No. 19-1004

IN THE

Supreme Court of the United States

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

Debtors,

TUMBLING DICE, INC. *ET AL*.,

Petitioner,

v.

UNDER MY THUMB, INC.,

Respondent.

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

BRIEF FOR PETITIONER

Team No. P. 6
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether Section 365(c)(1) of the Bankruptcy Code permits a debtor in possession and original licensee to assume its licensing agreement and hold the non-debtor licensor to the original bargain when applicable non-bankruptcy law excuses the non-debtor licensor from rendering performance to an entity other than the debtor in possession.

II. Whether Section 1129(a)(10) of the Bankruptcy Code, which requires "at least one class of claims that is impaired under the plan has accepted the plan," is satisfied when one impaired class of any debtor in a joint, multi-debtor plan accepts the plan.

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OPINIONS BELOW

On January 11, 2016, Tumbling Dice, Inc. and its nine subsidiaries voluntarily commenced cases seeking reorganization under chapter 11 of the Bankruptcy Code. R. at 3. The bankruptcy court followed standard practice and jointly administered the cases pursuant to Federal Rule of Bankruptcy Procedure 1015(b) for the convenience of all parties. R. at 3. After lengthy mediation and the debtors' submission of a resulting *Joint Plan of Reorganization*, Under My Thumb, Inc. filed two objections to the plan seeking to prevent confirmation. R. at 3, 6–7. The bankruptcy court resolved both objections in favor of the debtors. R. at 3. On appeal, the Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court's rulings, also finding in favor of the debtors. R. at 3. Under My Thumb appealed to the United States Court of Appeals for the Thirteenth Circuit, which reversed the decisions of the appellate panel and bankruptcy court. R. at 3. This Court then granted the debtors' petition for a writ of certiorari.

STATEMENT OF JURISDICTION

The formal statement of jurisdiction is waived pursuant to competition rule VIII.

STATUTORY PROVISIONS

11 U.S.C. § 365(c)(1) and 11 U.S.C. § 1129(a)(10) are relevant to this case and are reprinted in Appendix A and Appendix B respectively.

STATEMENT OF FACTS

The Players at the Table. Tumbling Dice, Inc. ("TDI") and its nine wholly-owned subsidiaries (all ten collectively "Tumbling Dice") encompass one of the nation's largest gaming operations. R. at 4. The Tumbling Dice enterprise provides resort-level entertainment in locations spanning from Lake Tahoe to New Orleans to Chicago. R. at 2, n.1. To manage such extensive operations, TDI serves as a holding company, while eight of its subsidiaries serve as operators of Tumbling Dice Resorts across the country. R. at 4. The ninth subsidiary, Tumbling Dice Development, LLC ("Development"), serves a limited purpose as a software licensee under an agreement with Under My Thumb, Inc. R. at 4.

In 2008, Development contracted directly with Under my Thumb for a software system that would streamline Tumbling Dice's longstanding resort-rewards program. R. at 4. The non-exclusive licensing agreement (the "Agreement") allowed Development to share the software with its affiliates and required Development to make monthly payments to Under My Thumb. R. at 5. The Agreement proved profitable for both parties. Under My Thumb licensed similar software versions to other entities and received much higher than expected monthly payments, while Tumbling Dice tripled membership in its rewards program. R. at 5.

During this period of success, TDI drew increased investor attention, ultimately leading to Start Me Up, Inc. acquiring TDI's stock in 2011 through a leveraged buy-out. R. at 6. To support the transaction, a group of lenders granted a $3 billion loan and secured first-priority liens on the assets of all Tumbling Dice entities, with the exception of Development. R. at 6. Tumbling Dice shouldered the weight of the debt for five years before commencing voluntary cases under chapter 11 of the Bankruptcy Code to restructure or refinance and move forward with operations. R. at 6.

The Chips are Down, the Cards Dealt. For the convenience of all parties, with no objections made, and under common multi-debtor bankruptcy procedure, the bankruptcy court consolidated the cases of all ten Tumbling Dice debtors. R. at 3. The Tumbling Dice integrated business enterprise continued to use its prepetition cash management system postpetition. R. at 4. The parties, including the unsecured creditors' committee which represented the interests of Under My Thumb, entered into lengthy non-binding mediation. R. at 6.

The negotiations were fruitful. Tumbling Dice emerged from mediation with a *Joint Plan of Reorganization* (the "Plan"). R. at 7. The lenders agreed to restructure the loan, Development assumed the Agreement with Under My Thumb, and Start Me Up enlisted the aid of Sympathy for the Devil, LP to jointly fund a 55% distribution to all unsecured creditors. R. at 7. Start Me Up and Sympathy for the Devil agreed to split the voting shares of reorganized TDI stock after jointly paying the unsecured debts. R. at 8.

The Plan was met with overwhelming approval. R. at 8. Under My Thumb looked upon the plan favorably because Development was assuming the Agreement—meaning more incoming lucrative monthly payments. Additionally, Under My Thumb's anticipated distribution greatly exceeded the value of Development's assets that it expected to recover against. R. at 7.

The Table is Flipped. Upon discovery that Sympathy for the Devil was a plan participant, Under My Thumb recalled that one of its own competitors in the software industry was among the multitude of entities in Sympathy for the Devil's portfolio of companies. R. at 8. Immediately, Under My Thumb became suspicious of the attenuated link between the Plan and Under My Thumb's rival. R. at 8. The votes were cast and Under My Thumb broke rank with the near universal creditor support for the Plan. R. at 8. As the sole creditor of Development, Under My Thumb voted to block confirmation. R. at 8.

Tumbling Dice now defends the confirmation of the beneficial Plan and seeks to proceed onward with a reorganization that will save countless jobs, maximize creditor recovery, and preserve substantially more value than liquidation under chapter 7.

SUMMARY OF THE ARGUMENT

Reorganization under chapter 11 of the Bankruptcy Code provides all debtors and creditors a negotiating table where competing interests can be balanced, assets maximized, and employee livelihoods preserved. The benefits of reorganization are lost—and the policy of chapter 11 shirked—when an individual party breaks down negotiations and assumes the mantle of emperor, condemning a plan to death with a single, disapproving thumbs-down. This Court properly construes 11 U.S.C. § 365(c)(1) and 11 U.S.C. § 1129(a)(10) of the Bankruptcy Code when it preserves the flexible, pro-confirmation policies that Congress built into chapter 11. This Court should apply the "actual test" to Section 365(c)(1) and the "per plan" approach to Section 1129(a)(10). Both approaches safeguard the flexibility inherent in the Bankruptcy Code, ensuring reorganization is possible for the near infinite varieties of businesses and enterprises across the country.

The "actual test" is the proper application of 11 U.S.C. § 365(c)(1). The text, structure, purpose, and legislative history of Section 365(c)(1) indicate that a non-debtor party cannot prevent a debtor in possession from assuming an executory contract unless the non-debtor is actually required to render performance to an entity other than the debtor in possession. The policy goals this Court has recognized within chapter 11 support an interpretation of Section 365(c)(1) that allows a debtor in possession to assume executory contracts.

First, the "actual test" is the proper application of Section 365(c)(1) because it best adheres to principals of statutory construction. Beginning with the explicit text of the statute, a literal reading of the provision produces absurd results. Notably, a debtor still fully complying with the obligations of its contract could fall victim to unilateral revocation by the other party solely because the debtor filed for reorganization. Additionally, the significant debate over the merits of both the "actual test" and "hypothetical test" indicates Section 365(c)(1) is ambiguous and warrants a deeper analysis beyond the plain meaning of the text.

The structure, the purpose, and the history of Section 365(c)(1) all reveal that Congress intended courts to follow the "actual test" approach to 365(c)(1)—and for good reason. Bankruptcy proceedings should not be a vehicle to force creditors to perform obligations for parties with which they never anticipated to contract. However, this danger is simply not present when the same party the creditor originally contracted with is merely seeking to continue to perform as both parties agreed they would.

The "actual test" thus comports with the goals and policies of chapter 11 as a whole. This Court has recognized that Congress's goals underlying chapter 11 are to maximize the going concerns of debtors and to ensure the greatest number of creditors are repaid. Allowing debtors in possession to assume executory contracts, which are often fundamental to debtors' continued operation, ensures that assets are not wasted, reorganization can succeed, and resulting profits can pay back the greatest number of creditor claims.

The "per plan" approach is the proper application of 11 U.S.C. § 1129(a)(10). Similarly, the text, purpose, and structure of Section 1129(a)(10) together indicate that confirmation of a joint plan of reorganization requires acceptance from any one impaired class of creditors under the plan. The statutory construction analysis favoring the "per plan" approach is likewise bolstered by Congress's policy concerns underlying chapter 11.

First, an application of the plain meaning and unambiguous language of Section 1129(a)(10) logically leads to the application of the "per plan" approach. Confirmation simply requires that "at least one class of claims that is impaired under the plan has accepted the plan." 11 U.S.C. § 1129(a)(10) (2018). This conclusion is supported not only by other courts which have addressed this issue, but also by rules of statutory construction and other creditor protection mechanisms that Congress carefully enacted. In the context of Section 1129(a) as a whole, the "per plan" approach adheres to Congress's desire to set a minimum threshold of impaired creditor support—likewise for good reason. Under the "per plan" approach, Section 1129(a)(10) prevents a plan from being "crammed down" over the objections of every single impaired creditor, an important protection that meshes well with other creditor protection mechanisms in the Bankruptcy Code.

The minimal level of impaired creditor support guaranteed under the "per plan" approach also furthers the underlying goals of chapter 11. Congress tailored chapter 11 to address not only cases with relatively few debtors, but also cases with debtors numbering in the thousands. Applying the "per debtor" approach would not only turn the Section 1129(a)(10) requirement into a near-impossible task, but it would ensure the demise of countless beneficial plans by providing an unmitigated veto power for opportunistic creditors. An opportunistic creditor, regardless of the size of its impaired claim, would have free reign to jettison a beneficial plan of reorganization merely by virtue of its status as a lone creditor to a debtor entity. Congress's objectives in formulating chapter 11 are to maximize assets, satisfy creditor claims, and preserve the livelihoods of the employees affected by the plan. The "per plan" approach supported by the plain and unambiguous language of Section 1129(a)(10) allows these beneficial plans to proceed onward towards confirmation.

ARGUMENT

I. 11 U.S.C. § 365(c)(1) Permits a Debtor in Possession to Assume an Executory Contract Otherwise Unassignable Under Applicable Non-Bankruptcy Law.

This Court should reverse the Thirteenth Circuit and adopt the "actual test" to find that Section 365(c)(1) permits Development to assume the Agreement. Generally, chapter 11 of the Bankruptcy Code grants a debtor in possession broad powers to assume or reject executory contracts during the reorganization process. 11 U.S.C. § 365(a) (2018). Section 365(a) provides that a "trustee subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." *Id.* This Court should remain true to the underlying intent of the statute and find that Section 365(c)(1) allows Development to assume the Agreement.

Some courts have interpreted Section 365(c)(1) in a manner inconsistent with the underlying purposes and policies of both Section 365 and chapter 11 as a whole. These courts set out a "hypothetical test" prohibiting a trustee from assuming or assigning an executory contract without the consent of the other party. *See Bonneville Power Admin. v. Mirant Corp. (In re Mirant Corp.)*, 440 F.3d 238, 246 (5th Cir. 2006); *In re West Elecs., Inc.*, 852 F.2d 79 (3d Cir. 1988). Advocates of the "hypothetical test" argue that Section 365(c)(1) limits a debtor in possession's ability to assume an executory contract only if hypothetically it could assign the contract to a third party. *In re Mirant Corp.*, 440 F.3d at 246.

Other courts recognize the absurdity of this limitation in practice and instead adopt the more practical approach known as the "actual test." The First Circuit in *Summit Inv. & Dev. Corp. v. Leroux* explains that Section 365 requires a "case-by-case inquiry into the *actual* consequences—to the non-debtor party—of permitting these executory contracts to be performed by the debtor party." 69 F.3d 608, 613 (1st Cir. 1995) (emphasis added). Here, the non-debtor party "must make an individualized showing that it would not receive the 'full benefit of [its] bargain.'" *Id.* The non-debtor can only prevent assumption if such assumption would *actually* force the non-debtor to accept performance from a party other than the debtor party with whom it originally contracted. *Id.* An inquiry into the actual consequences of assumption is not only the more practical approach, but is also grounded in established principals of statutory construction and bankruptcy policy.

The "actual test" is most consistent with statutory construction and best resolves the inconsistencies in Section 365. When reading the "assume or assign" language in Section 365(c), this Court should construe the disjunctive "or" as a conjunctive "and" because a literal reading produces absurd results, ignores the remaining text of Section 365(c), renders other provisions of Section 365 inoperative, and disregards legislative history. In the alternative, this Court should apply a plain meaning analysis and hold that "trustee" in Section 365(c) does not mean "debtor in possession." Under either application of the "actual test," this Court promotes effective reorganization and maximizes available assets by allowing Development to continue to perform its obligations under the Agreement.

A. The "Actual Test" Should Apply to Section 365(c)(1) Because It Best Comports with Well-Established Principles of Statutory Construction.

Conventional principles of statutory construction support a finding that Section 365(c)(1) allows Development to assume the Agreement under the "actual test." By reading the disjunctive "or" in Section 365(c)(1) as a conjunctive "and," this Court avoids absurd results, ensures that language in the statute is not superfluous, gives meaning to the entirety of the text, and recognizes the legislative history of the statute.

When construing a statute, the plain language of its terms only binds the court "where the disposition required by the text is not absurd." *Contra Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). However, in this case, a plain reading of Section

365(c)(1) would lead to an absurd result by effectively eliminating a debtor in possession's ability to assume a licensing agreement to which it was the original licensee. *See Summit Inv.*, 69 F.3d at 613 (explaining that an absurd result effectuates when there is no right left for a debtor in possession to assume under Section 365(c)(1)). Effectively, a licensor could unliterally revoke a fully compliant licensee's rights solely because the licensee sought protection under the Bankruptcy Code. *In re Footstar, Inc.*, 323 B.R. 566, 570 (Bankr. S.D.N.Y. 2005).

An application of the "hypothetical test" highlights the ambiguity in Section 365(c)(1) and creates inconsistencies in the structure of Section 365 as a whole. These discrepancies provide a second basis for interpreting Section 365(c) beyond the literal meaning of the text. *See Bd. of Educ. v. Harris*, 444 U.S. 130, 140 (1979) (explaining that when a statute is ambiguous, courts may look at the structure, context, and history of the text). An ambiguity arises when a provision is "susceptible to two or more reasonable interpretations." *Ace Am. Ins. Co. v. Wattles Co.*, 930 F.3d 1240, 1252 (11th Cir. 2019). In this case, there are several competing but plausible interpretations of Section 365: the "actual test," the *In re Footstar* analysis, and the "hypothetical test." *Summit Inv.,* 69 F.3d at 612 (reasoning that it is "plausible to construe these provisions as requiring an actual showing"). Even Justice Kennedy acknowledged these competing interpretations, noting 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. Mktg. Grp., Inc. v. BG Star Prods., Inc.*, 129 S. Ct. 1577, 1578 (2009) (denying certiorari).

In the alternative, a proper plain reading of the statute reaches a similar result as the traditional "actual test" because the terms "trustee" and "debtor in possession" have different meanings under Section 365(c)(1). Reading the terms "trustee" and "debtor in possession" to have different meanings supports the policies underlying chapter 11 and Section 365(c) as a whole by allowing effective reorganization and maximizing the debtor's estate while balancing the non-debtor's interests. Thus, even if this Court declines to read "or" as "and," it should read the terms "trustee" and "debtor in possession" to have different meanings and find that Section 365(c)(1) allows Development to assume the Agreement.

1. A Proper Construction of Section 365(c)(1) Indicates That the Disjunctive "or" Should Read as a Conjunctive "and."

Section 365(c) provides that "the trustee may not *assume or assign* any executory contract… of the debtor." 11 U.S.C. § 365(c) (2018) (emphasis added). While Section 365(c)(1) literally says, "assume *or* assign," basic principles of statutory construction indicate that this Court should construe "or" to mean "and" to best effectuate Congress's intent. *See In re Mirant Corp.*, 440 F.3d at 249 (adopting the "actual test"). "The word 'or' is often used as a careless substitute for the word 'and,'" although the word "and" would express the intent of the statute "with more clarity." *De Sylva v. Ballentine*, 351 U.S. 570, 573 (1956). In this case, the text, structure, purpose, and history of Section 365(c)(1) confirm that this Court should read "or" as "and" to allow Development to assume the Agreement. *General Dynamics Land Sys. v. Cline*, 540 US 581, 600 (2004).

Statutory construction requires courts to analyze the "text, structure, purpose, and history" of the statute. *Id.* This Court should construe "or" in Section 365(c) to mean "and" because a literal reading of the statute produces an absurd result by not allowing a debtor in possession to assume a licensing agreement even when it does not intend to assign the contract to a third party. Next, by applying the "actual test," this Court gives effect to the entirety of Section 365(c). Further, a literal reading of the statute renders other sections of the statute, particularly Section 365(f)(1), inoperative and superfluous. Lastly, the legislative history of Section 365(c) contains an express statement specifying Congress's intent to allow a debtor in possession to assume an executory contract. By applying the "actual test," this Court would further the intent of Congress by protecting debtors from the unmitigated veto power of a non-debtor.

a. A Literal Reading of Section 365(c)(1) Produces an Absurd Result.

A literal reading of Section 365(c) produces an absurd result by effectively eliminating a debtor in possession's ability to assume a licensing agreement even when it has no intention of assigning the contract to a third party. *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997). When a literal reading of a statute "has led to absurd or futile results," it is an accepted principle of statutory construction that courts may look "beyond the words to the purpose of the act." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940). If a literal reading of the statute is absurd, "the act must be so construed as to avoid the absurdity." *Church of the Holy Trinity v. United States*, 143 U.S. 457, 460 (1892). Thus, this Court should apply the "actual test" because the "hypothetical test" allows creditors to use bankruptcy proceedings as an excuse to shirk their contractual obligations and strip nonetheless-complying debtors of valuable contracts essential to their reorganization efforts.

Several courts have adopted the "actual test" after recognizing the absurdity of the "hypothetical test." *See Summit Inv.*, 69 F.3d at 613. A literal reading under the "hypothetical test" generates absurd results by not providing any "contractual right left for a debtor or debtor in possession to assume under Section 365(c)(1)." *Id.* Allowing a non-debtor to "block assumption" of a licensing agreement simply because applicable law excuses performance to a third party would give the non-debtor a "windfall while destroying the debtor's chances at reorganization." *In re Cumberland Corral, LLC*, No. 313-06325, 2014 Bankr. LEXIS 936, at *25 (Bankr. M.D. Tenn. Mar. 11, 2014). Under this approach, creditors could unilaterally revoke their contracts with debtors, many of which are essential for successful reorganization under chapter 11.

The "hypothetical test" further leads to absurd results because it ignores the intent of the parties and makes irrelevant their initial bargain. Under the "hypothetical test," the actual intent of the parties is irrelevant because it presumes assignment even when the parties intend to continue performing under the contract. *Ohio Skill Games Inc. v. Pace-O-Matic, Inc. (In re Ohio Skill Games Inc.)*, Nos. 08-60560, 08-6049, 2010 Bankr. LEXIS 2220, at *11 (Bankr. N.D. Ohio July, 8 2010). Additionally, preventing Development from assuming the Agreement unravels the agreed upon "benefits and detriments of their bargain." *Id.* In any other scenario—for example, if the same stock buyout occurred outside of bankruptcy—the contract would still bind the parties. *See Institut Pasteur*, 104 F.3d at 494 (noting the absurdity of terminating a debtor's rights under licensing agreements merely due to a change in stockholder identity). The "actual test" remedies this absurdity by allowing the debtor in possession to assume the licensing agreement, which "merely puts the parties in the position they were in on the day the bankruptcy was filed." *In re Ohio Skill Games Inc.*, 2010 Bankr. LEXIS 2220, at *16. Therefore, this Court should apply the "actual test" to avoid these absurd results and allow Development to assume the Agreement.

b. The "Actual Test" Properly Gives Effect to the Entire Text of Section 365(c)(1).

While the "actual test" focuses on the entirety of Section 365(c)(1), the "hypothetical test" incorrectly focuses solely on the "assume or assign" language to find that the statute precludes a debtor in possession from assuming an executory contract. *See Institut Pasteur*, 104 F.3d at 493 (rejecting the hypothetical test). A "cardinal principle of statutory construction" requires courts to "give effect…to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 367 (2000). This Court must give proper effect to the determinative phrases "applicable law" and "an entity other than the debtor or debtor in possession" in Section 365(c)(1)(A), which indicate that the applicable law does not bar assumption by a debtor in possession when it intends to "continue to perform under an executory contract." *Institut Pasteur*, 104 F.3d at 493.

By turning away from a narrow reading of the "assume or assign" language in Section 365(c)(1) and towards the entirety of the section, this Court should hold that the "applicable law" language is not triggered because assumption by a debtor in possession is not an assignment. Here, the applicable law encompasses federal intellectual property law, which provides that licensing agreements are "personal to the licensee and not assignable unless expressly made so in the agreement." *Unarco Indus., Inc. v. Kelley Co., Inc.*, 465 F.2d 1303, 1306 (7th Cir. 1972), *cert. denied*, 410 U.S. 929 (1973). Proponents of the "hypothetical test" argue that the debtors as prepetition debtors, "effectively (though not literally) 'assigned' their contract rights to themselves in their capacities as postpetition debtors in possession." *Summit Inv.*, 69 F.3d at 613. However, this Court has explained that the debtor in possession is the "same entity, as which existed before the debtor filed for bankruptcy." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). The Court's decision in *Bildisco* eliminates the "legal 'fiction' that the prepetition debtor and the postpetition debtor are to be treated as though they were separate legal entities." *Summit Inv.*, 69 F.3d at 614 (citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984)). Because the prepetition debtor and postpetition debtor are the same entity, a debtor in possession who assumes an executory contract with the intent to continue performing under the agreement is not assigning the contract to any third party. *Institut Pasteur*, 104 F.3d at 493. If there is no assignment, then the applicable anti-assignment law is not even triggered, thereby presenting no bar to assumption. *Summit Inv.*, 69 F.3d at 613.

In this case, adopting the "actual test" would not require Under My Thumb to extend performance under the Agreement to any entity other than Development. Development is the same entity with whom Under My Thumb contracted, the only difference being a change in shareholders. R. at 7. A change in ownership does not change the status of the entity because Development is "a legal entity distinct from its shareholders." *Institut Pasteur*, 104 F.3d at 494 (finding a reorganized entity owned by a different legal entity does not change the status of the reorganized entity). Under the "actual test," a "postpetition change in contract performance" is not sufficient to "deprive the parties of the full benefit of their bargain." *Summit Inv.*, 69 F.3d at 614. Development does not intend to (and legally cannot) assign the Agreement to a third party; in fact, the record specifies Development itself will continue to perform under the Agreement and Under My Thumb will continue to receive the benefits of its bargain. R. at 7.

By not solely focusing on the "assume or assign" language in Section 365(c)(1) and giving effect to the entirety of the text, the "actual test" properly analyzes the actual intent of the debtor to assign the contract to a third party. *Institut Pasteur*, 104 F.3d at 493 (applying the "actual test"). This Court should adopt the "actual test" to find that Development may assume the Agreement because it is simply continuing performance under the contract, which does not trigger applicable law under Section 365(c)(1).

c. A Literal Reading of Section 365(c)(1) Renders Other Provisions of Section 365 Inoperative and Superfluous.

This Court should adopt the "actual test" because the "hypothetical test" renders Section 365(f)(1) inoperative and superfluous. *Breeden v. Catron (In re Catron)*, 158 B.R. 629, 636 (E.D. Va. 1993). It is the court's duty "to give effect, if possible, to every clause and word of a statute.'" *Duncan v. Walker*, 533 U.S. 167, 174 (2001). It is a fundamental rule of statutory construction that courts are to construe a statute so "that if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews,* 534 U.S.

19, 31 (2001). A literal reading of Section 365(c)(1) under the “hypothetical test” would render the “applicable law” language in Section 365(f) a nullity. *In re Catron*, 158 B.R. at 637.

There is a “seemingly inescapable conflict” between the use of the phrase “applicable law” in Sections 365(c) and 365(f). *Id.* at 636. Section 365(f)(2) provides that notwithstanding applicable law prohibiting assignment, “a trustee may assign an executory contract...if the trustee assumes such contract…” 11 U.S.C. § 365(f)(2) (2018). An entity must first assume an executory contract as a prerequisite to assignment. *In re Mirant Corp.*, 440 F.3d at 253. In contrast, a plain reading of Section 365(c)(1) under the “hypothetical test” seems to prohibit assumption if applicable law excuses the non-debtor from accepting substitute performance. *In re Catron*, 158 B.R. at 639. However, if applicable law prohibits assumption “then there was no reason for Congress to provide that the trustee ‘may not assume *or assign*’ such contracts.” *Id.* All the statute would need to say was “that the trustee cannot ‘assume’ such contracts.” *Id.* A literal reading of Section 365(c)(1) would then render Section 365(f) superfluous because “anytime applicable law prohibits assignment” Section 365(c)(1) would govern, leaving Section 365(f) “meaningless.” *In re Cardinal Indus.*, 116 B.R. 964, 977 (Bankr. S.D. Ohio 1990).

The phrase “or assign” in Section 365(c)(1) would not create inconsistencies, however, if “or” were read as a conjunctive “and” because applicable law “does not necessarily preclude a debtor from assuming the contract” when it intends to continue performing under its obligations. *Id.* Such a reading of the statute clarifies that the debtor in possession “may be able to assume” an executory contract and continue to perform under its obligations without assigning the contract, but it may not “assume and assign.” *Id.* By simply reading “assume *or* assign” to mean “assume *and* assign,” this court harmonizes Sections 365(c) and 365(f) so that neither section is superfluous. *Id.* Therefore, the “actual test” ensures that Section 365(f) remains operative because non-assignability under applicable law does "not necessarily preclude a debtor from assuming the contract." *Id.*

d. The Legislative History of Section 365(c) Indicates that Congress Has Always Intended to Allow a Debtor in Possession to Assume an Executory Contract.

A literal reading of Section 365(c) is incompatible with the legislative history of the statute. *See Summit Inv.*, 69 F.3d at 612 (adopting the "actual test" in part due to the legislative history of the statute). This Court should look to the legislative history of Section 365(c)(1) because the statutory language is ambiguous and open to more than one plausible interpretation. *Id.* (citing *O'Neill v. Nestle Libbys P.R., Inc.*, 729 F.2d 35, 36 (1st Cir. 1984)). When a statute requires resolution of an ambiguity or is "demonstrably at odds with congressional intent," courts look "first to the statutory language and then to the legislative history if the statutory language is unclear." *Griffin v. Oceanic Contractors*, 458 U.S. 564, 571 (1982); *Blum v. Stenson*, 465 U.S. 886, 896 (1984).

Congress directly sought to protect a debtor's ability to assume an executory contract when it drafted the current language of Section 365(c)(1). *Summit Inv.*, 69 F.3d at 613. Congress adopted the current version of Section 365 into the Bankruptcy Code in the Bankruptcy Amendments and Federal Judgeship Act of 1984 (1984 Act). Pub. L. No. 98-353, sec. 362(a), § 365, 98 Stat. 333 (1984). The 1984 Act amended 11 U.S.C. § 365(c)(1)(A) to replace the former phrase, "the trustee," with the modern language, "an entity other than the debtor or the debtor in possession." *Summit Inv.*, 69 F.3d at 613. The 1984 Act originated from the 1980 House Amendment, where Congress initially proposed this change and addressed the intent behind the amendment. H.R. Rep. No. 96-1195, at 57 (1980). The 1980 Amendment contained a committee report explaining:

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

Id. at 12. In the 1984 Act, Congress revised Section 365(c) by making the exact same changes considered in the legislative history of the 1980 Amendment. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, sec. 362(a), § 365, 98 Stat. 333 (1984).

The Committee Report addresses the exact language adopted in the 1984 Act and undoubtedly expresses "the inapplicability of Section 365(c)(1) to a debtor in possession's assumption" of an executory contract. *In re Footstar, Inc.*, 323 B.R. at 575. Congress did not intend to bar the debtor in possession from assuming an executory contract. *Summit Inv.*, 69 F.3d at 613. The Committee Report suggests just the opposite. Instead, Congress intended to provide each party with the "full benefit of its bargain." *Id.*

When drafting Section 365(c), Congress intended to allow a debtor in possession to assume an executory contract if "the performance to be given or received . . . will be the same as if no petition had been filed." *Id.* (quoting H.R. Rep. No. 96-1195, at 12). Prohibiting a debtor in possession from simply assuming an executory contract when there is no intention to assign it contradicts Congress's intent. *Institut Pasteur*, 104 F.3d at 493.

In this case, Development simply wanted to assume the Agreement and continue to perform its obligations therein. R. at 7. The success of the Agreement resulted in higher than expected payments each month, and Development remained current in its obligations under the Agreement. R. at 5-6. In fact, Under My Thumb "initially viewed the Plan favorably." R. at 7. Because performance would be the same had no bankruptcy been filed, Congress intended a debtor in possession like Development to assume a licensing agreement under Section 365(c)(1).

Therefore, congressional intent supports the adoption of the "actual test" test to allow Development to assume the Agreement.

2. In the Alternative, the Plain Meaning of the Statute Allows a Debtor in Possession to Assume an Executory Contract Under Section 365(c)(1).

Even if this Court declines to read the language in Section 365(c)(1) as "and" instead of "or," a plain reading of the statute indicates that "trustee" and "debtor in possession" have different meanings. In a chapter 11 bankruptcy case, "the debtor and the trustee…are entirely different parties." *In re Footstar, Inc.*, 323 B.R. at 571. By reading these terms to have different meanings, this Court would allow a debtor in possession to assume an executory contract under Section 365(c)(1) even though a trustee may not. *See Id.* at 575.

Construing "trustee" and "debtor in possession" to have the same meaning in Section 365(c)(1) defies the intent of Congress. *Id.* at 570. The court in *In re Footstar, Inc.,* developed a hybrid version of the "actual test" which focused on the plain meaning of the statute to reach the same result as the traditional "actual test." *Id.* The Court explained that "a trustee is an entity other than the debtor or the debtor in possession…who has succeeded by operation of the Bankruptcy Code to all the debtor's property including contracts." *Id.* at 573. To "read 'trustee' to mean 'debtor in possession'" is non-sensical because doing so would "render the provision a virtual oxymoron." *In re Aerobox Composite Structures, LLC*, 373 B.R. 135, 142 (Bankr. D. N.M. 2007) (citing *In re Footstar, Inc.*, 323 B.R. 566, 573 (Bankr. S.D.N.Y. 2005)). Under such a construction, 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.

The legislative history further indicates that "trustee" and "debtor in possession" have different meanings in Section 365(c)(1). *Id.* at 574. As stated above, the legislative history behind Section 365(c)(1) indicates "that the prohibition against a trustee's power to assume an executory contract does not apply" where the debtor in possession intends to continue performing under the contract. H.R. Rep. No. 96-1195, § 27(b) (1980). Congress understood that the trustee and the debtor in possession are separate, distinct entities and made it clear that Section 365(c)(1) does not "preclude the debtor in possession from assuming its non-assignable contracts." *In re Footstar, Inc.*, 323 B.R. at 574. Thus, Section 365(c) only prevents a trustee from assuming and assigning an executory contract, not a debtor in possession who simply wishes to continue performing its obligations. *Id.*

By reading "trustee" and "debtor in possession" as having the same meaning, this court would force a debtor to "lose the benefit of a non-assignable contract vital to its economic future solely because it filed for bankruptcy." *Id.* "Executory contracts are valuable assets of the estate." *In re Adelphia Communs. Corp.*, 359 B.R. 65, 73 (Bankr. S.D.N.Y. 2007). The drafters of chapter 11 designed the Code to foster effective reorganization and increase the "economic well-being of debtors in possession." *In re Footstar, Inc.*, 323 B.R. at 574. Because the plain language only prevents the trustee from assuming and assigning executory contracts, this Court should apply the plain meaning of Section 365(c)(1) as a whole and allow Development to assume and continue performing under the Agreement.

B. The "Actual Test" Furthers General Bankruptcy Policy by Maximizing the Value of the Debtor's Assets and Promoting Successful Reorganization.

This Court should apply the result of the traditional "actual test," or the version of the "actual test" under *In Re Footstar*, because a case-by-case analysis into whether assumption will actually force the non-debtor to accept performance from an entity other than the debtor in possession is most consistent with the underlying policies of the Bankruptcy Code. It is a fundamental goal of bankruptcy policy to maximize the value of the bankruptcy estate. *Toibb v. Radloff*, 501 U.S. 157, 163 (1991). Further, another key principle underlying the Code is promoting "successful rehabilitation of debtors." *Bildisco*, 465 U.S. at 516.

By applying the "actual test," this Court considers the debtor's actual intent to assign the executory contract to a third party, which "properly balances both the rehabilitative goals of the debtor and the non-debtor party's rights under the executory contract." *In re Edison Mission Energy*, No. 12-49219, 2013 Bankr. LEXIS 3872, at *38 (Bankr. N.D. Ill. Sept. 16, 2013). The "actual test" avoids the inherent inconsistencies a "hypothetical" approach would create between Section 365(c)(1) and policies underlying chapter 11.

1. The "Hypothetical Test" Undermines General Bankruptcy Policy by Preventing a Debtor in Possession from Assuming an Executory Contract.

The "hypothetical test" precludes the debtor in possession from assuming a valuable contract even when the debtor does not intend to assign the contract. *Institut Pasteur*, 104 F.3d at 493. Such a limitation on Section 365(c)(1) is contrary to the purposes behind the statute and detrimental to "the entire creditor body and the debtor's reorganizing efforts." *In re Edison Mission Energy*, 2013 Bankr. LEXIS 3872, at *31. Thus, this Court should instead apply the "actual test" to best effectuate the intent of the Bankruptcy Code and Section 365(c)(1).

The "hypothetical test" puts unreasonable barriers on the debtor in possession's ability to reorganize, which is contrary to the fundamental policy of the Bankruptcy Code.[1] A literal interpretation allows a non-debtor to unilaterally force rescission of the contract, meaning that the debtor could lose valuable assets essential to effective reorganization. *In re Footstar, Inc.*,

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[1] AM. BANKR. INST., COMMISSION TO STUDY THE REFORM OF CHAPTER 11, 2012-2014 FINAL REPORT AND RECOMMENDATIONS 124 (2014).

323 B.R. at 570. The "hypothetical test" would give the non-debtor power to compel modifications and rescind the agreement merely because bankruptcy proceedings commenced. *Id*. A literal reading of Section 365(c)(1) would favor the non-debtors above all other creditors and disadvantage the debtors in possession as well as other parties connected to the Agreement.

The "hypothetical test" is a hyper-technical analysis which "furthers no bankruptcy purpose at all." *Texaco, Inc. v. La. Land & Expl. Co.*, 136 B.R. 658, 671 (M.D. La. 1992). Therefore, this Court should adopt the "actual test" because the approach gives effect to chapter 11 bankruptcy policy, which focuses on maximization of the bankruptcy estate and encourages rehabilitation for the benefit of all parties.

2. The "Actual Test," Under Either the Traditional Approach or the *In Re Footstar* Analysis, is Most Consistent with General Bankruptcy Policy.

An application of either the traditional "actual test" or the *In re Footstar* "actual test" would give effect to the purposes and policies of the Bankruptcy Code by allowing Development to assume the Agreement. Allowing a debtor in possession to accept the benefits of an advantageous contract and maximizing the property available to satisfy creditors are central policies underlying chapter 11. *In re Edison Mission Energy*, 2013 Bankr. LEXIS 3872, at *31. By adopting a case-by-case inquiry into whether assumption will actually force the non-debtor party to accept performance from an entity other than the debtor in possession, this Court would "allow a debtor in possession to hold onto a valuable estate asset." *Id.* The Code also serves to facilitate efficient reorganization, in accordance with the general rehabilitative policies of bankruptcy. *Bildisco*, 465 U.S. at 516.

The bankruptcy community at large recognizes the rehabilitative and practical benefits of the result of the "actual test," favoring it significantly over the "hypothetical test." *See In re Footstar, Inc.*, 323 B.R. at 569. The First and Fifth Circuits, along with a "great majority" of bankruptcy courts, agree that Section 365(c)(1) reads “so as to permit assumption where the debtor in possession in fact does not intend to assign the contract.” *Id.*

Further, a Commission impaneled by the American Bankruptcy Institute analyzed Section 365(c)(1) and chose to reject the “hypothetical test” and recommended that courts instead adopt the “actual test.”[2] The Commission advocated that Congress amend the Bankruptcy Code to expressly clarify that a debtor in possession may assume executory intellectual property licenses.[3] By focusing on whether the parties will receive the benefit of their bargain, the “‘actual test’ properly balances both the rehabilitative goals of the debtor and the non-debtor party's rights under the executory contract.” *In re Edison Mission Energy*, 2013 Bankr. LEXIS 3872, at *31. The possibility that a debtor may lose the benefit of a valuable licensing agreement “solely because it filed for bankruptcy” is a “perverse and anomalous consequence.” *In re Footstar, Inc.*, 323 B.R. at 574.

Under My Thumb was free to negotiate restrictions on the license based on “changes in its stock ownership or corporate control,” but it did not. *See Institut* Pasteur, 104 F.3d at 494 (declining to prohibit assumption based on changes in stock ownership). Allowing a non-debtor to leverage consent or extort modifications to the agreement simply because the debtor seeks the “protections of the Bankruptcy Code” expressly goes against the underlying purpose of chapter 11. *In re Footstar, Inc.*, 323 B.R. at 570. This Court should not allow a non-debtor to use bankruptcy proceedings to re-write a contract to resolve a problem that it “reasonably should have foreseen.” *Institut Pasteur*, 104 F.3d at 495.

In this case, applying the “actual test” still provides Under My Thumb with the benefit of its bargain. Development is “in all material ways the legal entity” with which Under My Thumb

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[2] AM. BANKR. INST., *supra* note 1.
[3] *Id.*

"freely contracted" and simply seeks to assume the Agreement and continue rendering performance. *Id.* at 495. The "actual test" would allow Under My Thumb to continue receiving the monthly payments under the Agreement, while also allowing Development to maximize its bankruptcy estate and pay Under My Thumb's claim in accordance with the reorganization policies of chapter 11. R. at 7. Therefore, this Court should adopt the "actual test" to allow Development to assume the Agreement under Section 365(c)(1).

II. 11 U.S.C. § 1129(a)(10) Requires Acceptance from Any One Impaired Class of Creditors Under a Joint, Multi-Debtor Plan.

Section 1129(a)(10) safeguards a minimal level of creditor support by ensuring a court may not confirm a plan over the objections of all impaired creditors. Under chapter 11 of the Bankruptcy Code, a court shall not confirm a plan unless each class of impaired creditors consents to the plan. 11 U.S.C. § 1129(a)(8) (2018). However, in a "cramdown" scenario, a plan can be confirmed over the objections of a creditor. 11 U.S.C. § 1129(b)(1) (2018). Section 1129 provides several requirements for plan approval that protect impaired creditors in this scenario. One of these requirements, Section 1129(a)(10), ensures a plan receives a minimal level of support by requiring that at least one impaired creditor has accepted the plan. 11 U.S.C. § 1129(a)(10) (2018).

Although the language of Section 1129(a)(10) plainly requires "at least one class of claims that is impaired under the plan has accepted the plan," there are two approaches that courts utilize in interpreting the requirement: the "per plan" approach and the "per debtor" approach. *Id.* Respondent encourages this Court to ignore the plain language of the statute and instead modify the language to require that at least one impaired class of claims *of each debtor* accept the plan. However, this Court should adopt the "per plan" approach because it conforms to the plain and unambiguous language of the statute, the structure of Section 1129 as a whole, and the purpose and policy behind both Section 1129 and chapter 11 of the Bankruptcy Code.

A. The Plain Language of Section 1129(a)(10) Supports a "Per Plan" Approach.

The plain language of Section 1129(a)(10) unambiguously requires acceptance from "at least one class of claims that is impaired under the plan" and should be interpreted as written. *Id.* This Court recognizes the well-established principal that a court's inquiry "begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. U.S.*, 541 U.S. 176, 183 (2004). Because Section 1129(a)(10) is unambiguous, this Court should interpret the statute as written and apply the "per plan" approach. However, even if the Court were to go beyond the unambiguous statutory language, principles of statutory construction, and the context of Section 1129(a)(10) support the "per plan" approach.

1. The Text of the Statute is Unambiguous, and Therefore Must Be Interpreted as Written.

Unlike 11 U.S.C. § 365(c)(1) discussed above, this Court should enforce section 1129(a)(10) as written because the statutory language produces no ambiguity or absurd result. A court's function when construing statutory language is to give effect to the intent of Congress. *Am. Trucking Ass'ns*, 310 U.S. at 542. The best evidence of Congress's intent is the plain language of the statute. *See Sebelius v. Cloer*, 569 U.S. 369, 380 (2013) (stating that the court's inquiry ceases in a statutory construction case if the statutory language is unambiguous); *see also Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) (stating that the court must enforce plain and unambiguous statutory language according to its terms). Simply put, "[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 v. U.S. Tr.*, 540 U.S. 526, 534 (2004).

The Court must enforce the plain and unambiguous language of Section 1129(a)(10) to avoid circumventing Congress's authority to draft statutes. If courts had the power to rewrite unambiguous law whenever the judgment of the Legislature was in question, courts would effectively diminish the confidence and importance placed in the law and its application. To construe a statute based on a mere surmise or inference as for what the Legislature intended assumes that the Legislature's choice of words was due to inadvertence. *Doski v. M. Goldseker Co.*, 539 F.2d 1326, 1332 (4th Cir. 1976). The Judiciary must uphold its role as the interpreter of the law by enforcing unambiguous statutory language enacted explicitly by the Legislature. Such unambiguous language is present in Section 1129(a)(10), and the Court should therefore interpret the statute as written.

The plain language of Section 1129(a)(10) supports the "per plan" approach. Section 1129(a)(10) states in its entirety:

> 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). Under its plain language, Section 1129(a)(10) unambiguously requires that at least one impaired class of claims "under the plan" approve "the plan." *Id.* "[I]t 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." *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). The statute clearly states that "once a single impaired class accepts a plan, Section 1129(a)(10) is satisfied as to the entire plan." *Id.*

The only pathway to reach the "per debtor" approach urged by Respondent requires this Court to ignore the plain language of the statute. Advocates of the "per debtor" approach ignore

Congress's intent evident in the clear and unambiguous language it chose. By requiring that at least one impaired class of claims *of each debtor* accept the plan, "per debtor" supporters seek to amend the statutory language by placing additional restrictions upon plan confirmation that are not in the statute's actual text. In contrast, the "per plan" approach furthers this Court's belief that Congress "says in a statute what it means and means in a statute what it says there." *Contra Hartford Underwriters Ins. Co.*, 530 U.S. at 6.

This Court's approval of the "per plan" approach would affirm the decisions of the majority of lower courts that have ruled on this issue as well. The only circuit court to have addressed this question, along with the majority of bankruptcy courts, has interpreted the statute according to its plain language and in support of the "per plan" approach. *E.g. In re Transwest Resort Props., Inc.*, 881 F.3d at 729 ("The plain language of the statute supports the "per plan" approach."); *In re Enron Corp.*, No. 01-16034 (AJG) (Jointly Administered), 2004 Bankr. LEXIS 2549, at *235 (Bankr. S.D.N.Y. July 15, 2004) ("The plain language and inherent fundamental policy behind Section 1129(a)(10) of the Bankruptcy Code provides that an affirmative vote of one impaired class under the plan is sufficient to satisfy Section 1129(a)(10) of the Bankruptcy Code."); *In re SGPA, Inc.*, No. 1-01-02609, 2001 WL 34750646, at *6 (Bankr. M.D. Pa. Sept. 28, 2001) (holding that the plain language of the statute supports the "per plan" approach). Even the court in *In re Tribune*, which Respondent heavily relies on, found "nothing ambiguous in the language of Section 1129(a)(10)." *In re Tribune Co.*, 464 B.R. 126, 183 (Bankr. D. Del. 2011). This Court, in finding that Section 1129(a)(10) supports a "per plan" approach, will not only affirm those courts that have previously considered this issue but will also uphold the cardinal rule of statutory construction: to enforce the statute according to its terms when the language is plain and unambiguous.

2. Even If the Statute Is Ambiguous, Application of the Rules of Statutory Construction and Consideration of the Entire Structure of Section 1129(a) Favor the “Per Plan” Approach.

Although a court’s inquiry into interpreting statutory language ceases when the language of the statute is unambiguous, Respondent argues that this Court should overlook the language of Section 1129(a)(10) and utilize other rules of statutory construction. R. at 19–20. However, plain language alone is not the only justification favoring the “per plan” approach. If this Court looks past the literal text of Section 1129(a)(10), the result remains the same: principals of statutory construction and the overall structure of Section 1129(a) lead to a “per plan” interpretation of Section 1129(a)(10).

First, the rule of statutory construction codified in Section 102(7) of the Bankruptcy Code lends helpful guidance that favors the “per plan” approach—not the “per debtor” approach as Respondent contends. Section 102(7) states that “the singular includes the plural.” 11 U.S.C. § 102(7) (2018). After applying the rule, the language of Section 1129(a)(10) becomes:

> If classes of claims are impaired under the plans, at least one of the classes of claims that is impaired under the plans have accepted the plans…

Even in the plural, the requirement of Section 1129(a)(10) is satisfied when “at least one of the classes of claims” accepts the plan, confirming the application of the “per plan” approach is proper. *See In re Transwest Resort Props., Inc.*, 881 F.3d at 730 (holding that Section 102(7) does not change the conclusion that Section 1129(a)(10) supports the “per plan” approach). This conclusion evidences Congress’s consideration that even when there is a joint plan of reorganization, only one impaired class of claims under the plan must accept the plan. The unambiguous language of the statute still stands.

Moving even further beyond the application of Section 102(7), the overall structure of Section 1129(a) does not favor the “per debtor” approach over the “per plan” approach.

Respondent's contention that Sections 1129(a)(1), (a)(3), and (a)(8) favor a "per debtor" approach fails because these sections yield the same result whether applied on a "per debtor" or "per plan" basis. Additionally, even if these other subsections can apply on a "per debtor" basis, that is not reason alone to force a "per debtor" interpretation onto Section 1129(a)(10) as well. *See Pittsburgh & Lake Erie R. Co. v. Ry. Labor Executives' Ass'n*, 491 U.S. 490, 510 (1989) (stating that when two statutes are capable of co-existence, each should be given effect to preserve their sense and purpose).

The other sections of 1129(a)(10) do not favor a "per debtor" approach. For example, Sections 1129(a)(1) and 1129(a)(3) require that the entire plan complies with the Bankruptcy Code and is proposed in good faith, respectively. 11 U.S.C. § 1129(a)(1) (2018); 11 U.S.C. § 1129(a)(3) (2018). Applying the Section 102(7) rule that "the singular includes the plural," these subsections require that the entirety of the "plans" comply with these requirements. That these subsections demand compliance from the entirety of all plans is important; these subsections are fundamentally different from Section 1129(a)(10), which merely requires "one" acceptance and not acceptance from the entire body of impaired classes.

Under the "per plan" or "per debtor" approach, the result remains the same. From the "per plan" perspective, if a single component of a jointly administered plan as a whole does not meet the standards under Section 1129(a)(1) or was not proposed in good-faith under Section 1129(a)(3), the entire plan will be unable to proceed to confirmation. Similarly, from the "per debtor" perspective, if a single component of any of the debtor's individual sub-plans does not meet the standards under Section 1129(a)(1) or was not proposed in good-faith under Section 1129(a)(3), then the entire plan will be unable to proceed to confirmation. If these sections truly encouraged a "per debtor" approach, the interpretation of these sections would vary depending on the application of a "per debtor" or "per plan" approach. However, they do not; regardless of whether applying the requirement to the plan as a whole under the "per plan" approach or applying the requirement to each debtor, the applications of Sections 1129(a)(1) and 1129(a)(3) yield the same result.

Similarly, Section 1129(a)(8) explicitly states that "each class of claims" must accept the plan. 11 U.S.C. § 1129(a)(8) (2018). This language is the type of explicit language that Respondent wishes were present in Section 1129(a)(10), but that is instead lacking. These various requirements in Section 1129(a) show Congress's ability to formulate statutory language that differs in its purpose, applicability, and intended interpretation. Once again, if Congress had intended that the requirement in Section 1129(a)(10) apply on a "per debtor" basis, it would have specified. *See BedRoc Ltd.*, 541 U.S. at 183 (holding a court presumes that Congress says in the statute what it means.)

Additionally, the subsections in Section 1129(a) are capable of co-existence and do not need to apply uniformly. This Court has repeatedly held that when two statutes are capable of co-existence, each should be given effect to preserve their sense and purpose absent a clearly expressed congressional intention to the contrary. *Pittsburg & Lake Erie R.R. Co.*, 491 U.S. at 510; *Watt v. Alaska*, 451 U.S. 259, 267 (1981); *Ruckelshaus v. Monsanto Co*., 467 U.S. 986, 1018 (1984). Congress phrased the requirements in Section 1129(a) uniquely, giving them varying purposes and objectives. Taking the position that every requirement under Section 1129(a) must apply uniformly disregards the unique purposes and objectives behind each statute and undercuts the importance of unambiguous statutory language. Because the requirements under Section 1129(a) are capable of co-existence and there is no explicit language or congressional intent to apply each requirement on a uniform "per debtor" or "per plan" basis, the unambiguous language of Section 1129(a)(10) should not be disturbed. Therefore, this Court should apply a "per plan" approach and recognize Congress's determination that only one impaired class of claims of any single debtor under the plan must accept the plan.

B. The "Per Plan" Approach Is Consistent with the Purpose and Policy Behind Chapter 11 and Section 1129(a)(10) of the Bankruptcy Code.

Courts that apply the "per debtor" approach to Section 1129(a)(10) not only misconstrue the text and structure of the statute but also stray from the purpose and policy behind both chapter 11 and Section 1129(a). These underlying purpose and policy concerns support the position that only one impaired class per plan must vote in favor of the plan in order to satisfy Section 1129(a)(10). The "per plan" approach furthers the purpose of Section 1129 (a)(10) and chapter 11 by preventing plan confirmation if none of the impaired classes accept the plan while simultaneously preventing affected creditors from possessing an all-encompassing veto power.

1. The "Per Plan" Approach Preserves a Minimal Level of Support from Impaired Creditors, Furthering the Purpose of Section 1129(a)(10).

To ensure that reorganization provides both creditors and debtors with a negotiating table, Section 1129 provides safeguards to both sides such that neither can wholly dominate nor be wholly dominated during reorganization. *See In re The Vill. at Lakeridge, LLC*, 814 F.3d 993, 1000 (9th Cir. 2016) (stating that Section 1129 "contains a variety of safeguards for secured creditors who could be negatively impacted by a debtor's reorganization plan.") Specifically, Section 1129(a)(10) "operates as a statutory gatekeeper barring access to cramdown where there is absent even one impaired class accepting the plan." *One Times Square Assocs. Ltd. P'ship v. Banque Nationale de Paris (In re One Times Square Assocs. Ltd. P'ship)*, 165 B.R. 773, 776–77 (S.D.N.Y. 1994). This procedural requirement guarantees consensus in the reorganization process by ensuring there is "some other properly classified group that is also hurt and nonetheless favors the plan." *Id.*

Although Section 1129(a)(10) is an important protection mechanism for impaired creditors, this requirement is "not an all-purpose creditor protection mechanism." *In re SGPA, Inc.*, 2001 WL 34750646, at *15. In addition to the Section 1129(a)(10) requirement, the plan of reorganization must meet several other requirements under Section 1129(a) which also seek to garner consensus and protect affected creditors. *See* 11 U.S.C. § 1129(a)(1) (2018) (requiring the plan to comply with the Bankruptcy Code); 11 U.S.C. § 1129(a)(3) (2018) (requiring the plan be proposed in good faith); 11 U.S.C. § 1129(a)(5) (2018) (requiring the plan proponent to disclose the identities of all insiders and potential insiders); 11 U.S.C. § 1129(b)(2) (2018) (requiring the plan to be "fair and equitable"). These protections remain mandatory and essential to the protection of affected creditors, even after the plan complies with the Section 1129(a)(10) requirement. Therefore, even if a plan is accepted in the presence of a disapproving creditor under the "per plan" approach, the affected creditor can rely on a variety of other safeguards to protect its interests.

Furthering the idea that Section 1129(a)(10) is simply a procedural requirement aimed at garnering a minimal level of creditor support, several courts have allowed debtors to artificially impair classes of creditors to meet the Section 1129(a)(10) requirement. *E.g., In re Greate Bay Hotel & Casino, Inc.*, 251 B.R. 213, 240 (Bankr. D. N.J. 2000) ("Under the statutory scheme for the classification and treatment of claims, a plan proponent may impair a class of claims. If an impaired class accepts the plan, the requirement of Section 1129(a)(10) is satisfied."); *In re Duval Manor Assocs.*, 191 B.R. 622, 628 (Bankr. E.D. Pa. 1996) (concluding that "artificial impairment, while perhaps philosophically not the better view, is nevertheless clearly permitted under the plain meaning of the statute"); *see also In re Vill. at Camp Bowie I, L.P.*, 710 F.3d 239 (5th Cir. 2013) (holding that artificial impairment was sufficient for purposes of Section

1129(a)(10)). The allowance of artificial class impairment to satisfy Section 1129(a)(10) illustrates that the requirement is to be a statutory gatekeeper merely securing a baseline level of plan support, and not operating as an all-encompassing protection mechanism for creditors.

In the present case, applying the "per plan" approach furthers the purpose of Section 1129(a)(10) by maintaining an overwhelming amount of creditor support in favor of the Plan, an amount which is above and beyond the "indicia of support" that Section 1129(a)(10) aims to safeguard. *In re Windsor on the River Assocs., Ltd.*, 7 F.3d 127, 131 (8th Cir. 1993). The Plan achieved "near universal support from all creditor groups," including support from the unsecured creditors' committee. R. at 6, 8. Because the "per plan" approach ensures there is at least a minimal level of support by affected creditors, it furthers the purpose of Section 1129(a)(10). *See In re Enron Corp.*, 2004 Bankr. LEXIS 2549, at *235 (holding that the "fundamental policy behind Section 1129(a)(10)" supports a "per plan" approach).

2. The "Per Plan" Approach Encourages Flexibility and a Path Toward Confirmation Between the Parties of a Beneficial Plan, Furthering the Purposes of Chapter 11.

The purpose of chapter 11 of the Bankruptcy Code 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." *Toibb*, 501 U.S. at 163–64 (1991). Chapter 11 reorganization provides financially distressed businesses "breathing space in which to return to a viable state." *In re C-TC 9th Ave. P'ship*, 113 F.3d 1304, 1310 (2d Cir. 1997). This Court has emphasized that "policies of flexibility and equity [are] built into chapter 11 of the Bankruptcy Code" because the "fundamental purpose" of chapter 11 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. 513, 525, 528 (1984). Put simply, if chapter 11 reorganization is successful, "everyone wins: the debtor, creditors, employees, and shareholders." *In re Capitol Food Corp. of Fields Corner*, 490 F.3d 21, 25 (1st Cir. 2007).

The "per plan" approach furthers the purposes of chapter 11 of the Bankruptcy Code by encouraging flexibility, equity, and beneficial negotiations in the reorganization process. By holding that Section 1129(a)(10) applies on a "per plan" and not "per debtor" basis, this Court ensures that debtors and creditors alike can pursue meaningful negotiations and beneficial solutions without being blindsided by a creditor vetoing an otherwise advantageous plan of reorganization. As described by the court in *In re SGPA, Inc.*:

> To require the formality of a separate accepting impaired class for each corporate entity here would undermine a finely wrought plan solution aimed at preserving maximum value at the operating subsidiary level where all meaningful assets reside. The result might well be failure of the Plan, which would harm the creditors…. The Bankruptcy Code does not mandate such an unjust result.

In re SGPA, Inc., 2001 WL 34750646, at *16. Applying the "per debtor" approach to Section 1129(a)(10) "would inappropriately complicate multi-debtor cases by exalting form over substance and would, in some cases, make a negotiated plan unworkable." *Id.* While the "per plan" approach encourages flexibility and equity, the "per debtor" approach creates roadblocks to the purposes and policies behind chapter 11.

The inequitable result of the "per debtor" approach to Section 1129(a)(10) is apparent in the present case. It is "undisputed" that the Plan leaves Under My Thumb in a much better place than it would be if Debtors were liquidated under chapter 7. R. at 31. While the "per plan" approach furthers the purposes of chapter 11 by granting the Debtors' business the breath of fresh air needed to continue efficient operations, the "per debtor" approach torpedoes a universally beneficial plan into nonexistence. If the "per debtor" approach jettisons this Plan involving only ten debtors, beneficial plans involving hundreds or even thousands of accepting parties will likewise find themselves at the mercy of a dissatisfied creditor's veto power. In applying the "per plan" approach, this Court will extend a life-raft to the flexibility and preservation of value that keeps chapter 11 of the Bankruptcy Code afloat.

C. This Court Should Not Misconstrue the Plain Language of Section 1129(a)(10) to Address the Judicially-Created Doctrine of Substantive Consolidation.

Substantive consolidation and joint administration are both "procedures available to a bankruptcy court to link two or more related bankruptcy cases." *In re Parkway Calabasas Ltd.*, 89 B.R. 832, 836 (Bankr. C.D. Cal. 1988). However, the two mechanisms drastically differ in their purposes, origins in the law, and impacts on the rights of debtors and creditors. The purpose of joint administration is to "make case administration easier and less expensive than in separate cases" and is created by statute. *Id.*; 11 U.S.C. § 1015(b) (2018). In contrast, substantive consolidation, a judicially-created equitable remedy, is not an "instrument of procedural convenience, but a measure vitally affecting substantive rights." *In re Snider Bros., Inc.*, 18 B.R. 230, 234 (Bankr. D. Mass. 1982).

Despite the separate origins of these procedures and differences in their effects, Respondent dangerously blurs the line between them and asks this Court to reconstrue an otherwise unambiguous statute to address qualms with a purely judicial doctrine. Because the estates of the Debtors are not in actuality being substantively consolidated and the Creditors never made a proper objection to any of their substantive consolidation concerns, this Court should apply the "per plan" approach uninhibited by the doctrine of substantive consolidation.

In the present case, "the Debtors' cases were jointly administered for the convenience of the parties and the court" with no objection. R. at 3. Further, the Plan expressly stated that the Debtors' estates were not being substantively consolidated. R. at 7. Although Respondent alleges a "per plan" approach results in substantively consolidating the Debtors' estates, courts have readily applied a "per plan" approach to jointly administered estates without reaching such an aggressive conclusion. *In re Transwest Resort Props., Inc.*, 881 F.3d at 730; *In re SGPA, Inc.*, 2001 WL 34750646, at *17; *see also In re Enron Corp.*, 2004 Bankr. LEXIS 2549, at *234 (observing that the debtors were managed on an integrated basis making it reasonable and administratively convenient to propose a joint plan). These courts properly recognize that applying a "per plan" approach to debtors' jointly administered estates does not, in fact, result in a "back door" substantive consolidation effort.

Respondent wrongly associates the "per plan" approach with the judicially-created equitable remedy of substantive consolidation. Although creditors may find reason to object to the joint administration of debtors' estates, reconstruing the unambiguous language and policy of Section 1129(a)(10) in favor of a "per debtor" approach is not the appropriate solution. Instead the creditor "can and should object that the plan—rather than the requirements confirming the plan—results in de facto substantive consolidation." *In re Transwest Resort Props., Inc.*, 881 F.3d at 733 (Friedland, J., concurring). Even if there are concerns about "entangling various estates in a complex, multi-debtor reorganization," the "blanket statutory solution" presented as the "per debtor" approach is not the appropriate solution. *Id.* The matter before this Court is one of statutory construction. This Court should not misconstrue the intent of Congress by bending Section 1129(a)(10) to address implications flowing from the judicially-created remedy of substantive consolidation.

CONCLUSION

This Court should reverse the Thirteenth Circuit's decision holding that 11 U.S.C. § 365(c)(1) prevents a debtor in possession from assuming an executory contract over the objection of the non-debtor party where applicable non-bankruptcy law excuses performance from an entity other than the debtor in possession. Additionally, this Court should reverse the Thirteenth Circuit's decision that 11 U.S.C. § 1129(a)(10) requires the acceptance of multiple impaired classes of creditors under a joint plan of reorganization. Petitioner respectfully asks this Court to reinstate the decisions of the bankruptcy court and appellate panel that allow Tumbling Dice Development, LLC to assume its licensing agreement and place all parties involved back on track towards a successful plan of reorganization.

APPENDIX A

11 U.S.C. § 365(c)(1)

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

APPENDIX B

11 U.S.C. § 1129(a)(10)

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.