No. 19-1004

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

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

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

Team R7
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.

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OPINIONS BELOW

In unreported opinions, the bankruptcy court overruled UMT's objections and confirmed the Debtors' reorganization plan, which was affirmed by the Bankruptcy Appellate Panel for the Thirteenth Circuit. (R. at 3.) The Court of Appeals for the Thirteenth Circuit reversed on both issues; its opinion is reproduced as the record in this appeal. (R. at 3.)

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

11 U.S.C. § 365

(a)-(b) [omitted]

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

(1)

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

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

(2)-(3) [omitted]

(d)-(e) [omitted]

(f)

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

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if—

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) [omitted]

11 U.S.C. § 1129

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

(1)-(2) [omitted]

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

(4)-(6) [omitted]

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

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

(i) has accepted the plan; or

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

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

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

(A) such class has accepted the plan; or

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

(9) [omitted]

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

(11)-(16) [omitted]

(b)

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

(2) [omitted]

(c)-(e) [omitted]

STATEMENT OF FACTS

Tumbling Dice, Inc. (TDI), was formed as a holding company to own the membership interests of its nine wholly-owned subsidiaries (collectively, the Debtors). (R. at 4.) Eight of the subsidiaries operate a luxury resort and casino under the Tumbling Dice name at various locations throughout the country. (R. at 4.) The ninth subsidiary, Tumbling Dice Development, LLC (Development), serves a more limited purpose in the overall corporate structure by acting as the licensee to a non-exclusive software agreement. (R. at 4.)

For the past thirty years, the Debtors used their casino loyalty program, Club Satisfaction, to promote brand loyalty and incentivize member participation in gaming and other activities at their casinos and resorts. (R. at 4.) In 2008, Development sought out the services of Under My Thumb (UMT) to develop a software system (Software) that would help modernize their existing Club Satisfaction program. (R. at 4.) The Software development process took nearly a year, and UMT incurred approximately $10 million in costs as a result. (R. at 4.) Development agreed to repay UMT a portion of these costs through an unsecured $7 million promissory note (R&D Note). (R. at 4.) After the Software was completed, UMT and Development entered into a license agreement (Agreement) that granted Development a non-exclusive license to use the copyrighted and patented Software. (R. at 5.) In exchange for use of the Software, Development agreed to pay UMT a monthly fee that was calculated based on the amount of spending by Club Satisfaction members. (R. at 5.) The Agreement allowed Development to "extend the benefits of the Agreement to its affiliated entities only," despite the fact the remaining Debtors were not actually parties to the Agreement. (R. at 5.) Aside from this provision, the Agreement explicitly prohibited the Debtors from assigning or sublicensing their rights absent UMT's express written consent. (R. at 5.) The Debtors' use of the Software proved incredibly successful and helped revitalize the Club Satisfaction program. (R. at 5.) Despite this success, the Debtors suddenly stopped making payments under the R&D Note in June 2015. (R. at 6.)

In December 2011, the hedge fund Start Me Up, Inc. (SMU) acquired 100% of the stock of TDI in the course of a leveraged buy-out transaction (LBO). (R. at 6.) Pursuant to the terms of the LBO, in exchange for a loan of $3 billion, the Debtors granted first priority liens on their assets to a syndicated group of lenders (Lenders). (R. at 6.) Because of Development's limited purpose in the corporate structure, it was not required to act as a borrower or guarantor under the loan. (R. at 6.) Overcome by the burden of loan service under the LBO, the Debtors commenced voluntary chapter 11 cases in January 2016. (R. at 6.) At this time, Development still owed over $6 million to UMT under the R&D Note. (R. at 6.)

As part of the proceedings, the bankruptcy court ordered the Debtors to engage in non-binding mediation. (R. at 6.) SMU, the Lenders, the unsecured creditors' committee, and certain other stakeholders were parties to the court-ordered mediation. (R. at 6.) Notably missing from the mediation, however, was UMT. (R. at 6.) The parties to the mediation reached a deal, memorialized in a plan support agreement (Plan Support Agreement), that would allow for consensual restructure of all secured indebtedness in exchange for SMU promising to inject new capital of $66 million, which would be used to fund a 55% pro rata distribution to the unsecured creditors. (R. at 7.) While this allowed SMU to retain its equity interest, the Plan Support Agreement called for the cancellation of the existing shares and membership interests in the Debtors, and the issuance of new shares and membership interests in the reorganized Debtors. (R. at 7.) The Debtors filed the reorganization plan and disclosure statement (together, the Plan) in August 2016. (R. at 7.) At no time did the Debtors ever file a motion for substantive consolidation. (R. at 7.) Moreover, 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.)

With respect to UMT, the Plan proposed assumption of the Agreement, thus allowing for continued monthly payments in exchange for the Debtors' use of the Software. (R. at 7.) It also provided for a 55% pro rata distribution on the remaining unsecured $6 million owed under the R&D Note. (R. at 7.) Closer review of the disclosure statement, however, revealed that of the $66 million paid to unsecured creditors, only $31 million was directly financed by SMU. (R. at 7.) Sympathy for the Devil (SFD), a private equity group, was to invest the remaining $35 million. (R. at 7-8.) In exchange for its financing, SFD would receive 51%, a majority interest, of the voting shares of the reorganized TDI and several seats on the new board of directors. (R. at 8.) SFD's involvement was suspicious to UMT because SFD's portfolio of companies included a direct competitor of UMT, who had attempted to replicate the Software for several years. (R. at 8.) Based on these concerns, UMT voted to reject the Plan. (R. at 8.) Because UMT controlled Development's only class of creditors, Development did not have an impaired accepting class of creditors. (R. at 8.)

The bankruptcy court overruled UMT's objections due to the overwhelming support of the remaining creditors and confirmed the Plan. (R. at 8.) Adopting the actual test, the court permitted assumption of the Agreement under § 365(c)(1) because it determined that UMT was not asked to do anything other than to honor its existing Agreement with Development. (R. at 9.) Further, the court found that a joint, multi-debtor plan only requires approval from one impaired class under § 1129(a)(10). (R. at 9.) The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court on both issues. (R. at 9.) The Court of Appeals for the Thirteenth Circuit subsequently reversed on both issues. (R. at 3.)

ARGUMENT

The facts of this case are undisputed. (R. at 3 n.3.) This appeal presents only questions of law, which are reviewed de novo. *Texas v. Soileau (In re Soileau)*, 488 F.3d 302, 305 (5th Cir. 2007).

I. Section 365 of the Bankruptcy Code Governs the Rights of Debtors to Assume or Assign the Agreement Because It Is an Executory Contract Under Both the Countryman Test and the Functional Approach.

Section 365 of the Bankruptcy Code (Code) governs the rights of a debtor to assume or reject an executory contract. *See generally* 11 U.S.C. § 365 (2018) (governing executory contracts and unexpired leases). The Code does not define the term "executory contract," but courts have traditionally adopted one of two tests to determine whether the contract at issue is executory: (i) the Countryman test, or (ii) the functional approach. *See In re Worldcom, Inc.*, 343 B.R. 486, 492-93 (Bankr. S.D.N.Y. 2006) (stating "[m]ost jurisdictions have now come to utilize either the 'Countryman' test or the 'Functional' approach when determining whether a prepetition contract is executory."). Regardless of which test this Court decides to apply, the Agreement between UMT and Development meets the definition of an executory contract under both tests, and thus § 365 governs the rights of the Debtors to assume or assign the Agreement.

A. The Agreement Is an Executory Contract Under the Countryman Test Because Both UMT And Development Had Substantial Performance Obligations Remaining at the Time the Debtors Filed the Chapter 11 Petition.

The majority of courts and scholars employ the Countryman test to resolve the issue of whether a contract is executory. *See COR Route 5 Co., LLC v. Penn Traffic Co.* (*In re Penn Traffic Co.)*, 524 F.3d 373, 379 (2d Cir. 2008) (noting "most courts and scholars look to the standard first articulated by Professor Vernon Countryman"). Under the Countryman test, a contract is executory if the "obligations of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete the performance would constitute a material breach excusing the performance of the other." *RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257, 264 (4th Cir. 2004) (quoting Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 460 (1973)). Moreover, "[t]he time for testing whether there are material unperformed obligations on both sides is when the bankruptcy petition is filed." *Enter. Energy Corp. v. United States* (*In re Columbia Gas Sys. Inc.)*, 50 F.3d 233, 240 (3d Cir.1995).

Many courts adopting the Countryman test have found that intellectual property licenses are executory contracts. *See, e.g.*, *Lubrizol Enters. v. Richmond Metal Finishers*, 756 F.2d 1043, 1046 (4th Cir. 1985) (holding non-exclusive license agreement to utilize patented technology was executory); *Fenix Cattle Co. v. Silver (In re Select-A-Seat Corp.)*, 625 F.2d 290, 292 (9th Cir. 1980) (granting exclusive rights to use and license debtor's software packages in all but five areas of the world was executory contract); *RCC Tech. Corp. v. Sunterra Corp.*, 287 B.R. 864, 865 (Bankr. D. Md. 2003) (stating "there is a long line of authority holding that intellectual property licensing agreements such as the SLA are executory contracts"), *rev'd*, 361 F.3d 257, 264 (4th Cir. 2004); *In re Buildnet, Inc.*, No. 01–82293, 2002 WL 31103235, at *3 (Bankr. M.D.N.C. Sept. 20, 2002) ("As a general rule, most patent, trademark, technology and other intellectual property licenses are executory contracts."). Courts generally find that intellectual property licenses satisfy the Countryman test because "each party to the license ha[s] the material duty of 'refraining from suing the other for infringement of any of the [intellectual property] covered by the license.'" *In re Golden Books Family Entm't, Inc.*, 269 B.R. 300, 308 (Bankr. D. Del. 2001) (quoting *In re Access Beyond Tech., Inc.*, 237 B.R. 32, 43 (Bankr. D. Del. 1999)); *see generally* Bradley N. Raderman & John Walshe Murray, *Assumption and Assignment* *of Patent Licenses under Chapter 11 of the Bankruptcy Code*, 6 J. BANKR. L. & PRAC. 513, 514-15 (1997) (explaining continuing material obligations of both licensor and licensee in intellectual property license agreement). In particular, a licensor's ongoing duty to refrain from suing the licensee for infringement is considered a material executory obligation of the licensor. *See Everex Sys. Inc. v. Cadtrak Corp. (In re CFLC, Inc.)*, 89 F3d 673, 677 (9th Cir. 1996) (holding licensor had executory duty to refrain from suing licensee for patent infringement under nonexclusive license); Raderman & Murray, *supra*, at 515 (detailing common executory duties of a licensor in intellectual property license agreements). As for the licensee, courts commonly determine that material executory obligations include the duty to account for and pay royalties to the licensor, the duty to mark all products made under the license with proper statutory notice, and the duty to protect the licensor's rights in the intellectual property. *See In re CFLC, Inc.*, 89 F.3d at 677 (describing licensee's obligation to mark all products made under license with proper statutory notice); *In re Select-A-Seat Corp.*, 625 F.2d at 292 (stating licensee had executory obligation to pay specified return from use of licensed software); *Lubrizol Enters.*, 756 F.2d at 1046 (highlighting licensee's obligation to render accounting and pay royalties); *In re Chipwich, Inc.*, 54 B.R. 427, 430 (Bankr. S.D.N.Y. 1985) (noting licensee had obligation to pay royalties, furnish licensor with sales reports, and protect licensor's rights in licensed trademark).

The Agreement is an executory contract under Countryman because both UMT and Development had material outstanding obligations remaining at the time the Debtors filed the chapter 11 petition in January 2016. Under the Agreement, UMT granted Development a non-exclusive license to use its copyrighted and patented Software and permitted Development to "extend the benefits of the Agreement to its affiliated entities only." (R. at 5.) Because the grant of a non-exclusive license is essentially "a mere waiver of the right to sue the licensee for infringement," UMT had an ongoing material executory obligation not to sue Development for copyright and patent infringement for its use of the Software. *See In re CFLC, Inc.*, 89 F.3d at 677 (finding licensor owed significant continued performance to the licensee because "it must continue to refrain from suing it for infringement, since a nonexclusive patent license is, in essence 'a mere waiver of the right to sue' the licensee for infringement."). Development also owed significant performance to UMT because it had an unperformed and continued duty to account for and pay royalties in exchange for the license to use the Software. *See Lubrizol Enters.*, 756 F.2d at 1046 (stating "[licensee] owed [licensor] the unperformed and continuing duty of accounting for and paying royalties for the life of the agreement"); *In re Chipwich, Inc.*, 54 B.R. at 430 (determining "the licensee's continuing duty of accounting for, and paying royalties for the life of the agreement meant that the contract was executory as to both parties in that case."). This duty to pay UMT a monthly fee— an amount that was calculated based on the spending activity by Club Satisfaction members—constitutes a material obligation because it goes beyond a mere debt or promise to pay a fixed sum of money, but instead requires Development to continue to account for and pay royalties for the life of the Agreement. *See Lubrizol Enters.*, 756 F.2d at 1046 (noting "if [licensee] had owed [licensor] nothing more than a duty to make fixed payments or cancel specified indebtedness under the agreement, the agreement would not be executory as to [licensee]"). Since both UMT and Development owed substantial performance at the time of the filing, the Agreement satisfies the Countryman definition and is therefore an executory contract within the meaning of § 365.

B. The Agreement Is an Executory Contract Under the Functional Approach Because It Satisfies the More Stringent Countryman Standard, and Thus Is Executory Under the Functional Approach's More Lenient Definition.

If a bankruptcy court determines that the contract at issue is an executory contract under the Countryman test, there is no need for the appellate court to review the bankruptcy court's decision under the more lenient and flexible functional approach. *See Shoppers World Cmty. Ctr., L.P. v. Bradlees Stores, Inc. (In re Bradlees Stores, Inc.)*, No. 00-16033 (BRL), 2001 WL 1112308, at *7 (S.D.N.Y. Sept. 20, 2001) (upholding bankruptcy court's determination that a contract was executory under the Countryman definition and accordingly declining to review its decision under the more lenient functional test). The more lenient functional approach definition provides that a contract may still be executory even though there are material obligations outstanding on the part of *only one* of the parties, if assumption and rejection of the contract would ultimately benefit the estate and its creditors. *Sipes v. Atl. Gulf Cmtys. Corp. (In re Gen. Dev. Corp.)*, 84 F.3d 1364, 1370 (11th Cir. 1996) (mem.) ("Legislative history for [§ 365] evidences that congress considered mutual obligation to be indicative of an executory contract in some . . . but not all, cases."); *see In re Magness*, 972 F.2d 689, 694 (6th Cir. 1992) ("[I]n determining whether the contract is executory, we should work backward from an examination of the purposes to be accomplished by rejection and, if they have already been accomplished, then the contract cannot be said to be executory."). Because the functional approach only requires *one* of the parties to the contract to have material outstanding obligations, the Countryman definition is generally accepted as the more stringent test, and therefore if a contract is executory under Countryman, it is also executory under the more lenient functional approach. *See In re ASPC Corp.*, 601 B.R. 766, 797 (Bankr. S.D. Ohio 2019) ("[T]here is simply no basis under Sixth Circuit law to conclude that a contract is executory under the Countryman definition and non-executory under the functional test."); *In re Ellipsat, Inc.*, 480 B.R. 1, 7 n.5 (Bankr. D.D.C. 2012) ("The Countryman test is more stringent, and as a consequence, if a contract is executory under that test, it is also executory under the [f]unctional test."); *In re Helm*, 335 B.R. 528, 535 (Bankr. S.D.N.Y. 2006) (stating "if a contract is executory under [the Countryman] standard, the contract is necessarily executory" under the functional approach).

The Agreement is an executory contract under the Countryman test because the obligations of both UMT and Development were so unperformed that failure of either to complete performance would constitute a material breach of the contract. *See supra* Section I.A (analyzing whether Agreement is executory under Countryman definition). Because UMT owed an ongoing material duty to refrain from suing Development for infringement, and conversely, Development owed UMT a continuing obligation to account for and pay royalties, *both parties* had substantial performance obligations remaining under the Agreement. *See In re CFLC, Inc.*, 89 F.3d at 677 (finding licensor owed significant continued performance to the licensee because "it must continue to refrain from suing it for infringement"); *Lubrizol Enters.*, 756 F.2d at 1046 (holding licensee owed licensor an executory duty of accounting for and paying royalties). As a result, the Agreement is executory under the stringent Countryman standard, and must therefore be executory under the more lenient functional approach. *See In re ASPC Corp.*, 601 B.R. at 797 (highlighting if contract executory under Countryman, also executory under functional approach). Consequently, further analysis under the functional approach is unnecessary, and the Court should find the Agreement executory under both standards.

II. The Debtors May Not Assign the Agreement Under § 365 Because It Is A License of Intellectual Property That Is Not Assignable Under Federal Intellectual Property Common Law Absent Respondent's Consent.

Federal intellectual property common law governs the assignability of a licensee's interest in the intellectual property. *See In re Trump Entm't Resorts, Inc.*, 526 B.R. 116, 123 (Bankr. D. Del. 2015) ("Since the Trademark License Agreement is just that, a trademark license agreement, it is clear that the applicable law here is federal trademark law."). Under this body of law, the doctrine of nonassignability prohibits a licensee from assigning an interest in a patent, copyright, or trademark license to a third party without the licensor's consent. *See Troy Iron & Nail Factory v. Corning*, 55 U.S. 193, 216 (2012) ("A mere license to a party, without having his assigns or equivalent words to them, showing that it was meant to be assignable, is only the grant of a personal power to the licensees, and is not transferable by him to another."); *Gartner v. Nike, Inc.*, 279 F.3d 774, 781 (9th Cir. 2002) (holding hold that federal law governed the case and that the exclusive copyright license was only assignable with the consent of the licensor); *Stenograph Corp. v. Fulkerson*, 972 F.2d 726, 729 n.2 (7th Cir. 1992) ("Patent licenses are not assignable in the absence of express language."); *In re Trump Entm't Resorts, Inc.*, 586 B.R. at 123 ("[U]nder federal trademark law, trademark licenses are not assignable in the absence of some express authorization from the licensor, such as a clause in the license agreement itself."); *In re Alltech Plastics, Inc.*, 71 B.R. 686, 689 (Bankr. W.D. Tenn. 1987) ("[F]ederal common law classifies patent licenses as personal in nature and not assignable unless expressly made so."). The doctrine of nonassignability is premised on the principle that intellectual property licenses are personal service contracts, where the identity of the licensee is a material term of the license and the abilities and talents of the licensee are of primary importance. *See* Warren E. Agin, *Assuming Intellectual Property Licenses*, 13-FEB AM. BANKR. INST. J. 46, 46 (2012) (describing Supreme Court rationale for rule restricting assignability); *see also Oliver v. Rumford Chem. Works*, 109 U.S. 75, 83 (1883) ("It is apparent that [intellectual property licenses] must have been granted to such individuals as the grantor chose to select because of their personal ability or qualifications."); *Sally Beauty Co. v. Nexxus Prods. Co.*, 801 F.2d 1001, 1008 (7th Cir. 1986) ("If [performance is a personal services contract], the duty is per se nondelegable. There is no inquiry into whether the delegate is as skilled or worthy of trust and confidence as the original obligor: the delegate was not bargained for and the obligee need not consent to the substitution.”).

Further, the exclusive or non-exclusive nature of the intellectual property license may be a factor the court considers when determining assignability. *See Perlman v. Catapult Entm't Inc. (In re Catapult Entm't, Inc.)*, 165 F.3d 747, 750 (9th Cir. 1999) (highlighting “non[-]exclusive patent licenses are ‘personal and assignable only with the consent of the licensor.’”); *In re Patient Educ. Media, Inc.*, 210 B.R. 237, 240-241 (Bankr. S.D.N.Y. 1997) (discussing effect of exclusive or non-exclusive nature of license on licensee’s ability to assign); *see also* Aleta A. Mills, Note, *The Impact of Bankruptcy on Patent and Copyright Licenses*, 17 BANKR. DEV. J. 575, 585–86 (2001) (collecting and summarizing cases). Courts may determine an exclusive license is assignable because the exclusive nature of the license grants the debtor complete ownership rights in the intellectual property. *See In re Patient Educ. Media, Inc.*, 210 B.R. at 240 (“[T]he licensee under an exclusive license may freely transfer his rights, and moreover, the licensor cannot transfer the same rights to anyone else.”). With respect to non-exclusive licenses, however, courts generally hold that non-exclusive licenses, regardless of the character of the intellectual property, are unassignable because it is only a grant of a license in a personal property interest and ownership remains with the licensor. *See I.A.E., Inc. v. Shaver*, 74 F.3d 768, 775 (7th Cir. 1996) (“[In a] non[-]exclusive license, the licensor-creator of the work, by granting an implied non[-]exclusive license, does not transfer ownership of the copyright to the licensee. The copyright owner simply permits the use of a copyrighted work in a particular manner.”); *In re Golden Books Family Entm’t, Inc.*, 269 B.R. at 309 (“[A] non[-]exclusive licensee . . . has only a personal and not a property interest in the [intellectual property], which "cannot be assigned unless the [intellectual property] owner authorizes the assignment.").

The intellectual property license agreement at issue is a non-exclusive license that allows Development to use UMT's copyrighted and patented Software. (R. at 5). Since this is a copyright and patent license, the applicable law governing Development's ability to assign its interest in the Agreement is federal copyright and patent law. *See In re Trump Entm't Resorts, Inc.*, 526 B.R. at 123 (determining that since the contract at issue was a trademark license agreement, the applicable law is federal trademark law). Under the federal common law, the doctrine of non-assignability prohibits a licensee from assigning its interest in a patent or copyright license to a third party without the licensor's consent, meaning that Development may only assign its interest in the Agreement if UMT consents. *See Gartner*, 279 F.3d at 781 (holding hold that federal law governed the case and that the exclusive copyright license was only assignable with the consent of the licensor); *Stenograph Corp.*, 972 F.2d at 729 n.2 (emphasizing patent licenses are not assignable without express consent). While there is no indication in the facts that Development wishes to assign its interest in the Agreement, there is explicit language in the Agreement that broadly prohibits the Debtors from assigning or sublicensing their rights to others without UMT's written consent. (R. at 5.) This language in the Agreement further reinforces the common law principle that the identity of the licensee is a material term of the license, and indicates that UMT reserves the right to restrict who has an interest in their intellectual property. *See Oliver*, 109 U.S. at 83 (noting identity of identity of licensee in intellectual property licenses is material to the licensor).

Despite the ambiguity surrounding the effect of exclusivity on the licensee's ability to assign its interest in an intellectual property license, this is a non-issue in the present case because the Agreement involves a *non-exclusive* license to use UMT's copyrighted and patented Software. (R. at 5.) As demonstrated *supra*, unlike exclusive licenses, courts consistently recognize that a non-exclusive license prohibits a licensee from assigning without the licensor's consent. *In re Golden Books Family Entm't, Inc.*, 269 B.R. at 309 (detailing that a non-exclusive licensee grants only a personal interest in the intellectual property, which cannot be assigned without the licensor's consent). Here, it is clear from the undisputed facts that both parties understood they were entering into a non-exclusive license. (R. at 5.) Assuming *arguendo* that exclusivity was disputed, however, the language in the Agreement permitting Development to "extend the benefits of the Agreement to its affiliated entities only" and broadly prohibiting Debtors from assigning or sublicensing their rights to others without UMT's written consent, recognizes that UMT was only granting Development a personal property interest in the Software, and ownership of the Software remained with UMT. *See I.A.E., Inc.*, 74 F.3d at 775 (stating ownership of the copyright remains with the licensor in a non-exclusive license). Because the Agreement was a non-exclusive intellectual property license and UMT did not consent to assignment, this Court should find that the Debtors may not assign their interest in the Software under § 365.

III. Section 365(c)(1) Prohibits the Assumption *or* Assignment of UMT's Software License, Thus Requiring Application of the Hypothetical Test.

When faced with a question of statutory interpretation, a court's analysis must start with the language of the statute. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"); *see also United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) ("[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'"); *United States v. Goldenberg*, 168 U.S. 95, 102-103 (1897) ("The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used."). Reading § 365(c) with this canon at the forefront produces a clear result demonstrating Congress's intent to treat "assume" and "assign" as alternatives, and thus the hypothetical test must be applied.

A. If the Meaning of a Statute is Clear There is No Need for Further Analysis.

1. "Or", As Used in § 365(c), Is A Disjunctive Term.

Congress's decision to use "or" in a statute indicates its intent to highlight the surrounding terms as alternatives. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings"). Merriam-Webster Dictionary, to which this Court frequently cites, defines "or" as a term "used as a function word to indicate an alternative." *Or*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/or; *see also Ocasio v. United States*, 136 S. Ct. 1423, 1441 (2016) (using Merriam-Webster definition of "another"); *Burlington N. & Santa Fe Ry. v. United States*, 556 U.S. 599, 611 (2009) (citing to Merriam-Webster definition of "arrange"); *Joseph Burstyn v. Wilson*, 343 U.S. 495, 525 (1952) (referencing several editions of Merriam-Webster dictionaries to define "sacrilege" and "sacrilegious"). Further, this Court directly addressed the meaning of "or" when it was called to interpret the phrase "the value of any property (*or* the adjusted basis of any property)," as used in a former version of 26 U.S.C. § 662(e)(1)(A). *United States v. Woods*, 571 U.S. 31, 43, 45 (2013) (emphasis added). Because its ordinary use is almost always disjunctive, the words that "or" connects "are to be given separate meanings." *Id.* at 45. Thus, there rests a strong presumption in favor of "or" being a disjunctive term when used in a statute.

The choice of Congress to use the term "or" in § 365(c) was an intentional one meant to highlight "assume" and "assign" as alternatives. The language of § 365(c)(1) states:

> [T]he 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 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 such party does not consent to such assumption or assignment.

11 U.S.C. § 365(c)(1) (emphasis added). Using "or" in the prefatory § 365(c) clause requires the statute be read as preventing a trustee from assuming *or* assigning an executory contract. *See Woods*, 571 U.S. at 45 (giving separate meanings to words connected by "or"). "By its plain language, § 365(c)(1) addresses both assumption and assignment. An assumption and an assignment are 'two conceptually distinct events,' and the nondebtor must consent to each independently." *In re Sunterra Corp.*, 361 F.3d at 267 (internal citations omitted). Here, the Agreement explicitly prevents the Debtors from assigning the contract without UMT's consent. (R. at 5.) UMT did not consent to either the assumption or the assignment of the executory Agreement. (R. at 8.) UMT also timely objected to confirmation of the Plan because, under the hypothetical test, it was excused from accepting performance from Development without its consent. (R. at 8.) Thus, this Court must reverse confirmation of the Plan because the statutory requirements of § 365(c) were not satisfied.

2. Reading "or" As a Disjunctive Term in § 365(c) Plainly Requires the Use of the Hypothetical Test.

Using "or" as a disjunctive term leads to an unambiguous reading of § 365(c). "The preeminent canon of statutory interpretation requires us to presume that [the] legislature says in a statute what it means and means in a statute what it says there. Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (internal citations omitted). Because the statute unambiguously requires "assume" and "assign" to be treated as alternatives, the hypothetical test, as adopted by the Third, Fourth, and Ninth Circuits, must be applied. *See In re Sunterra Corp.*, 361 F.3d at 269 (rejecting actual test); *In re Catapult Entm't Inc.*, 165 F.3d at 750 (adopting hypothetical test); *In re West Elecs., Inc*., 852 F.2d 79, 83 (3d Cir. 1988) (introducing concept of hypothetical test). The hypothetical test stands for the position that "a debtor in possession may not assume an executory contract over the nondebtor's objection if applicable law would bar assignment to a hypothetical third party, even where the debtor in possession has no intention of assigning the contract in question to any such third party." *In re Catapult Entm't Inc.*, 165 F.3d at 750. Consequently, even if the trustee or debtor in possession has no intent to assign the executory contract, it still may not be assumed without the licensor's consent if applicable law prevents assignment of the contract. *Id.*

The actual test considers whether assignment would actually force the nondebtor party to accept performance from a party different than the one with whom it contracted. *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997). The First Circuit originally rejected the hypothetical test in *Summit Inv. & Dev. Corp. v. Leroux* when a general partner to a business agreement challenged the *ipso facto* provision as contravening § 365(e) of the Code. 69 F.3d 608, 609, 611 (1st Cir. 1995). Two years later, the First Circuit again rejected the hypothetical test, this time in connection with an executory contract under § 365(c). *Cambridge Biotech Corp.*, 104 F.3d at 493. The court chose to implement a case-by-case approach to determine whether the nondebtor party was "actually" being forced to accept performance under the executory contract from someone other than the party to the original contract. *Id.* This case-specific approach has come to be known as the actual test and has been adopted by the First and Fifth Circuits. *Id*. (detailing actual test); *Bonneville Power Admin. v. Mirant Corp. (In re Mirant Corp.)*, 440 F.3d 238, 249-50 (5th Cir. 2006) (adopting actual test to interpret § 365(e)(2)).

While the actual test gives courts freedom to reach a decision that fits the specific circumstances of each case, this Court has repeatedly stated that "[a]chieving a better policy outcome . . . is a task for Congress, not the courts." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13 (2000); *see also Kawaauhau v. Geiger*, 523 U.S. 57, 64 (1998) ("But unless and until Congress makes such a decision, we must follow the current direction § 523(a)(6) provides"); *Union Bank v. Wolas*, 502 U.S. 151, 162 (1991) ("Whether Congress has wisely balanced the sometimes conflicting policies underlying § 547 is not a question that we are authorized to decide."); *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 19 (1974) ("Congress knows how to deprive a court of broad equitable power when it chooses so to do."). A court cannot overlook the plain meaning of a provision of the Code just because the result it produces is unfavorable to a debtor. *In re Sunterra Corp.*, 361 F.3d at 268. Application of the actual test is improper as it allows courts to ignore the plain language of § 365 in favor of an unfounded policy-based approach.

This Court should not adopt the actual test because the decisions applying this approach are distinguishable from the present case and they ignore the plain meaning of "or." *Leroux* is distinct because the First Circuit was addressing a partnership agreement, not a software license. 69 F.3d at 608, 609. Although the court looked to § 365(c) in reference, its primary focus was on interpreting § 365(e). *Id.* at 611-12. The *Cambridge Biotech* court used the framework laid out in *Leroux* when called to interpret an executory contract under § 365(c), but its approach strained to find ambiguity in order to craft a new application which clearly disregarded the statutory language. 104 F.3d at 493. Ignoring all presumptions in favor of reading "or" as a disjunctive term, the court instead decided to focus on the identity of the debtor in possession on a case-by-case basis. *Id.* The *Leroux* court noted that, at best, it is only "plausible" that a showing of an actual change to the party to the agreement would be necessary under § 365(c). 69 F.3d at 612. Even though the hypothetical test "is not precluded by the literal statutory language," the court still chose to override this plain language to craft its new test. *Id*.

Under the hypothetical test, the Plan cannot be confirmed. Even if the Debtors had no intent to assign the executory contract to another party, the hypothetical test still bans assumption because applicable federal common law precludes assignment of the Agreement without UMT's consent. *In re Catapult Entm't Inc.*, 165 F.3d at 750 (highlighting irrelevance of debtor in possession's intent); *supra* Part II (explaining applicability of federal intellectual property law to ban assignment without consent of licensor). Federal intellectual property common law prevents a licensee from assigning an interest in a patent, copyright, or trademark license to a third party without the licensor's consent. *See Troy Iron & Nail Factory*, 55 U.S. at 216 (noting licensee's ability to use the intellectual property but lack of ownership over it). Assignment of the Agreement is governed by this body of law. *See supra* Part II (identifying federal intellectual property common law as law governing assignment of the Agreement). Here, UMT did not consent to assignment of the Agreement at any point. (R. at 8.) The Agreement even explicitly stated that it could not be assigned without UMT's consent. (R. at 5.) As such, the Agreement cannot be assigned under federal intellectual property common law without UMT's consent, and thus cannot be assumed under the hypothetical test.

Even if this Court were to adopt the actual test, the Agreement still cannot be assumed. The First Circuit Court of Appeals proposed a "case-by-case inquiry into whether the nondebtor party . . . *actually* was being 'forced to accept performance under its executory contract from someone other than the debtor party with whom it originally contracted.'" *Cambridge Biotech*, 104 F.3d at 493 (emphasis added). Using this case-sensitive analysis would show that as a result of the LBO, UMT is being forced to accept performance from a different party than the one with whom it originally contracted. More than half of the voting shares of Development are now owned by SFD, whose portfolio of companies includes a direct competitor of UMT. (R. at 8.) This reorganized corporate structure has created a new entity, distinct from Development, the original party to the Agreement. When drafting licensing agreements, the identity of the licensee is a material term of the contract. *See* Agin, *supra* (explaining importance of identity of licensee in connection to restricting assignability). UMT entered into the Agreement with Development, before any involvement from SFD was ever contemplated. (R. at 4.) This change to Development's ownership is a substantial one and should be considered by the Court.

B. Section 365(f)(1) is Not Superfluous When Read in Conjunction With § 365(c)(1), And Thus Does Not Produce an Absurd Result.

1. In Interpreting a Statute, The Specific Governs the General.

When two statutory provisions are in apparent conflict, the specific provision governs the general. *RadLAX Gateway Hotel v. Amalgated Bank*, 566 U.S. 639, 645 (2012). "[A] specific statute . . . controls over a general provision . . . particularly when the two are interrelated and closely positioned." *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981).

Section 365(f)(1) is the broad provision, while 365(c)(1) is the exception. "[A] careful parsing of the provisions suggests that § 365(f) contains the broad rule and § 365(c) contains a carefully crafted exception to the broad rule made necessary by general principles of the common law and our constitutions." *In re Magness*, 972 F.2d at 695. Thus, § 365(f) lays out the general rule allowing assignment of contracts even in the face of contrary law. 11 U.S.C. §

365(f). Section 365(c) then lays out a specific provision preventing the assumption of an executory contract if an applicable law would ban assignment. 11 U.S.C. § 365(c). The two provisions are closely related as they both address the handling of executory contracts by a trustee or debtor in possession. 11 U.S.C. § 365(c), (f). Because § 365(c) is the more specific provision in the statutory scheme, a court must apply this provision first to determine if assumption of the executory contract is valid. *RadLAX Gateway Hotel*, 566 U.S. at 645 (requiring specific provision in a statute to govern a general provision); *HCSC-Laundry*, 450 U.S. at 6 (noting importance of closely positioned statutory provisions when determining which controls).

2. The Two Provisions at Issue are Referencing Different "Applicable Laws."

When interpreting statutory provisions, courts take caution to avoid reaching an interpretation that would render one of the provisions superfluous. *Kawaauhau*, 523 U.S. at 62 ("[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law."); *see also Hamilton v. Lanning*, 560 U.S. 505, 517-18 (2010) (using canon against superfluous result to decide between two approaches to interpreting 11 U.S.C. §1325). It is presumed that Congress knows what it is doing when drafting a statute and therefore would not write in unnecessary language. *See BedRoc Ltd., LLC.*, 541 U.S. at 183 (highlighting presumption that legislature means what it says when drafting statutes). Thus, care must be given to ensure that conflicting statutory provisions are interpreted in a way that gives consideration to all language used. *See Kawaauhau*, 523 U.S. at 62 (noting Court's policy to avoid interpretation that renders a portion of the statute superfluous).

Sections 365(c)(1) and 365(f)(1) address different sets of "applicable laws" and thus are not at odds. *In re Magness*, 972 F.2d at 695 ("[E]ach subsection recognizes an 'applicable law' of markedly different scope.”). At first glance, the ban on assumption in § 365(c) seems to eliminate the need for any restrictions on assignment, as found in § 365(f).

> The plain language of subsection (c)(1) bars assumption (absent consent) whenever ‘applicable law’ would bar assignment. Subsection (f)(1) states that, contrary provisions in applicable law notwithstanding, executory contracts may be assigned. Since assumption is a necessary prerequisite to assignment under § 365, *see* 11 U.S.C. § 365(f)(2)(A), a literal reading of subsection (c)(1) appears to render subsection (f)(1) superfluous.

In re Catapult Entm’t, Inc., 165 F.3d at 751. However, closer analysis reveals that the two sections are discussing different sets of “applicable laws.” The Fourth Circuit Court of Appeals explained this difference in *In re Sunterra Corp.*:

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

361 F.3d at 266-67 (internal citations omitted). The broad rule allowing assignment in § 365(f) is narrowed by the exception in § 365(c), which excuses the non-debtor party from accepting performance from an entity different than the one with which it originally contracted. *Id*. Thus, even though § 365(c) on its face appears to render § 365(f) superfluous, a closer examination shows that the two sections can operate in harmony. This comprehensive reading of § 365 requires that a trustee or debtor in possession be able to satisfy the specific § 365(c) restriction on assumption regardless of their intent to assign the executory contract under § 365(f). Because UMT

did not consent to the assumption or assignment of the Agreement, confirmation of the Plan must be reversed. (R. at 8.)

IV. Every Debtor in a Multi-Debtor Chapter 11 Reorganization Must Have At least One Impaired Class of Creditors Accept the Plan.

Section 1129(a) of the Code governs the requirements under which a court shall confirm a plan. 11 U.S.C. § 1129(a). Further, subsection (10) mandates that at least one class of claims that is impaired under the plan must accept the plan. 11 U.S.C. § 1129(a)(10). Congress enacted this section in 1984 to "curb the inequities" of reorganization plans being forced upon dissenting creditors. *Windsor on the River Assocs. v. Balcor Real Estate Fin. (In re Windsor on the River Assocs.*), 7 F.3d 127, 131. (8th Cir. 1993). The plain meaning and context of the Code reinforces Congress's intent to protect creditors by requiring per debtor satisfaction of § 1129(a)(10).

A. The Structure of the Bankruptcy Code Requires § 1129(A)(10) Apply to Each Debtor in a Multi-Debtor Chapter 11 Reorganization.

1. The Plain Meaning of § 1129(a)(10) Mandates a Per Debtor Requirement.

In deciding issues of statutory interpretation, a court must always begin by consulting the language of the statute itself. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985). Where the statute's language is plain and unambiguous, "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). The plain meaning of legislation should be conclusive, except where a result is demonstrably at odds with the intentions of the drafters. *Ron Pair Enters.*, 489 U.S. at 242.

Section 1129(a) of the Code lays out the statutory requirements for confirmation of a chapter 11 reorganization plan. *Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. Lasalle St. P'ship*, 526 U.S. 434, 441 (1999). Specifically, § 1129(a)(10) requires "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) (2018). In a typical single-debtor bankruptcy, the effect of this provision is evident: approval by at least one class of impaired creditors is required for plan confirmation. *See U.S. Bank N.A. v. Vill. At Lakeridge, LLC*, 138 S. Ct. 960, 963 (2018) (explaining prerequisite for judicial approval).

Similarly, in a multi-debtor bankruptcy, the effect of this provision is also made clear using § 102(7), the Code's own rule of construction, which states "the singular includes the plural." 11 U.S.C. § 102(7); *see In re Tribune Co.*, 464 B.R. 126, 182 (Bankr. D. Del. 2011) ("[A]scribing the plural to the meaning of 'plan' in § 1129(a)(10) is entirely logical and consistent with such a scheme."). If the singular "plan" in § 1129(a)(10) includes the plural "plans," the joint, multi-debtor plan consists of separate and distinct plans for each individual debtor, whereby each debtor must have at least one consenting impaired creditor. *See In re Tribune Co.*, 464 B.R. at 182 (explaining § 1129(a)(10) application to multi-debtor reorganizations).

By contrast, the Ninth Circuit held the plain language of the statute suggests only one impaired creditor class per plan need accept because § 1129(a)(10) does not distinguish between single-debtor and multi-debtor plans. *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props (In re Transwest Resort Props.)*, 881 F.3d 724, 729 (9th Cir. 2018). The court reasoned that § 102(7) does not preclude this interpretation because it effectively amends § 1129(a)(10) to read "at least one class of claims that is impaired under the plans has accepted the plans." *Id.* at 730. The court also noted that Congress could have required plan approval from an impaired class for each debtor by explicitly writing in that requirement for multi-debtor plans, but purposefully chose not to. *Id* at 729.

But the Ninth Circuit's opinion in *Transwest* is misguided because Congress did, in fact, require plan approval for each debtor by specifically *not* distinguishing between single-debtor and multi-debtor plans. *See In re Tribune Co.*, 464 B.R. at 183 (finding nothing ambiguous in the language to suggest § 1129(a)(10) does not require per-debtor approval). Regardless of the structure of the reorganization, every debtor must meet the requirements of § 1129(a)(10). *See Caminetti*, 242 U.S. at 485 (holding statutory words are to be used in their ordinary and usual sense). By failing to write in an exception that would allow multi-debtor reorganizations to satisfy § 1129(a)(10) on a per plan basis, Congress relied on the plain language of the statute to require satisfaction for each debtor individually. *See In re Tribune Co.*, 464 B.R. at 183 ("I find nothing ambiguous in the language of § 1129(a)(10), which absent substantive consolidation or consent, must be satisfied by each debtor in a joint plan.")

Even if the Court is persuaded by *Transwest* and finds that the plain language of § 1129(a)(10) suggests a per plan approach, the Court should still find for UMT because the plain language, as read by *Transwest*, would produce an absurd result. "All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose." *United States v. Katz*, 271 U.S. 354, 357 (1926). The Ninth Circuit's interpretation of § 1129(a)(10) renders that statute wholly ineffective with respect to multi-debtor reorganizations. Congress's motivation for drafting § 1129(a)(10) was to "provide some indicia of support by affected creditors and prevent confirmation where such support is lacking." *In re Windsor on the River Assocs.*, 7 F.3d at 131 (quoting *In re Lettick Typografic, Inc.*, 103 B.R. 32, 38 (Bankr. D. Conn. 1989)). Interpreting § 1129(a)(10) so as to ignore that requirement simply because the creditor is party to a multi-debtor reorganization is an absurd consequence inconsistent with the legislative purpose. Following the plain meaning of § 1129(a)(10), Congress has explicitly required approval from at least one creditor of each debtor in a joint, multi-debtor reorganization. *See* 11 U.S.C. § 1129(a)(10) (requiring approval from one impaired class of claims). Even if this Court finds the plain meaning of § 1129(a)(10) suggests per plan approval, the per debtor approach should still prevail because failure to do so would produce a demonstrably absurd result given Congress's intent to ensure the Plan has at least some degree of creditor support.

2. The Context Of § 1129 As a Whole Supports a Per Debtor Requirement For § 1129(a)(10).

A court may also consult the context of § 1129(a) in its entirety as additional support for finding that § 1129(a)(10) requires per debtor approval. 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 Hosp.*, 502 U.S. 215, 221 (1991). Drawing inferences from the context of a statute allows a court to determine that "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). By analyzing the context of the statute as a whole, a court can ensure their interpretation has given full effect to Congress's intent. *White v. Lord Abbett & Co., LLC* (*In re Lord Abbett Mut. Funds Fee Litig.)*, 553 F. 3d 248, 254 (3d Cir. 2009).

The other subsections of § 1129(a) suggest Congress intended for § 1129(a)(10) to apply to each debtor individually. First, some courts have found § 1129(a)(3), which requires the plan be proposed in good faith, embodies a prohibition on artificial classification or impairment used to manipulate the voting process. *See Conn. Gen. Life Ins. Co. v. Hotel Assocs. (In re Hotel Assocs.)*, 165 B.R. 470, 475 (B.A.P. 9th Cir. 1994) ("[T]he act of impairment in an attempt to gerrymander a voting class of creditors is indicative of bad faith."); *see also In re Abbotts Diaries*, 788 F.2d 143, 150 n.5 (3d Cir. 1986) ("The purpose of requiring a [§ 1129(a)(3)] finding prevents a debtor-in-possession or trustee from effectively abrogating the creditor protections of Chapter 11."). Artificial impairment and artificial classification are tactical moves by the debtor to impair a friendly creditor class or to gerrymander a subset of friendly creditors in order to achieve the requisite plan approval by one impaired class. *See* Peter E. Meltzer, *Disenfranchising the Dissenting Creditor through Artificial Classification or Artificial Impairment*, 66 AM. BANKR. L.J. 281, 311-12 (1992) (considering whether it was permissible to impair a class when it is not economically necessary to do so); *see also Fannie Mae v. Vill. Green I. GP*, 483 B.R. 807, 818 (Bankr. W.D. Tenn. 2012) (holding debtors must demonstrate some economic justification for delaying payment of "de minimis" or insignificant debts). However, "the creation of separate classes of unsecured and unsubordinated claims in order to allow gamesmanship in vote getting is not condoned under the Code." *In re Pine Lake Vill.*, 19 B.R. 819, 831 (Bankr. S.D.N.Y. 1982).

The Debtors' attempt to combine all nine subsidiaries into one plan to silence UMT's dissenting vote is not only indicative of bad faith under § 1129(a)(3), but also explains why Congress intended § 1129(a)(10) be satisfied per debtor. *See In re Hotel Assocs.*, 165 B.R. at 475 (noting that gerrymandering a voting class is indicative of bad faith). Chapter 11 includes several important creditor protections, like § 1129(a)(3), which would be rendered meaningless as applied to UMT if the Debtors were permitted to classify their creditors into one big group, instead of broken up individually by debtor, to force confirmation. *See In re Abbotts Diaries*, 788 F.2d at 150 n.5 (explaining importance of safeguarding chapter 11 creditor protection). The Debtors could not have proposed the Plan in good faith knowing Development does not meet the

§ 1129(a)(10) requirement of at least one class of impaired creditors accepting the Plan. *See In re Tribune Co.*, 464 B.R. at 183 (noting § 1129(a)(3) unmet where "fewer than all" debtors proposing a joint plan satisfies it).

Another chapter 11 creditor protection, § 1129(a)(7)'s "Best Interest Test," mandates that a reorganization plan may not be confirmed unless every creditor either accepts, or will receive not less than they would have received under a chapter 7 liquidation. 11 U.S.C. § 1129(a)(7). "Creditors cannot be expected to approve a plan in which they would receive less than they would from an immediate liquidation of the debtor's assets." *Toibb v. Radloff*, 501 U.S. 157, 164 (1991). In a joint, multi-debtor plan, § 1129(a)(7) "cannot be read fairly other than as an entitlement to the prescribed treatment for every impaired class of creditors for each debtor which is part of a joint plan." *In re Tribune Co.*, 464 B.R. at 183.

The Debtors' attempt to combine the bankruptcy estates of all nine subsidiaries weakens the creditor protection ensured by the § 1129(a)(7) Best Interest Test. In a straight chapter 7 liquidation, UMT, as the only creditor, would receive the liquidation value of Development's estate. *See Pioneer Inv. Servs v. Brunswick Assocs. Ltd. P'ship.*, 507 U.S. 380, 389 (1993) ("[T]he aim of a Chapter 7 liquidation is the prompt closure and distribution of the debtor's estate."). But if all of the Debtors' estates were combined under one plan, UMT would be forced to share the total liquidation value of that single estate, which could very well leave them worse off. Section 1129(a)(7) is another carefully crafted provision intended to protect creditors from unfair reorganization plans, which should apply uniformly to both single-debtor and multi-debtor plans. *In re Tribune Co.*, 464 B.R. at 183 (explaining every impaired class of creditors for each debtor in a joint plan is entitled to 1129(a)(7) protection).

Finally, § 1129(a)(8) requires that each class of claims have either accepted the plan or are not impaired under the plan. 11 U.S.C. § 1129(a)(8). Section 1129(b)(1) relieves a plan proponent of § 1129(a)(8)'s requirements in what is called a "cram down" if the plan: (i) does not discriminate unfairly; (ii) is fair and equitable; and (iii) all other requirements of § 1129(a) are met. 11 U.S.C. § 1129(b)(1). Importantly, the Code does not provide the same relief to plan proponents who do not satisfy § 1129(a)(10), meaning one class of impaired creditors must *always* accept the plan. *See In re Tribune Co.*, 464 B.R. at 183. This distinction reinforces the importance of Congress's purported goal of § 1129(a)(10) to provide an "indicia of support" from creditors for the plan. *See Windsor on the River Assocs.*, 7 F.3d at 131 (quoting *In re Lettick Typografic, Inc.*, 103 B.R. at 38)).

The Debtors tried to circumvent the one § 1129(a) provision for which Congress made no short-cut—§ 1129(a)(10). *See In re Tribune Co.*, 464 B.R. at 183 (noting § 1129(b) does not relieve a plan proponent of § 1129(a)(10) requirement). The requirements of § 1129(a)(10) cannot be waived, either by a "cram down" or, as attempted here, by combining all debtors into one joint, multi-debtor plan. *Id.*

The other subsections of § 1129(a), namely subsections (a)(3), (a)(7) and (a)(8) lay out important protections Congress intended for creditors during a chapter 11 reorganization. These subsections would be rendered useless if this Court allowed Debtors' joint, multi-debtor plan as it would effectively silence UMT's statutory right to object. As a result, the structure of the Code as a whole settles this question of statutory interpretation in UMT's favor: each debtor in a multi-debtor chapter 11 reorganization must individually meet the requirements of 1129(a)(10).

B. Absent Substantive Consolidation, Each Debtor in A Joint, Multi-Debtor Administration Must Satisfy the Requirements of § 1129(a)(10) Individually.

1. The Debtors Did Not Seek Court Approval for Substantive Consolidation and Would Not Have Met The *Owens Corning* Test If They Had.

A bankruptcy case is commenced when one debtor files a petition under § 301, at which point a single bankruptcy estate is created. 11 U.S.C. §§ 301, 541(a). The only statutory authority for more than one debtor filing a joint bankruptcy case is for an individual debtor and his or her spouse under § 302(a). *In re Roberts*, 570 B.R. 532, 541-42 (Bankr. S.D. Miss. 2017). Substantive consolidation, on the other hand, is an equitable remedy evolving from federal common law that "treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities." *Genesis Health Ventures Inc. v. Stapleton (In re Genesis Health Ventures, Inc.)*, 402 F.3d 416, 423 (3d Cir. 2005).

Although there are no provisions in the Code that specifically authorize a court to approve consolidation of separate entities into one, most circuits recognize that bankruptcy courts have the authority to substantively consolidate pursuant to their general equitable powers. *Kapila v. S&G Fin. Servs., LLC (In re S&G Fin. Servs.)*, 451 B.R. 573, 579 (Bankr. S.D. Fla. 2011). "Consolidation restructures (and thus revalues) rights of creditors and for certain creditors this may result in significantly less recovery." *In re Owens Corning*, 419 F.3d 195, 205 (3d Cir. 2005). As a result, there is "nearly unanimous consensus" among courts that substantive consolidation should be used sparingly. *See Alexander v. Compto*n *(In re Bonham)*, 229 F.3d 750, 767 (9th Cir. 2000) (holding substantive consolidation should be used sparingly and in keeping with its equitable nature); *Union Sav. Bank v. Augie/Restivo Baking Co. (In re Augie/Restivo Baking Co.)*, 860 F.2d 515, 518 (2d Cir. 1988) ("The sole purpose of substantive consolidation is to ensure the equitable treatment of all creditors.").

Upon the filing of this chapter 11 bankruptcy, none of the Debtors sought the requisite court approval for substantive consolidation. In fact, the Plan expressly states that "the Debtors' estates are not being substantively consolidated, and no Debtor is to become liable for the obligations of another." (R. at 7.) Generally speaking, the bankruptcy estates of separate debtors are to be kept separate, except in the rare case, not present here, where the court has approved substantive consolidation. *See In re Tribune Co.*, 464 B.R. at 182 ("In the absence of substantive, consolidation, entity separateness is fundamental."). Given the drastic nature of substantive consolidation, the Debtors cannot, unilaterally after the fact, assume they were substantively consolidated in order to force a reorganization plan past the requirements of § 1129(a)(10), where the Plan otherwise would not be confirmed.

In *Owens Corning*, the Third Circuit considered under what circumstances a court may substantively consolidate affiliated entities. *See* 419 F.3d at 199 (noting absence of opinion on point in the Third Circuit and differing rationales by other courts). The *Owens Corning* debtors and their subsidiaries comprised a multinational corporate group wherein each different entity had different purposes. *See id.* at 200 (addressing facts of case). Applying long held principles of bankruptcy and corporate law, the court set forth a test under which entities seeking substantive consolidation must prove either: "(i) prepetition they disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity; or (ii) postpetition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors." *Id.* at 211. The requirements are strict because substantive consolidation goes against a fundamental concept of corporate law that "each corporation is a separate legal entity with its own debts and assets, even when such corporation is wholly owned by another corporate entity." *Kreisler v. Goldberg*, 478 F.3d 209, 213 (4th Cir. 2007).

Even if the Debtors had sought court approval for substantive consolidation, which they did not, their request would have been denied for failure to satisfy the *Owens Corning* test. 419

F.3d at 211. There is no evidence to suggest that either (i) the Debtors disregarded separateness so significantly that creditors relied on the breakdown of entity borders, or (ii) that the assets and liabilities of the Debtors are so scrambled that separating them is prohibitive. (R. at 7.) Rather, Development acted as the licensee under the Agreement, which was entirely separate and distinct from the casino operations of the remaining Debtors. (R. at 4-5.) Since a court would likely have denied the Debtors equitable relief for substantive consolidation, this Court should not analyze the case as such for purposes of § 1129(a)(10). *See In re Owens Corning*, 419 F.3d at 216 (finding no "perfect storm" needed to invoke substantive consolidation).

2. In a Jointly Administered Multi-Debtor Reorganization the Requirements Of § 1129(a)(10) Must Be Satisfied on a Per Debtor Basis.

Joint administration, unlike substantive consolidation, is a procedural vehicle with no substantive value, wherein each debtor must organize their individual bankruptcy estate separately. *See In re N.S. Garrott & Sons*, 63 B.R. 189, 191 (Bankr. E.D. Ark. 1986) (highlighting difference between substantive consolidation and joint administration). In a joint administration, a court must treat each legal entity separately, with each debtor responsible for their own assets and liabilities. *See Skidmore, Owings & Merrill v. Can. Life Assurance Co.,* 907 F.2d 1026, 1027 (10th Cir. 1990) ("Absent circumstances justifying disregard of the corporate form, a parent company is treated as a legal entity separate from the subsidiary."). Parties cannot use joint administration to bypass the requirements of substantive consolidation or alter substantive legal rights set forth in the Code. *See Reider v. Fed. Deposit Ins. Corp. (In re Reider),* 31 F.3d 1102, 1109 (11th Cir. 1994) ("Great care must be taken to avoid confusion between the attributes of joint administration and indicia supporting substantive consolidation.").

Complex, multi-debtor chapter 11 reorganizations, like the present case, are often jointly administered for the sake of convenience. *In re Tribune Co.*, 464 B.R. at 183. But "convenience alone is not sufficient reason to disturb the rights of impaired classes of creditors of a debtor not meeting confirmation standards." *Id.* As the Bankruptcy Court for the District of Delaware has explicitly decided, even jointly administered multi-debtor chapter 11 reorganizations must meet the requirements of § 1129(a)(10) on a per debtor basis. *See id.; see also In re Woodbridge Grp. of Cos., LLC*, 592 B.R. 761, 778 (Bankr. D. Del. 2018) (recognizing requirement of § 1129(a)(10) must be satisfied by each debtor in a joint plan); *In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293, 301-02 (Bankr. D. Del. 2011) (stating in the absence of substantive consolidation, each debtor must have at least on impaired accepting class).

Contrarily, a few lower courts have concluded that jointly administered multi-debtor chapter 11 reorganizations need only meet the requirements of § 1129(a)(10) on a per plan basis. 11 U.S.C § 1129(a)(10); *see In re Transwest Resort Props.*, 881 F.3d at 730 (finding plain language of § 1129(a)(10) indicates Congress intended a per plan approach); *In re Enron Corp.*, No. 01–16034 (AJG), 2004 WL 6075307, at *236 (Bankr. S.D.N.Y. July 15, 2004) (justifying treating all debtors as a single legal entity for voting and distribution purposes)*; JP Morgan Chase Bank, N.A. v. Charter Commc'n Operating, LLC (In re Charter Commc'n)*, 419 B.R. 221, 266 (Bankr. S.D.N.Y. 2009) (deeming compliance with §1129(a)(10) on a per plan basis appropriate). But these cases fail to explain how the courts justified ignoring the plain language of § 1129(a)(10) and the context of the remaining subsections of § 1129(a) to come to this conclusion. *See In re Enron Corp.*, 2004 WL 6075307, at *234, *277 (relying on a "global compromise" to allow confirmation of a 177-debtor plan when at least one class of impaired class voted to accept). This Court should settle the current split in authority by following the Delaware Court's plain language and contextual analysis set forth in *Tribune* to hold that the Code mandates § 1129 (a)(10) requirements be satisfied on a per debtor basis.

C. The Court Cannot Ignore Explicit Statutory Provisions in the Joint Administration of a Multi-Debtor Case in Order to Realize the Goal of Reorganization.

In balancing the various equities associated with Bankruptcy, a court must focus on the ultimate goal of reorganization. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984). But, in pursuing this goal, a court cannot ignore the explicit language in the Code. *See Hartford Underwriters Ins. Co.*, 530 U.S. at 13 ("[T]he natural reading of the text produces the result we announce."). Courts "do not sit to assess the relative merits of different approaches to various bankruptcy problems." *Id*. Even if Congress had enacted into law something different than it intended, it is not a court's obligation to "rescue" Congress from its drafting errors and provide its own interpretation of what should be the law. *United States v. Granderson,* 511 U.S. 39, 68 (1994) (Scalia, J., concurring); *see also Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) ("There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.").

The Debtors acknowledged in their first day fillings that restructuring and refinancing debt in this reorganization was their primary goal. (R. at 6.) The Debtors' pursuit of this goal, however, cannot contravene explicit statutory provisions like § 1129(a)(10). *See Hartford Underwriters Ins. Co.*, 530 U.S. at 13 (citing natural reading of text should control). So long as UMT opposes the plan, it cannot properly be confirmed under § 1129(a)(10). That being said, reorganization under this particular plan is not the "end all be all" of the bankruptcy case. The Debtors can still seek out other remedies that are consistent with the Code such as proposing a different plan that UMT accepts or converting the case to a chapter 7 liquidation. But as the Plan stands today, it fails the § 1129(a)(10) requirement demanding that at least one class of impaired creditors of each debtor consent to the Plan.

Conclusion

Assumption of the Agreement by the reorganized Development was in error of federal intellectual property common law. The personal and specific nature of this type of executory contract requires consent from the licensor before it may be assigned. UMT did not consent to assignment of the Agreement, and thus Development was prevented from assuming it.

Policy concerns cannot override explicit, unambiguous statutory language. Section 365(c) mandates use of the hypothetical test because Congress intended to treat assumption and assignment as alternatives, evidenced by the decision to use "or" between them. UMT never consented to assumption or assignment of the Agreement. Debtors are trying to circumvent this roadblock to confirmation by asking this Court to adopt the actual test.

Debtors could have sought substantive consolidation so that their separate entities were treated as one. They did not. Now, in attempt to remedy this crucial mistake, they are asking this Court to overlook the plain language of § 1129(a)(10). Every debtor must satisfy this requirement for a plan to be confirmed. Given UMT's objections to the Plan, Development clearly did not satisfy this burden.

The decision of the Thirteenth Circuit should be affirmed on both issues, thus reversing confirmation of the Plan.

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