes an “applicable law of markedly different scope”).

Section 365(f) permits assignment in bankruptcy regardless of restrictions placed on assignment by the parties. *See Cinicola v. Scharffenberger*, 248 F.3d 110, 120 (3d Cir. 2001). Subsection (f) also overrides “applicable law” prohibiting assignment. *See id*. Significantly, the introductory clause of § 365 (f) makes clear that the subsection applies “[e]xcept as provided in subsection (c)." 11 U.S.C. § 365(f)(1). Accordingly, the general rule under § 365(f)(1) is every contract is freely assignable in bankruptcy with one notable exception; executory contracts addressed by § 365(c). *See Cinicola v. Scharffenberger*, 248 F.3d at 121 (noting that “Section 365(c) places constraints on the assignment rights created under § 365(f) . . .”).

The context in which the phrase is used in the respective sections demonstrates that the scope of “applicable law” referred to in subsection (c) is notably different from the “applicable law” described in subsection (f). *See In re Magness*, 972 F.2d at 695.

1. The plain language of § 365(c) renders subsection (f) effective against applicable law based on contract provisions.

In bankruptcy, § 365(f) invalidates laws that prohibit assignment based on contract provisions. *See In re Supernatural Foods, LLC*, 268 B.R. at 788. (following the reasoning of *In re Pioneer Ford Sales, Inc.*, 729 F.2d 27 (1st Cir. 1984)); *see also* 11 U.S.C. § 365(f)(1) (providing the trustee may assign contracts in bankruptcy “notwithstanding a provision in an executory contract or unexpired lease of the debtor, *or in applicable law*” that prohibits . . . the assignment of such contract or lease”) (emphasis added). Accordingly, subsection (f) renders state contract laws enforcing non-assignment provision in an executory contract ineffective. *In re Supernatural Foods, LLC*, 268 B.R. at 789. Additionally, subsection (f) invalidates state contract law that

prevents assignment based on terms in a contract, such as state law enforcing provisions that impliedly restrict assignment. *See id.*

Comparatively, section 365(c) only applies when "applicable law" prohibits assignment "whether or not such contract . . . prohibits or restricts assignment." 11 U.S.C. § 365(c). Subsection (c) refers to a limited, unique subset of law; laws that outright bar assignment regardless of contract provisions. *See* Daniel J. Bussel & Edward A. Friedler*, The Limits on Assuming and Assigning Executory Contracts*, 74 Am. Bankr. L.J. 321, 331 (2000). Subsection (f) addresses laws that are beyond the scope of 365(c). Under the hypothetical test, subsection (f) is effective because it allows the trustee to ignore laws based on contract provisions. When the hypothetical test is applied, trustee's can still assume and assign anything beyond the scope of § 365(c). Therefore, the plain language of § 365(c), applied through the hypothetical test, does not render section 365(f) superfluous.

The present case illustrates the operation of 365(f)(1) when assumption is governed by the hypothetical test. Two types of "applicable law" would prevent assignment of the Agreement outside of bankruptcy: 1) federal intellectual property law; and 2) state contract law enforcing the anti-assignment provision and interpreting the provision which restricts Development to only extend the benefits of the license to its affiliates. R. at 5. The parties have stipulated that Federal Intellectual Property law would prohibit assignment of the Agreement, even if the Agreement did not contain an anti-assignment provision. *See Id.* at 8 n.7. At issue in the present case is how section 365(c) ought to be applied to Petitioners proposed assumption; it is uncontroverted that federal intellectual property law meets the subsection (c) description of applicable law. *Id.*

Comparatively, state laws interpreting and enforcing the terms of the Agreement are beyond the scope of "applicable law" detailed in section 365(c). *See* 11 U.S.C. § 365(c).

Nevertheless, state laws interpreting and enforcing the terms of the Agreement fall within the scope of "applicable law" described in section 365(f)(1). *See* 11 U.S.C. § 365(f). If similar provisions existed in a contract that was not governed by federal intellectual law, subsection (c) would not be triggered and the trustee would be allowed to assign the contract, regardless of the "applicable law" described in section 365(f)(1).

The application of the plain meaning of section 365(c) is internally consistent with 365(f)(1); by its terms, subsection (f)(1) does not apply when § 365(c)'s definition of applicable law is met.

2. The plain language of § 365(c) renders subsection (f) effective against "applicable law" that merely conditions or restricts assignment.

Additionally, the plain language of 365(c) renders subsection (f) effective against "applicable law" that merely "conditions or restricts" assignment. 11 U.S.C. § 365(f)(1). As noted above, subsection (c) only prevents the trustee from assigning contracts when applicable law excuses a non debtor party to an executory contract from accepting or rendering performance to an entity other than the debtor. *See In re Sunterra Corp.*, 361 F.3d at 266; 11 U.S.C. § 365(c). In other words, section 365(c) only prohibits assignment when applicable law completely bars assignment. 11 U.S.C. § 365(c); *See* Daniel J. Bussel & Edward A. Friedler, *The Limits on Assuming and Assigning Executory Contracts*, 74 Am. Bankr. L.J. 321, 331 (2000).

"Applicable law" that restricts assignment, without banning it completely, is beyond the scope of the "applicable law" described in subsection (c). *See id*. By contrast, subsection (f) allows assignment when applicable law merely "restricts or conditions" assignment. 11 U.S.C. § 365(f)(1). Under the hypothetical test, subsection (f) allows the trustee to disregard "applicable law" that stops short of an outright prohibition on assignment.

A literal application of § 365(c) does not render § 365(f)(1) wholly superfluous. Perceived conflict between subsections (c) and (f) does not justify altering the language of the Code to create an "actual test." The statute is unambiguous, therefore the Thirteenth Circuit properly applied its text literally.

ii. The plain language of § 365(c) is consistent with Congressional intent and Bankruptcy policy.

The plain language of § 365(c) controls its application rather than debtor friendly bankruptcy policy concerns. The Court has held that "[t]he plain meaning of legislation should be conclusive, except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989). Additionally, the Court has emphasized that "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).

Petitioner may argue that the actual test promotes debtor friendly bankruptcy policy by facilitating the confirmation of chapter 11 plans. However, the Court has noted that while the Code aims to make reorganization possible, "it does not permit anything and everything that might advance that goal." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1665 (2019). Rather, the Bankruptcy Code attempts to balance between multiple competing interests. *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 51 (2008). Therefore, it is improper to assume that section 365(c) was enacted in error simply because the subsection is not favorable to Debtors.

Moreover, courts should not alter the text of section 365(c). Bankruptcy policy does not warrant the judicial rewrite of section 365(c) proposed by the "actual test." The Court "do[es] not sit to assess the relative merits of different approaches to various bankruptcy problems." *See*

Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A., 530 U.S. at 13 (reaching a result based on "the natural reading of the text" of the Bankruptcy Code). "The natural reading" of section 365(c) leads to an application of the hypothetical test. The actual test requires courts to depart from the text of 365(c) in a result-oriented manner. The Thirteenth Circuit properly interpreted the statute as it is actually written. R. at 15.

Additionally, to abandon the plain language of 365(c), the Petitioner bears the burden of demonstrating that a literal application of the statute contradicts Congressional intent. *See In re Sunterra Corp.*, 361 F.3d at 269 (noting that *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. at 109 "requires a court to apply the Plain Meaning Rule unless the party contending otherwise can *demonstrate* that the result would be contrary to that intended by Congress"). The only circuit court to adopt the actual test relied on legislative history to abandon the plain language of the statute. *See Summit Invest. & Dev. Corp. v. Leroux*, 69 F.3d at 613. However, the legislative history of section 365(c) does not conclusively demonstrate that the statute's plain language is at odds with the intent of the drafters. *In re Catapult Ent., Inc.*, 165 F.3d at 754. Therefore, the hypothetical test—a literal application of section 365(c)—is the appropriate interpretation of the statute.

The limited legislative history of section 365(c) does not warrant disregarding the plain language of the statue for several reasons.

First, it is not necessary to consider the legislative history of § 365(c) when applying the subsection. Legislative history is irrelevant when interpreting an unambiguous statute. *In re Catapult Ent., Inc.*, 165 F.3d at 753 (citing *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808–9 n.3 (1989)). As noted above, a literal reading section 365(c) is unambiguous and does not render any statutory language inoperative or surplus. Therefore, the statute's legislative history should not be considered; the plain language is determinative.

Second, courts should not replace the language of a statute with "unenacted legislative intent." *In re Sunterra Corp.*, 361 F.3d at 270 (internal citations omitted). Significantly, no authoritative legislative history accompanied the most recent enactment of subsection (c). *In re Cardinal Industries, Inc.*, 116 B.R. at 978. Instead, proponents of the result oriented actual test attempt to support their position with the legislative history of an unenacted amendment to 365(c)—which was proposed years before the most recent enactment. *See Summit Invest. & Dev. Corp. v. Leroux*, 69 F.3d at 613.

Finally, even the available legislative history from an unenacted iteration of subsection (c) does not provide conclusive legislative intent. When faced with statutory interpretation, the Court has held "absent a very clear legislative intent, the plain meaning will prevail." *Aaron v. SEC*, 446 U.S. 680, 697 (1980).

A "relatively obscure committee report" accompanied the proposed, but unenacted, 1980 amendment to 365(c). *In re Sunterra Corp.*, 361 F.3d at 270 (citing *In re Catapult Ent., Inc.*, 165 F.3d at 754). At most, the report expresses the thoughts of a single House committee. *In re Catapult Ent., Inc.*, 165 F.3d at 754. (concluding that the report was not a clear indication of contrary congressional intent).

Even if the legislative history of section 365(c) is considered, it "is simply not the sort of conclusive legislative history that would trump contrary language in the statute." *Sigmon Coal Co., Inc. v. Apfel*, 226 F.3d 291, 306 (4th Cir. 2000), *aff'd sub nom. Barnhart v. Sigmon Coal Co.*, Inc., 534 U.S. 438 (2002). The inconclusive legislative history of section 365 is irrelevant when interpreting the unambiguous language of subsection (c). The Plan cannot be confirmed because the clear, unambiguous language of the Code prohibits Petitioner from assuming the Agreement.

II. THE THIRTEENTH CIRCUIT COURT CORRECTLY HELD THAT SECTION 1129(A)(10) REQUIRES ACCEPTANCE FROM AN IMPAIRED CLASS OF CLAIMS OF EACH DEBTOR UNDER A JOINT, MULTI-DEBTOR PLAN.

Under the Bankruptcy Code, a court may confirm a chapter 11 plan of reorganization only if the plan meets certain statutory requirements. 11 U.S.C. § 1129(a). Among these requirements is that if a class of claims is impaired, at least one impaired class accepts the plan. 11 U.S.C. § 1129(a)(10).

A creditor may file a proof of claim, 11 U.S.C. § 501(a), and a claim is allowed unless a party in interest objects. 11 U.S.C. § 502(a). A plan can organize claims into classes, but "only if such claim or interest is substantially similar to the other claims or interests of such class." 11 U.S.C. § 1122(a). Furthermore, a class of claims is impaired under a plan if the plan alters the legal, equitable, and contractual rights of the creditor who holds the claim. 11 U.S.C. § 1124(1). Also, impairment triggers the right to vote on a plan. 11 U.S.C. § 1126(a), (f). In short, in order to confirm a plan of reorganization, *inter alia*, if a class's legal, equitable, or contractual rights are altered, at least one of those impaired classes must vote for the plan. In this case, UMT is an impaired creditor under the Plan as it proposes that UMT's $6 million unsecured claim under the R&D Note is not receiving payment in full. R. at 7. Because the "legal, equitable and contractual rights" of UMT with respect to the R&D Note are being altered, they are an impaired creditor.

Generally, a debtor may reorganize only the assets and liabilities of its own bankruptcy estate, however, there are alternative mechanisms in certain circumstances. Pursuant to Bankruptcy Rule 1015(b), a case for a debtor and its affiliates may be jointly administered. Fed. R. Bankr. P. 1015(b). Joint administration is a "procedural tool permitting use of a single docket for administrative matters. . ." *In re Reider*, 31 F.3d 1102, 1109 (11th Cir. 1994). Furthermore, "[t]here is no merging of assets and liabilities of the debtors," and "[c]reditors of each debtor

continue to look to that debtor for payment of their claims." *Matter of Transwest Resort Properties, Inc.*, 881 F.3d 724, 731 (9th Cir. 2018). On the other hand, substantive consolidation "involves the pooling of the assets and liabilities of two or more related entities; the liabilities of the entities involved are then satisfied from the common pool of assets created by consolidation." *Eastgroup Properties v. S. Motel Ass'n, Ltd.*, 935 F.2d 245, 248 (11th Cir. 1991). In the present case, the Debtors' cases were jointly administered for the convenience of the parties. R. at 3. 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." R. at 7.

Thus, the question is whether the debtors must each have an impaired class of creditors vote for the plan, or whether a single debtor's impaired class voting for the plan is sufficient. Due to the plain language of the Bankruptcy Code and the difference between substantive consolidation and joint administration, in a jointly administered, multi-debtor plan, the Bankruptcy Code requires a "per-debtor" approach, not a "per-plan" approach; in other words, an impaired class of claims of *each debtor* must vote in favor of the plan.

A. The plain language of § 1129(a)(10) requires that if there are impaired classes under a joint, multi-debtor plan, at least one impaired class of each debtor votes in favor of the plan.

The Court's statutory interpretation analysis begins with the language of a statute. *See Connecticut Nat'l Bank v. Germain,* 503 U.S. at 253–54 (noting that the statutory language is the "cardinal canon" to be addressed "before all others"). Section 1129(a)(10) reads 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. . .

11 U.S.C. § 1129(a)(10). While Petitioners endeavor to replace the text as it is, the overall statutory scheme in the Bankruptcy Code clearly indicates the "per debtor" approach as the correct approach.

i. While "plan" is referred to in the singular in § 1129(a)(10), this does not mean that "plan" must always be read in the singular.

Petitioners may argue that the term "plan" is singular in § 1129(a)(10), therefore, the subsection applies on a "per plan" basis. This interpretation ignores the reality of the text and the Bankruptcy Code.

The Bankruptcy Code provides statutory rules of construction, among which is the rule that "the singular includes the plural." 11 U.S.C. § 102(7). Thus, 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." *In re Tribune Co.*, 464 B.R. 126, 182 (Bankr. D. Del.), on reconsideration in part, 464 B.R. 208 (Bankr. D. Del. 2011), *aff'd sub nom. In re Tribune Media Co.*, 587 B.R. 606 (D. Del. 2018), and *aff'd in part sub nom. In re Tribune Media Co.*, 587 B.R. 606 (D. Del. 2018).

While the Debtors filed a joint plan, as noted above, this means that each of the ten Debtor's cases were jointly administered. R. at 3. Importantly, the Plan simply allows the Debtors to jointly administer their separate cases and separate estates under one "plan" for the convenience of the court and the parties. Although the Plan in the present case is referred to in the singular, the terms of the Plan and the disclosure statement make clear that in reality, multiple plans are being administered together. In *Tribune*, the plans contained provisions expressly stating that:

> the respective Debtors' estates are not being substantively consolidated, that a claim against multiple Debtors will be treated as a separate claim against each, that claims are to be satisfied only from assets of the particular Debtor against which a claim is made, that obligations of any particular Debtor shall remain with that particular Debtor and no Debtor is to become liable for the obligations of another.

Tribune, 464 B.R. at 182. The court explained that the practical effect of these "non-substantive consolidation" provisions is that each joint plan actually consists of a separate plan for each Debtor. *Id*. In the present case, the Plan explicitly provided that the Debtors' separate bankruptcy estates were not substantively consolidated, and that no Debtor became liable for the obligations of another. R. at 7. Thus, as in *Tribune*, the practical effect in this case is that the joint plan actually consists of a separate plan for each debtor.

With this in mind, because of § 102(7), the "per debtor" approach follows naturally when an unconsolidated, jointly administered mutli-debtor plan is considered. Section 1129(a)(10) requires that at least one impaired debtor votes for a plan. In a jointly administered case, there are individual plans for each debtor. Because the "singular includes the plural" pursuant to § 102(7), the Bankruptcy Code accounts for this structure. Therefore, § 1129(a)(10) applies to each debtor within the joint plan.

ii. When read as a whole, § 1129 functions on a "per debtor" basis not on a "per plan" basis.

Additionally, when read and comprehended in its entirety, § 1129 clearly requires a "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, 222 (1991); *Credit Agricole Corporate and Inv. Bank v. American Home Mortg. Holdings, Inc.,* 637 F.3d 246, 255 (3rd Cir. 2011) ("The Supreme Court has indicated a reluctance to declare provisions of the Bankruptcy Code ambiguous ... courts [should] not be guided by a single sentence ..., but look to the provision of the whole law, and to its object and policy.")

Section 1129(a)(1) requires that a "plan" complies with applicable provisions of the Bankruptcy Code. 11 U.S.C. § 1129(a)(1). Furthermore, § 1129(a)(3) requires that the "plan" be proposed in good faith and not by any means forbidden by law. 11 U.S.C. § 1129(a)(3). As the *Tribune* court posited: "Could either of these requirements be met if only one or more—but fewer than all—debtors proposing a joint plan satisfies them? The answer is no." *Tribune*, 464 B.R. at 183. Regarding subsection (a)(3), if one of the debtors proposed the plan in bad faith, the fact that other debtors supported the plan in good faith would surely not save the plan from violation. Moreover, § 1129(a)(7), considered among the "cornerstones" of chapter 11, requires that under the "plan", every dissenting creditor receives at least what it would receive in a hypothetical chapter 7 liquidation. 11 U.S.C. § 1129(a)(7). This provision could not be satisfied if some but not all of the creditors were guaranteed at least the chapter 7 liquidation amount.

Section 1129(a)(8) requires that, with respect to each class of claims, either each class has accepted the plan, or each class is not impaired. The scheme setup by (a)(8) and (a)(10) ensures that the plan is unanimously accepted, or if not, that no class is impaired, but in the event that there are impaired classes rejecting the plan, that at least one impaired class votes for the plan. 11 U.S.C. § 1129(a)(8), 11 U.S.C. § 1129(a)(10). This scheme ensures creditors have a voice in the process and protects their substantive rights. *See e.g. In re Fur Creations by Varriale, Ltd.*, 188 B.R. 754, 760 (Bankr. S.D.N.Y. 1995) ("[Section 1129(a)(10)] ensures that prior to 'embarking upon the tortuous path of cramdown and compelling the target of cramdown to shoulder the risks of error necessarily associated with a forced confirmation,' there is a showing that some group hurt by the plan favors the plan.")

To apply § 1129(a)(10) on a "per plan" basis would go against this statutory scheme, because a "per plan" basis would effectively be a "cram down" on impaired creditors without

actually following the "cram down" procedure. While § 1129(b), the "cram down" provision, relieves a plan proponent from the § 1129(a)(8) requirement, all other § 1129(a) requirements must be met, including § 1129(a)(10). Furthermore, the plan cannot "discriminate unfairly," and must be "fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b).

Peering outside of § 1129, other provisions also support the "per debtor" approach. Section 1122(a) requires that a plan may place a claim in a particular class only if the claim is "substantially similar to the other claims or interests of such class." 11 U.S.C. § 1122(a). This provision could not be met if one debtor's creditors were correctly classified, and another debtor's creditors were not. Furthermore, the "per plan" approach would completely disregards this provision.

In sum, the statutory scheme written by Congress inherently requires a "per debtor" approach.

iii. The legislative history further supports the "per debtor" approach to § 1129(a)(10).

The legislative history of § 1129(a)(10) supports this legislative scheme. The 1978 version of § 1129(a)(10) required that "at least one class of claims has accepted the plan." Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978). "It is widely known that the requirement was designed to ameliorate a perceived harshness inherent in the cramdown provisions available under the Code in the wake of the decision in *In re Pine Gate Associates*." *In re Duval Manor Assocs.*, 191 B.R. 622, 628 (Bankr. E.D. Pa. 1996). Later, "impaired" was added to the statute and a congressional report indicated that this change was intended to ensure that a class of creditors affected by the plan voted in its favor. *See In re Bloomingdale Partners*, 170 B.R. 984, 994 n.15 (Bankr. N.D. Ill. 1994) (citing 1983 Senate report that stated, "Paragraph (10)

makes clear the intent of section 1129 (a) (10) that one 'real' class of creditors must vote for the plan of reorganization").

It is clear from the text and the legislative history that Congress intended § 1129(a)(10) to protect the substantive rights of creditors impaired under the plan. The "per plan" approach proposed by Petitioners would disrupt this statutory scheme. In effect, the "per plan" approach would allow for a single impaired creditor of one debtor to "cram down" a plan against impaired creditors of another debtor who are unrelated with regards to implementation of the plan. This assumes that the creditors of one debtor are similarly situated to those of another.

B. The policy favoring smooth chapter 11 reorganizations cannot override the text of the statute and the substantive rights of the parties.

While certain policy considerations may favor the "per plan" approach, those considerations alone cannot override the text of the statute. *SCA Hygiene Prod. Aktiebolag v. First Quality Baby Prod.*, LLC, 137 S. Ct. 954, 967, 197 L. Ed. 2d 292 (2017) ("we cannot overrule Congress's judgment based on our own policy views.") Furthermore, the policy favoring smooth reorganization cannot outweigh the substantive rights of the creditors. While the Bankruptcy Code aims to make reorganization possible, "it does not permit anything and everything that might advance that goal." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1665 (2019); *see also In re Cordes*, 147 B.R. 498, 504 (Bankr. D. Minn. 1992) ("An equitable balance between the rights of debtors and the rights of creditors underlies the structure of the Bankruptcy Code."); *see e.g. Matter of Love*, 957 F.2d 1350, 1357 (7th Cir.1992) ("the focus of the good faith inquiry under both Section 1307 and Section 1325 is often whether the filing is fundamentally fair to creditors and, more generally, is the filing fundamentally fair in a manner that complies with the spirit of the Bankruptcy Code's provisions.").

i. Section 1129(a)(10) cannot be interpreted as having a "per plan" approach, as this interpretation would bypass the rigorous requirements for substantive consolidation.

Proponents of the "plan" want to have their cake and eat it too; they want to explicitly state this plan is not a substantive consolidation, therefore avoiding the difficulty of such a course, but simultaneously ask for its benefits. If § 1129(a)(10) is reinterpreted to be a "per plan" approach, then it would allow debtors to circumvent the rigorous requirements of substantive consolidation, and the distinction between joint administration and substantive consolidation would be rendered meaningless.

For the convenience of the parties and the court, a multi-debtor case can be jointly administered. Fed. R. Bankr. P. 1015(b). In joint administration, "[t]here is no merging of assets and liabilities of the debtors," and "[c]reditors of each debtor continue to look to that debtor for payment of their claims." *Matter of Transwest Resort Properties, Inc.*, 881 F.3d 724, 731 (9th Cir. 2018); *See also In re Reider*, 31 F.3d 1102, 1109 (11th Cir. 1994) ("Joint administration is designed for the ease of administration and to permit the payment of only one filing fee.")

On the other hand, in specific circumstances, substantive consolidation can be used to consolidate a debtor with one or more persons. 11 U.S.C. § 1123(a)(5)(C). Substantive consolidation "involves the pooling of the assets and liabilities of two or more related entities; the liabilities of the entities involved are then satisfied from the common pool of assets created by consolidation." *Eastgroup Properties v. S. Motel Ass'n, Ltd.*, 935 F.2d 245, 248 (11th Cir. 1991). In the advisory notes to Bankruptcy Rule 1015, the advisory committee explains:

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

Fed. R. Bankr. P. 1015 advisory committee's note on rule.

It is important to avoid conflating joint administration and substantive consolidation. *In re Reider*, 31 F.3d at 1109, ("Great care must be taken to avoid confusion between the attributes of joint administration and indicia supporting substantive consolidation.") Because substantive consolidation has such a powerful impact on the substantive rights of parties, courts have reached a nearly unanimous consensus that substantive consolidation is a remedy to be used sparingly. *In re Owens Corning*, 419 F.3d 195, 209 (3d Cir. 2005). Thus, courts have made the standards for substantive consolidation strict.[6] Moreover, respecting entity separateness is a "fundamental ground rule [ ]." *In re Owens Corning*, 419 F.3d at 211; *see In re Nortel Networks, Inc.*, 532 B.R. 494, 556 (Bankr. D. Del. 2015) ("the general expectation is that courts respect entity separateness absent compelling circumstances calling equity (and even then only possibly substantive consolidation) into play").

The "per plan" approach renders joint administration superfluous. In a substantive consolidation, while some creditor's rights may be altered, their rights are protected at the front-end by the strict requirements that must be met. "The purpose of substantive consolidation is to insure the equitable treatment of all creditors." *In re Murray Indus.,* 119 B.R. 820, 830 (Bankr. M.D.Fla. 1990). Furthermore, in substantive consolidation, the debtors would sacrifice their entity separateness. In the present case, Petitioner is attempting to treat the classes of creditors as if the debtors were substantively consolidated even though the Plan explicitly provides that the Debtors are being jointly administered. R. at 3. In short, Petitioners want to keep their separate identities, while treating the creditors as if there was a consolidation.

[6] While courts are diverse in their tests for substantive consolidation, at bottom, the determination is made after a detailed case-by-case analysis. *In re Bonham*, 229 F.3d 750, 765 (9th Cir. 2000); *see also In re Republic Airways Holdings Inc.*, 565 B.R. 710, 717 (Bankr. S.D.N.Y. 2017), *aff'd,* 582 B.R. 278 (S.D.N.Y. 2018) ("Indeed, the substantive consolidation factors should be 'evaluated within the larger context of balancing the prejudice resulting from the proposed consolidation against the effect of preserving separate debtor entities.'")

Development was recognized as being a separate entity by the Lenders who did not require Development to act as a borrower or guarantor in the leveraged buy-out. R. at 6. The Plan also 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. Therefore, it is clear that substantive consolidation did not occur here. Rather, what is in place are multiple, individual debtor plans, jointly administered for the convenience of parties. Once this is understood, the plain meaning of § 1129(a)(10) is apparent and the "per debtor" approach is inevitable.

ii. Policy cannot override substantive rights of the parties.

Section 1129(a)(10) was intended to ensure that a plan would have some creditor support, and an impaired creditor's vote is a powerful tool to force a debtor to negotiate. R at 21. The "per plan" approach flies in the face of this proposition. In practical effect, the "per plan" approach, in a multi-debtor plan, would lead to negotiations engaging only one impaired debtor and consider the interests of that debtor only. Here, UMT was not given the chance to participate in the mediation. R. at 6-7. Despite this, UMT is now expected to accept the Plan without regard to its own interests because the creditors of other debtors have deemed it acceptable. Furthermore, the Plan and disclosure statement make it seem like creditor rights were protected on a "per debtor" basis. The "per plan" approach allows TDI to tell creditors one thing but do another. On the other hand, the "per debtor" approach furthers the intent of the statute regardless of the comfortableness of the reorganization process by giving all impaired creditors a seat at the table with its vote in-hand.

Importantly, UMT's rights have not been protected. First, Debtors did not have to satisfy any requirements for substantive consolidation; the court never conducted a balancing of prejudicing creditors and continued entity separateness. Now, if the "per plan" approach is

adopted, then UMT and all future creditors in joint plans will lose the protection of being able to vote against a plan that alters their rights because their vote will no longer matter; rather, the single vote of an impaired creditor of one debtor will suffice. Petitioners may argue that here, UMT is the only creditor holding up confirmation of the Plan, and that therefore, the "per plan" approach makes sense; however, if the "per plan" approach is universally adopted, then in a joint, multi-debtor plan, a debtor's impaired class could confirm a plan without a single vote from another debtor's impaired creditor.

If § 1129(a)(10) applies on a "per plan" approach, a debtor would never need to substantively consolidate because it could force impaired creditors to accept the plan without considering the rights of more than one, single impaired creditor's vote. However, if § 1129(a)(10) is read as it is written (to apply on a "per debtor" basis) then once again creditor rights are protected, and joint administration is not morphed into a work-around substantive consolidation.

CONCLUSION

For the reasons stated in this brief, Respondent respectfully asks the Court to affirm the Court of Appeals for the Thirteenth Circuit on both issues.

APPENDIX A

11 U.S.C. § 365 (2018): Executory contracts and unexpired leases

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if--

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

. . .

11 U.S.C. § 1129 (2018): Confirmation of plan

(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.

. . .