JOINT MOOT COURT PROGRAM
FEBRUARY 18, 2014

PRESENTED BY

THE HON. JOHN C. FORD
AMERICAN INN OF COURT

DALLAS/FORT WORTH, TEXAS

THE DELAWARE BANKRUPTCY
AMERICAN INN OF COURT

DELAWARE

PRESIDED OVER BY

JUDGE KEVIN J. CAREY, U.S. BANKRUPTCY COURT (D. DEL.)

CHIEF JUDGE BARBARA J. HOUSER, U.S. BANKRUPTCY COURT (N.D. TEX.)

JUDGE ALAN S. TRUST, U.S. BANKRUPTCY COURT (E.D.N.Y.)

FACT PATTERN PREPARED BY

GREG HAUSWIRTH
GHAUSWIRTH@LEECHTISHMAN.COM

TIM SPRINGER
TIM_SPRINGER@TXNB.USCOURTS.GOV

IN THE
SUPREME COURT OF UNITED STATES

February 2014 Term

IN RE:	§	
	§	
TICKETKING CORPORATION	§	
DEBTOR.	§	
	§	
TICKETKING CORPORATION,	§	
Petitioner,	§	**CASE NO. 14-218**
	§	
V.	§	
	§	
GOODELL GAMING CORPORATION	§	
Respondent.	§	
	§	

January 21, 2014

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

1. Whether a debtor in possession may assume a licensing agreement over the licensor's objection pursuant to 11 U.S.C. § 365(c)(1) when the underlying licensing agreement excuses the licensor from accepting performance from any entity other than the debtor.

2. Whether a bankruptcy judge may enter a final order in a non-core proceeding pursuant to 28 U.S.C. § 157(c)(2) on the basis of consent without offending Article III of the Constitution when that order disposes of private rights. And, if so, whether such consent may be implied by litigation conduct in bankruptcy court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

IN RE:	§	
	§	
TICKETKING CORPORATION	§	
DEBTOR.	§	
	§	
GOODELL GAMING CORPORATION,	§	
MOVANT–APPELLANT,	§	**CASE NO. 11–1234**
	§	
V.	§	
	§	
TICKETKING CORPORATION	§	
DEBTOR-APPELLEE.	§	
	§	

Decided December 31, 2013
Before JONES, ROMO, and WITTEN, Circuit Judges.

OPINION

JERRAL W. JONES, SR., Chief Circuit Judge[1]:

Goodell Gaming Corporation ("GGC") appeals a bankruptcy court order ruling that TicketKing Corporation ("TicketKing"), as the chapter 11 debtor in possession, was entitled to assume a nonexclusive license of copyrighted software. On appeal, we must decide whether, pursuant to 11 U.S.C. § 365(c), a debtor in possession may assume, over the licensor's objection, a nonexclusive software license. In so deciding, we must resolve the issue of whether the disjunctive term "or," as used in the "assume or assign" language of § 365(c), should be construed in the conjunctive as "and." Additionally, GGC asserts that the bankruptcy court lacked constitutional authority to enter a final order regarding the license agreement pursuant to

1 Chief Judge Jones technically assumed a dual role as Chief Circuit Judge *and* Circuit Judge upon his appointment to the Fourteenth Circuit Court of Appeals in 1989.

the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). GGC has raised these constitutional concerns for the first time on appeal.

We conclude that the bankruptcy court was constitutionally authorized to dispose of GGC's motion to deem the licensing agreement rejected, but lacked final-order authority over GGC's adversary complaint. Because the constitutional infirmity in 28 U.S.C. § 157(c)(2) was beyond that which the parties' consent could cure, we vacate the bankruptcy court order and remand for further proceedings consistent with this opinion. As the bankruptcy court was constitutionally authorized to interpret § 365(c), we reach the merits of GGC's remaining arguments. Because we hold the plain meaning of § 365(c) elucidates a meaningful distinction between the disjunctive term "or" and the conjunctive term "and," TicketKing was precluded from assuming the nonexclusive software license.

I. BACKGROUND

A. The Licensing Agreement

At all times material to this appeal, GGC conducted business as a software development company for the ticketing industry. GGC's software products were used by entities in this industry, such as TicketKing, for ticket sales and transfer management. TicketKing was a leading ticket provider for sporting events, concerts, and theater shows. TicketKing was also the exclusive ticket provider for various professional sports organizations.

In 2005, TicketKing launched a program called TicketKing Reseller (the "Reseller Program"). Membership in the Reseller Program allowed ticket brokers or existing ticketholders (such as season ticketholders) to sell or trade tickets they already purchased for events that they did not want to attend. Because of the volume of customers involved in the Reseller Program, TicketKing needed to develop an integrated computer system to assist in its management of the

Reseller Program. For this purpose, TicketKing decided to acquire GGC's Fair Weather Fan® Software and modify it into a unique computer program, which it called the COWBOYS System.

In 2010, GGC and TicketKing entered into a software license agreement (the "Agreement"), pursuant to which GGC granted TicketKing a nonexclusive license to use the Fair Weather Fan® Software (the "Software"). Under the Agreement, effective April 1, 2010, GGC was required to provide TicketKing a "non-exclusive, worldwide, perpetual, irrevocable, royalty-free license to . . . use, copy, modify, and distribute" the Software (the "License"). The Agreement prevented TicketKing from assigning its rights under the Agreement without GGC's consent, although another provision excepted from this restriction transferring the License to a successor in interest if the transfer included substantially all of TicketKing's assets.

TicketKing paid GGC $5.0 million for the License.[2] Because the Software, as marketed, did not meet TicketKing's requirements, the Agreement authorized TicketKing to utilize the Software to develop its own software system. Under the Agreement, TicketKing owned any enhancements it made to the Software (the "TicketKing Enhancements"). TicketKing, in turn, granted GGC a license to use the TicketKing Enhancements. TicketKing thereafter invested approximately $25 million in developing the COWBOYS System.

B. The Bankruptcy Proceedings

On September 1, 2011, TicketKing filed a Chapter 11 bankruptcy petition in the District of Valley Ranch.[3] Approximately one year later, on August 10, 2012, the bankruptcy court confirmed TicketKing's Plan of Reorganization, effective September 15, 2012. Prior to the Plan's confirmation, on July 4, 2012, GGC filed a motion to have the court deem the Agreement

2 The deal also included some additional cash incentives and a license to be named later.

3 The District of Valley Ranch is subject to the jurisdiction of the Fourteenth Circuit Court of Appeals.

rejected (the "Motion"). By the Motion, GGC claimed that the Agreement was an executory contract and that TicketKing, as debtor in possession, was precluded by 11 U.S.C. § 365(c) from assuming the Agreement without GGC's consent. GGC maintained that, because it had refused to consent to assumption of the Agreement, the court was required by law to deem the Agreement rejected. At the same time it filed the Motion, GGC also filed an adversary proceeding against TicketKing seeking damages for various alleged breaches of the Agreement (the "Adversary").[4] The bankruptcy court consolidated and jointly administered the Motion and the Adversary.

TicketKing responded to the Adversary with a general denial and to the Motion by asserting that § 365 was inapplicable because the Agreement was not an executory contract. TicketKing also maintained that it was not precluded from assuming the Agreement because § 365(c)(1) should be interpreted as prohibiting a debtor in possession from assuming *and* assigning a contract, and it intended only to assume—not to assign. Finally, TicketKing contended that § 365(c)(1) did not prohibit assumption of the Agreement because GGC had agreed to permit reasonable assignments thereof.

After determining that it had jurisdiction over the Motion as a core proceeding under 28 U.S.C. § 157(b)(2)(A), the bankruptcy court held that § 365(c)(1) did not prohibit TicketKing, as debtor in possession, from assuming the Agreement. It decided that the Agreement was not an executory contract and that, if it were, § 365(c)(1) did not preclude assumption because TicketKing did not intend to assign the Agreement. The bankruptcy court concluded that prohibiting TicketKing from assuming the Agreement was nonsensical because GGC would not

4 In its Adversary complaint, GGC indicated that the proceeding constituted a core matter, as a required by Federal Rule of Bankruptcy Procedure 7008(a). Because it indicated that the proceeding was core, GGC did not include a statement consenting to the bankruptcy court's entry of a final order in the proceeding. GGC likewise did not demand a jury trial, but did demand an apology from TicketKing fans for throwing snowballs at Santa Claus.

be damaged if TicketKing, as debtor in possession, assumed the very contract rights it had possessed prior to bankruptcy. The following day the court entered a memorandum order denying the Motion (the "Order").[5]

In the Order, the bankruptcy court acknowledged that § 365(c)(1), read literally, precluded TicketKing, as debtor in possession, from assuming the Agreement because: (1) copyright law excused GGC from accepting performance from a party other than TicketKing, and (2) GGC did not consent to TicketKing's assumption of the Agreement. In explaining its ruling, the court recognized the existence of a circuit split on the issue of whether § 365(c)(1) should be applied literally. It acknowledged that at least three circuits, the Third, Ninth, and Eleventh, as well as several bankruptcy courts, have followed a "literal test" (generally called the "hypothetical test") in applying § 365(c)(1) to the assumption of executory contracts.[6] On the other hand, the First Circuit, along with a majority of the bankruptcy courts, have applied the "actual test" in such circumstances.[7]

The bankruptcy court recognized that resolution of the dispute turned on which of the two tests applied. If the literal test applied, TicketKing could not assume the Agreement because GGC was excused, pursuant to applicable copyright law, from accepting performance from a *hypothetical* third party. On the other hand, if the actual test applied, TicketKing, as debtor in

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5 In footnote 3 of the Order, the bankruptcy court granted TicketKing's motion to dismiss the Adversary, holding that no genuine dispute as to any material fact existed and that TicketKing was entitled to summary judgment as a matter of law. *See* FED. R. BANKR. P. 7056(a).

6 *See Perlman v. Catapult Entm't, Inc. (In re Catapult Entm't, Inc.)*, 165 F.3d 747, 750 (9th Cir. 1999) (characterizing § 365(c)(1)(A) as posing "a hypothetical question"); *City of Jamestown v. James Cable Partners (In re James Cable Partners)*, 27 F.3d 534, 537 (11th Cir. 1994) (same); *In re West Elecs., Inc.*, 852 F.2d 79, 83 (3d Cir. 1988) (same); *Breeden v. Catron (In re Catron)*, 158 B.R. 629, 633-38 (E.D. Va. 1993) (same), *aff'd*, 25 F.3d 1038 (4th Cir. 1994).

7 *See Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997) (rejecting the literal test in favor of the actual test); *In re Catapult*, 165 F.3d at 749 n.2 (collecting bankruptcy court decisions adopting actual test).

possession, was entitled to assume the Agreement because it did not intend to assign, and GGC would not *actually* be forced to accept performance from a party other than TicketKing. As no controlling authority exists in this circuit, the bankruptcy court adopted the actual test, interpreting the disjunctive "or" in the conjunctive as "and." As a result, the bankruptcy court held that, because GGC would not, in the circumstances, be forced to accept performance from a party other than TicketKing, § 365(c)(1) did not preclude it from assuming the Agreement.

Finally, the bankruptcy court addressed TicketKing's contention that, because GGC had agreed that it would not unreasonably withhold its consent regarding future assignments of the License by TicketKing, GGC had impliedly consented for TicketKing, as debtor in possession, to assume the Agreement. The court deemed unpersuasive TicketKing's contention that GGC consented to assumption of the Agreement. It determined, however, that its adoption and application of the actual test rendered the consent issue moot. Therefore, the bankruptcy court held that § 365(c) did not bar TicketKing, as debtor in possession, from assuming the Agreement. GGC filed a timely notice of appeal. Because the Order concerned a significant issue in TicketKing's eventual reorganization, the bankruptcy court certified a direct appeal to the Fourteenth Circuit.[8]

II. DISCUSSION

In its appeal, GGC contends that this Court should reverse for several reasons. First, GGC contends that the bankruptcy court lacked constitutional authority to enter a final order in the Adversary. Second, it maintains that, because the plain meaning of § 365(c) can be applied without producing a result that is patently absurd, the bankruptcy court erred in failing to do so.

8 Specifically, the bankruptcy court held a direct appeal was warranted because (1) no decision in the Fourteenth Circuit controls the Motion, *see* 11 U.S.C. § 157(d)(2)(A)(i), and (2) an immediate appeal may materially advance the progress of TicketKing's bankruptcy case because the assumption of the Agreement is central to the reorganization, *see id.* § 157(d)(2)(A)(iii). Both parties joined a motion requesting certification of a direct appeal.

Third, GGC contends that general bankruptcy policy cannot be relied upon to support the decision not to apply the plain meaning of § 365(c). Fourth, GGC maintains that § 365(c) is unambiguous and that use of legislative history to construe § 365(c) was inappropriate. Finally, GGC contends that, if legislative history can be utilized, it does not support the Order.

On the other hand, TicketKing maintains that, for multiple reasons, this Court should affirm. First, TicketKing argues that the bankruptcy court had authority to deny the Motion and grant summary judgment in the Adversary because the proceedings implicated the core federal bankruptcy power. Alternatively, TicketKing argues GGC, by its litigation conduct, consented to the bankruptcy court entering a final order. Put another way, TicketKing argues that GGC "was happy to litigate" in bankruptcy court and that we should "not consider [its] claim to the contrary, now that [it] is sad." *See Stern v. Marshall*, 131 S. Ct. 2594, 2608 (2011). Second, TicketKing asserts that § 365 applies only to executory contracts, and that the Agreement was not executory. Third, it contends that, if the Agreement was executory, this Court should affirm because courts need not apply the plain meaning of a statute to produce an absurd result or be inconsistent with clearly established legislative intent. On this point, TicketKing maintains that the literal test—interpreting the disjunctive "or" in § 365(c)(1) to mean what it says—would have produced an absurd result *and* been inconsistent with legislative intent. Finally, TicketKing contends that § 365(c)(1) does not preclude assumption of an executory contract if the non-debtor party consents to the assignment, and, here, GGC *impliedly* consented in the Agreement to reasonable assignments. TicketKing asserts that assumption was "automatically reasonable" because it would leave undisturbed the identity of TicketKing as the licensee. TicketKing contends, therefore, that this Court should affirm because GGC had consented to assumption of the Agreement by TicketKing as debtor in possession. We address these issues in turn.

A. The Bankruptcy Court Violated Article III By Finally Determining the Adversary

GGC contends that the bankruptcy court's final order in the Adversary violated structural protections presented by Article III of the Constitution. But GGC concedes that the bankruptcy court had authority to enter a final order on the core matters presented in the Motion. We agree with GGC on both points. While the bankruptcy court properly disposed of the Motion, its disposition of the Adversary proceeding unconstitutionally delved into matters beyond the bankruptcy and the claims allowance process. Moreover, the consent of private parties—even assuming such consent was present—could not relieve the structural intrusions into the separation of powers. As a result, under *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982), and its progeny, the Order dismissing the Adversary must be vacated.

1. Constitutional Authority Properly Raised on Appeal

As a preliminary matter, we note that GGC has raised issues of the bankruptcy court's constitutional authority for the first time on appeal. GGC litigated the Adversary in the bankruptcy court and indicated that the matter was a core proceeding in the Adversary complaint, as required by Federal Rule of Bankruptcy Procedure 7008. As a result, GGC has waived any objection to the bankruptcy court's *statutory* authority under 28 U.S.C. § 157(b) to finally determine the Adversary. *See Waldman v. Stone*, 698 F.3d 910, 917 (6th Cir. 2012). But GGC's objection to the bankruptcy court's *constitutional* authority "implicates not only its personal rights, but also the structural principle advanced by Article III. And that principle is not [GGC's] to waive." *Id.* at 918. Therefore, GGC's contention that the bankruptcy court lacked constitutional authority to determine the Adversary is properly before us, and we must address the constitutional concerns.

2. The Current Allocation Scheme and the Separation of Powers

Article III of the Constitution mandates that "[t]he judicial Power of the United States, shall be vested" in courts whose judges "shall hold their Offices during good Behaviour" and "receive for their Services[ ] a Compensation [ ] [that] shall not be diminished during their tenure." U.S. CONST. art. III, § 1. This requirement—that the federal judicial power be exercised by judges whose tenure and salary is protected—is "an inseparable element of the constitutional system of checks and balances that both defines the power and protects the independence of the Judicial Branch." *Stern*, 131 S. Ct. at 2608 (internal quotation marks omitted). Bankruptcy judges do not meet this requirement; they have neither the life tenure nor the salary protection Article III demands. *See* 11 U.S.C. § 152(a)(1) (bankruptcy judges appointed by the courts of appeals to fourteen-year terms); *Stern*, 131 S. Ct. at 2608–09. Instead, Congress created bankruptcy judges pursuant to its powers under Article I of the Constitution—that is, its power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4. As a result, the ability of bankruptcy judges to exercise the "judicial Power of the United States" is limited to those matters that lie "at the core of federal bankruptcy power . . . ." *N. Pipeline*, 458 U.S. at 71. Put another way, "Congress may not bypass Article III simply because a proceeding may have *some* hearing on a bankruptcy case; the question is whether the action at issue stems from the bankruptcy case itself or would necessarily be resolved in the claims allowance process." *Stern*, 131 S. Ct. at 2618.

Any exercise of the judicial Power of the United States by a bankruptcy judge outside of these parameters violates the separation of powers. And the preservation of the separation of powers is secured by the structure of the Constitution, not by the pleasures of any one branch. Thus, the issue "is not so much the aggrandizement of the Legislative or Executive Branches, as it is the diminution of the Judicial one." *Waldman*, 698 F.3d at 918. To the extent that Congress

can shift the judicial power to judges who lack the protections of Article III—at least outside of the narrow parameters already mentioned—the Judicial Branch is weaker and less independent than it should be. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986).

In the wake of the Supreme Court's decision in *Northern Pipeline*, Congress revised the jurisdictional allocation between district and bankruptcy courts to allay the constitutional objections plaguing the Bankruptcy Code[9] in 1978. After the 1984 amendments to the Bankruptcy Code, Congress granted district courts "original and exclusive jurisdiction of all cases under title 11" and original, but not exclusive, jurisdiction "of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(a)-(b) (2006). Bankruptcy courts are units of the district courts, *id.* § 151, and the bankruptcy judges "serve as judicial officers of the United States district courts established under Article III of the Constitution," *id.* § 152(a)(1).

The district court may refer "any or all" bankruptcy cases and proceedings to their respective district's bankruptcy judges. *Id.* § 157(a). Bankruptcy judge's authority in those cases and proceedings differs depending on whether a claim in bankruptcy is "core" or "non-core." *Id.* § 157(b)-(c). In a "core" proceeding, a bankruptcy judge "may enter appropriate orders and judgments," subject to review by the district court. *Id.* § 157(b)(1). Section 157(b)(2) provides a non-exclusive, example list of such core proceedings. In non-core proceedings, the bankruptcy judge "shall submit proposed findings of fact and conclusions of law to the district court, and any final order shall be entered by the district judge . . . after reviewing *de novo*" the objections of either party. *Id.* § 157(c)(1). And—critically for our analysis—§ 157(c)(2)

9 11 U.S.C. §§ 101 *et seq.* (2006) (the "Code").

authorizes bankruptcy judges to enter final judgment in non-core matters upon consent of the parties. *Id.* § 157(c)(2).

3. The Constitutional Problem

The Supreme Court's most recent pronouncement on the constitutional authority of bankruptcy courts came in *Stern v. Marshall*. Although the facts are familiar by now, *Stern* involved a widow—Anna Nicole Smith—and her late husband's son fighting over an inheritance and the constitutional authority of the bankruptcy court to have entered a final judgment on the son's counterclaim against the estate. *Stern*, 131 S. Ct. at 2601–02. The counterclaim was a core proceeding under § 157(b)(2)(C), thus the bankruptcy court had statutory authority to enter a final judgment on the counterclaim. *Id.* at 2608. But the Court held that Congress had overstepped its powers under Article I by conferring authority over a matter invoking the judicial power of the United States to a non-Article III judge. *Id.* at 2620.

Although the majority opinion attempted to fence its ruling with self-limiting language, the Court's broad reasoning has been the subject of considerable debate among our sister circuits.[10] We find the reasoning of the Fifth Circuit in *Frazin* particularly instructive here. In *Frazin*, the Fifth Circuit affirmed a bankruptcy court's disposal of estate professionals' fee applications and the corresponding malpractice claims and claims for breach of fiduciary duty against the estate professionals. 732 F.3d at 323–23. Likewise, the Fifth Circuit upheld the bankruptcy court's factual findings relating to claims under the Texas Deceptive Trade Practices Act ("DTPA"). *Id.* at 323–24. Each of these actions implicated the bankruptcy court's core

10 *See BP RE, L.P. v. RML Waxahachie Dodge, L.L.C. (In re BP RE, L.P.)*, 735 F.3d 279 (5th Cir. 2013); *Peterson v. Somers Dublin Ltd.*, 729 F.3d 741 (7th Cir. 2013); *Wellness Int'l Network Ltd. v. Sharif*, 727 F.3d 751 (7th Cir. 2013); *Frazin v. Haynes & Boone, L.L.P. (In re Frazin)*, 723 F.3d 313 (2013); *Exec. Benefits Ins. Agency v. Arkinson (In re Bellingham Ins. Agency, Inc.)*, 702 F.3d 553 (2012), *cert. granted*, 133 S. Ct. 2880 (2013); *Waldman v. Stone*, 698 F.3d 910 (6th Cir. 2012).

powers as each was necessarily resolved in the claims allowance process. *Id.* at 324.[11] But the Fifth Circuit reversed the bankruptcy court's final disposition of the DTPA claims because the legal conclusions were not necessarily part of ruling on the estate professionals' fee applications. *Id.* at 324–25.

The same bifurcation of constitutional authority exists in this case. The bankruptcy court here was able to determine the Motion without offending Article III because the interpretation of § 365(c)(1) stemmed from the bankruptcy itself and—because a deemed rejection would have resulted in, at a minimum, an unsecured claim against the estate under § 507(g)(1)—was necessarily resolved in the claims allowance process. Moreover, "[t]he Supreme Court has not come close to holding that an Article III judge must decide claims for which the Bankruptcy Code itself provides the rule of decision, and we will not do so here." *Sharif*, 727 F.3d at 773.

But the constitutional problem with the adversary is simple: the bankruptcy court erred in classifying the adversary as a core proceeding. It was not a core proceeding. Following the logic of *Northern Pipeline*, *Stern*, and *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), the pursuit of damages for a breach of contract involves the vindication of private rights that cannot be decided outside of an Article III court. As a result, the bankruptcy court's statutory authority as to the Adversary should have been allocated under 28 U.S.C. § 157(c), thus limiting the bankruptcy court to either (1) proposed findings of fact and conclusions of law, subject to a *de novo* review by the district court, *id.* § 157(c)(1); or (2) a final order entered only upon consent of the parties, *id.* § 157(c)(2). On account of its misclassification, the bankruptcy court appears to have exceeded both its statutory *and* constitutional authority as to the Adversary.

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11 That is, the fee application, related malpractice claim, and the factual findings under the DTPA claim all directly affected the allowance and the value of the estate professionals' administrative expense claims. *Frazin*, 732 F.3d at 320–21; *see also* 11 U.S.C. §§ 330(a), 503(b)(4).

4. Consent Could Not Cure the Constitutional Infirmity

Because the Adversary should have been classified as a non-core proceeding, both § 157 and Article III prohibited the bankruptcy court from entering a final judgment. TicketKing argues that the bankruptcy court's order was still proper even if the Adversary was considered non-core because GGC consented to a final order by the bankruptcy court. Specifically, TicketKing argues that (1) GGC's stipulation pursuant to Federal Rule of Bankruptcy 7008(a) in its Adversary complaint that the matter was core subsumed the requirement to consent to bankruptcy court adjudication, which is a required election only if a litigant deems a matter to be non-core; and (2) consent to bankruptcy court adjudication can be implied from GGC's litigation conduct in filing the adversary complaint and arguing the motion for summary judgment in bankruptcy court. Assuming without deciding that TicketKing is correct, GGC consenting to the bankruptcy court's final-order authority would seemingly solve only the problem of *statutory authority*. But the structural concerns expressed by the Supreme Court in *Schor* cannot be vindicated by the consent of private parties.

Again we find the reasoning of the Fifth Circuit in *Frazin* and *BP RE, L.P.* persuasive. In *BP RE, L.P.*, the Fifth Circuit followed the Sixth Circuit's reasoning in *Waldman* to hold that litigants' consent to have claims heard in bankruptcy court could not overcome the structural protections inherent within the separation of powers. *BP RE, L.P.*, 735 F.3d at 286–87 (citing *Schor*, 478 U.S. at 850; *Waldman*, 698 F.3d at 917). Indeed, "when separation of powers is implicated in a given case, the parties cannot by consent cure the constitutional difficulty . . . When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect." *Frazin*, 732 F.3d at 320 n.3 (quoting *Schor*, 478 U.S. at 850–51) (internal quotations removed). Such concern for structural protection is logically derived from the broad reasoning

in *Stern*—which far eclipses any tongue-and-cheek declarations that the status quo remains unchanged. *Cf. Stern*, 131 S. Ct. at 2620 ("If our decision today does not change all that much, then why the fuss?").

Accordingly, we adopt the compelling and thorough reasoning of the Fifth Circuit in *BP RE, L.P.* and the Sixth Circuit in *Waldman*.[12] Even assuming that GGC consented—either expressly by reverse-engineering its stipulation in the Adversary complaint or impliedly by its litigation conduct—GGC was unable to overcome the broader structural protections in place that guard the systemic interest in separate branches of government. As a result, the bankruptcy court was without authority to enter a final order dismissing the Adversary complaint. That order must be vacated.

B. The Agreement Was an Executory Contract

As a preliminary matter, we address TicketKing's contention that § 365(c) does not prohibit assumption of the Agreement because § 365 applies only to executory contracts and the Agreement was not executory. On this point, the Court agrees with the bankruptcy court that the Agreement was executory when TicketKing petitioned for bankruptcy. When the bankruptcy petition was filed, each party owed at least one continuing material duty to the other under the Agreement. Each possessed an ongoing obligation to maintain the confidentiality of the source code of the software developed by the other—that is, TicketKing as to the Software and GGC as

12 However, we note that no issue exists in this case with the so-called "statutory gap" in 28 U.S.C. § 157 as the Adversary is properly allocated under § 157(c) and not otherwise classified as core proceedings under § 157(b)(2). *Compare Waldman*, 698 F.3d at 921 (holding that a bankruptcy court could not issue proposed findings of fact and conclusions of law when determining a core proceeding under § 157(b)(2) would violate the separation of powers), *with Executive Benefits*, 702 F.3d at 565–66 (holding that no statutory gap existed because the power to "hear and determine" a proceeding under § 157(b)(2) encompassed the power to merely hear and submit proposed findings of fact and conclusions of law to a district court). As a result, we express no opinion on that issue.

to the TicketKing Enhancements. Accordingly, the Agreement was executory and subject to § 365.

C. The Plain Meaning of § 365 Prohibits Assumption of the Agreement

If the Agreement was executory, TicketKing agrees that a straightforward application of § 365(c) prohibits it from assuming the Agreement without GGC's consent. More specifically, TicketKing acknowledges that § 365(c) is drawn in the disjunctive and, by its plain language, prohibits TicketKing from "assuming *or* assigning, "rather than from "assuming *and* assigning," the Agreement. And as a settled principle, "unless there is some ambiguity in the language of a statute, a court's analysis must end with the statute's plain language . . . ." *Hillman v. I.R.S.*, 263 F.3d 338, 342 (4th Cir. 2001) (citing *Caminetti v. United States*, 242 U.S. 470, 485 (1917)) (the "Plain Meaning Rule").

TicketKing maintains that the Plain Meaning Rule has no application here, relying on the two narrow exceptions to application of a statute's plain language. The first such exception, premised on absurdity, exists "when literal application of the statutory language at issue results in an outcome that can truly be characterized as absurd, *i.e.*, that is so gross as to shock the general moral or common sense . . . ." *Id.* (quoting *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 304) (4th Cir. 2000) (internal quotation marks omitted), *aff'd sub nom. Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002). The second exception is premised on legislative intent, and it exists only "when literal application of the statutory language at issue produces an outcome that is demonstrably at odds with clearly expressed congressional intent . . . ." *Id.* A reviewing court may look beyond the plain language of an unambiguous statute only when one of these exceptions is implicated.

TicketKing maintains that this Court should affirm because, although the plain language of § 365(c)(1) precludes its assumption of the Agreement, application of the literal test produces

a result that is *both* absurd and demonstrably at odds with clearly expressed legislative intent. Specifically, TicketKing contends that this Court should reject the plain meaning of § 365(c)(1), and read the disjunctive "or" as the conjunctive "and," for three reasons: (1) the plain meaning of § 365(c) is absurd because it creates internal inconsistencies therein; (2) the plain meaning of § 365(c) is absurd because it is inconsistent with general bankruptcy policy; and (3) the plain meaning of § 365(c) is incompatible with its legislative history. We examine these contentions in turn.

1. The Plain Meaning of Section 365(c) Does Not Create Internal Inconsistencies

TicketKing maintains that adherence to the Plain Meaning Rule produces an absurd result because it sets § 365(c) at war with itself and its neighboring statutory provisions. Specifically, TicketKing maintains that a literal reading of § 365(c) implicates the absurdity exception because it renders inoperative and superfluous § 365(f)(1), as well as the phrase "or the debtor in possession" found in § 365(c)(1)(A). TicketKing contends that this Court should interpret § 365(c) to minimize any discord among the provisions of § 365 and, if possible, construe § 365(c) so that none of § 365 is inoperative or superfluous. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) ("[T]he cardinal rule [is] that, if possible, effect shall be given to every clause and part of a statute.") (quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932)).

a. A Literal Reading of § 365(c)(1) Settles Purported Inconsistencies With Other Statutes

In support of its inconsistency contention, TicketKing first maintains that it is absurd to read § 365(c)(1) literally because such a reading renders § 365(f)(1) inoperative and superfluous. The asserted inconsistency between § 365(c)(1) and § 365(f)(1) arises from use of the term "applicable law" in each provision. *In re Catapult*, 165 F.3d at 751. Subsection (c)(1) bars

assumption (absent consent) when "applicable law" would bar an assignment. And subsection (f)(1) provides that, *contrary provisions in applicable law notwithstanding*, executory contracts may be assigned. Of course, the assumption of an executory contract is a necessary prerequisite to its assignment under § 365. *See* 11 U.S.C. § 365(f)(2)(A) (providing that trustee may assign executory contract only if trustee first assumes such contract in accordance with provisions of § 365). A literal reading of § 365(c)(1), therefore, initially appears to render § 365(f)(1) inoperative or superfluous.

The Sixth Circuit, in its decision in *In re Magness*, squarely addressed the issue of whether the seemingly warring provisions of § 365(c)(1) and § 365(f)(1) are reconcilable. *In re Magness*, 972 F.2d 689, 695 (6th Cir. 1992). In so doing, the court acknowledged that "section 365(c), the recognized exception to 365(f), appears at first to resuscitate in full the very anti-assignment 'applicable law' which 365(f) nullifies." *Id.* As the court observed, however, the conflict between § 365(c)(1) and § 365(f)(1) is illusory, because "each subsection recognizes an 'applicable law' of markedly different scope." *Id.*; *accord In re James Cable*, 27 F.3d at 537-38; *In re Lil' Things, Inc.*, 220 B.R. 583, 590-91 (Bankr. N.D. Tex. 1998); *In re Antonelli*, 148 B.R. 443, 448 (D. Md. 1992), *aff'd*, 4 F.3d 984 (4th Cir. 1993). 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)." *In re Catapult*, 165 F.3d at 752 (citing *In re James Cable*, 27 F.3d at 538; *In re Magness*, 972 F.2d at 695). 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 . . . ." *Id.* 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 re Magness*, 972 F.2d at 699 (Guy, J., concurring).

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. *In re Catapult*, 165 F.3d at 752 (citing *In re Magness*, 972 F.2d at 700 (Guy, J., concurring); *In re Antonelli*, 148 B.R. at 448). 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). *Id.* Premised on this interpretation, we agree with those Circuits that apply § 365(c)(1) literally—the provisions of § 365(c)(1) are not inevitably set at odds with the provisions of § 365(f)(1). *In re Catapult,* 165 F.3d at 752; *In re James Cable*, 27 F.3d at 538; *In re Magness*, 972 F.2d at 695.

b. A Literal Interpretation of § 365(c)(1) Likewise Settles Purported Internal Inconsistencies

The second pillar of TicketKing's inconsistency contention is that a literal reading of § 365(c)(1) creates a conflict within itself. Specifically, TicketKing contends that § 365(c)(1) cannot be read literally because, when so read, the phrase "or the debtor in possession" found in § 365(c)(1)(A) is rendered inoperative and superfluous. Certain bankruptcy courts have agreed with TicketKing's contention, observing, for example, that, "[i]f the directive of Section 365(c)(1) is to prohibit assumption whenever applicable law excuses performance relative to *any* entity other than the debtor, why add the words 'or debtor in possession?' The [literal] test renders this phrase surplusage." *In re Hartec Enters., Inc.*, 117 B.R. 865, 871-72 (Bankr. W.D. Tex. 1990); *accord In re Fastrax, Inc.*, 129 B.R. 274, 277 (Bankr. M.D. Fla. 1991); *In re*

Cardinal Indus., Inc., 116 B.R. 964, 979 (Bankr. S.D. Ohio 1990). As the Ninth Circuit has recognized, however, this position is untenable because "[a] close reading of § 365(c)(1) . . . dispels this notion." *In re Catapult*, 165 F.3d at 752.

By its plain language, § 365(c)(1) addresses *both* assumption and assignment. *Id*. An assumption and an assignment are "two conceptually distinct events," and the non-debtor must consent to each independently. *Id.* Under the plain language of § 365(c)(1), therefore, *two independent events* must occur before a chapter 11 debtor in possession is entitled to assign an executory contract. The debtor in possession must first obtain the non-debtor's consent to assume the contract, and it must thereafter obtain the non-debtor's consent to assign the contract. Therefore, "where a non-debtor consents to the *assumption* of an executory contract, § 365(c)(1) will have to be applied a second time if the debtor in possession wishes to *assign* the contract in question." *Id.* And in the second application of § 365(c)(1), the issue is whether "applicable law excuses a party from accepting performance from or rendering performance to an entity other than . . . *the debtor in possession.*" 11 U.S.C. § 365(c)(1)(A) (emphasis added). We agree, therefore, that the phrase "debtor in possession," far from being rendered inoperative or superfluous by a literal reading of subsection (c)(1), dovetails neatly with the disjunctive language therein: "The trustee may not assume *or* assign . . . ." 11 U.S.C. § 365(c) (emphasis added); *see In re Catapult*, 165 F.3d at 752.

In light of the foregoing, TicketKing's inconsistency contention also lacks merit. Section 365(c)(1) may be read literally without creating an irreconcilable conflict within itself or with its neighboring statutory provisions. We, therefore, adopt the literal approach of the "hypothetical test" acknowledged by our brethren in the Third, Ninth, and Eleventh Circuits.

2. The Intent and Absurdity Exceptions Do Not Apply

TicketKing next maintains that reading § 365(c) literally would produce a result that is inconsistent with general bankruptcy policy, thus implicating the absurdity and intent exceptions to the Rule. For the reasons discussed below, we find that neither exception applies.

a. The Plain Meaning Does Not Produce an Absurd Result

We shall first assess whether a conflict between § 365(c) and general bankruptcy policy implicates the absurdity exception to the Plain Meaning Rule. The bankruptcy court refused to read § 365(c) literally because it viewed the result produced by such a reading to be "quite unreasonable." In assessing whether a plain reading of a statute implicates the absurdity exception, however, the issue is not whether the result would be "unreasonable," or even "quite unreasonable," but whether the result would be *absurd.*

TicketKing maintains that reading § 365(c) literally is absurd because such a reading conflicts with the general bankruptcy policy of fostering a successful reorganization and maximizing the value of the debtor's assets. GGC, on the other hand, asserts that reading § 365(c) literally is not absurd because Congress did not sacrifice every right of a non-debtor party to the reorganization process, and that courts should not assume that "sections of the Bankruptcy Code unfavorable to the debtor were enacted in error." GGC observes that the Bankruptcy Code contains many provisions preserving the rights of non-debtor parties from its general debtor-favorable application (the "Non-debtor Provisions").[13] In response, TicketKing acknowledges that "anyone looking at § 365 appreciates that the Bankruptcy Code balances non-debtor rights with those of a debtor in-possession." TicketKing maintains, however, that most of

13 *See, e. g.*, 11 U.S.C. §§ 362 (b) (listing exceptions to automatic stay, authorizing non-debtor parties to exercise their nonbankruptcy rights notwithstanding § 362(a)), 555-557, 559, 560 (protecting rights of non-debtor party under securities contracts, commodities contracts, grain storage contracts, repurchase agreements, and swap agreements, from effects of automatic stay, avoidance powers, and provisions of § 365).

the Non-debtor Provisions address particular grievances of an identifiable constituency, or were enacted in response to particular court decisions. TicketKing contends, therefore, that the mere existence of such provisions does not make it plausible that, in enacting § 365(c)(1), Congress intended to preclude Chapter 11 debtors from assuming executory contracts existing prior to the bankruptcy filing.

To the contrary, the existence of the Non-debtor Provisions makes it plausible that Congress meant what it said in § 365(c). And if it is plausible that Congress intended the result compelled by the Plain Meaning Rule, this Court must reject an assertion that such an application is absurd. In these circumstances, application of the Plain Meaning Rule does not produce a result so grossly inconsistent with bankruptcy policy as to be absurd.

b. The Plain Meaning Does Not Implicate the Intent Exception

We next turn to TicketKing's contention that the intent exception applies. TicketKing argues that the actual test—that is, reading the disjuntive "or" as the conjuctive "and"—is "far more harmonious" with bankruptcy policy that the literal test. Following this reasoning, and relying on *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989), TicketKing avers that the drafter's intent behind § 365 should govern over the plain meaning. Because the literal test allegedly produces a result that conflicts with the goals of chapter 11, TicketKing would have us look past the plain meaning of the § 365(c)(1).

In *Ron Pair*, the Supreme Court held that a statute's "plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of [the] statute will produce a result *demonstrably at odds* with the intentions of its drafters.'" 489 U.S. at 242 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)) (emphasis added). Under *Ron Pair*, therefore, a court is obliged to apply the Plain Meaning Rule unless the party contending otherwise can demonstrate that the result would be contrary to that intended by

Congress. Requiring a demonstration that the plain meaning of a statute *is at odds* with the intentions of its drafters is a more stringent mandate than requiring a showing that a statute's literal application *is unreasonable* in light of bankruptcy policy.

Some bankruptcy commentators maintain that sound bankruptcy policy supports adoption of the actual test. *See* 3 COLLIER ON BANKRUPTCY ¶ 365.06[1][d][iii] (Lawrence P. King et al. ed., 15th ed. rev. 1988). As the Supreme Court has repeatedly emphasized, however, Congress is the policymaker—not the courts.[14] Put simply, the modification of a statutory provision to achieve a preferable policy outcome is a task reserved to Congress.

As the Ninth Circuit has recognized, application of the actual test "effectively engrafts a narrow exception onto § 365(c)(1) for debtors in possession, providing that, as to them, the statute only prohibits assumption *and* assignment." *In re Catapult*, 165 F.3d at 754. Under the actual test, reading the disjunctive "or" of § 365(c) as the conjunctive "and" effectively reads the term "assume" out of the statute. In these circumstances, any perceived conflict between a literal reading of § 365(c) and general bankruptcy policy fails to implicate the intent exception to the Plain Meaning Rule. We conclude, therefore, that the intent exception is not implicated here.

3. Unenacted Legislative History Is Unpersuasive

TicketKing next maintains that a literal application of § 365(c)(1) produces an outcome at odds with legislative history. Importantly, § 365, as it now reads, was added to the Bankruptcy Code in 1984 (the "1984 Act"), and there is no relevant legislative history for the 1984 Act. TicketKing contends, however, that the 1984 amendments had their genesis in a 1980 House

14 *See, e.g.*, *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 13 (2000) (citing *Kawaauhau v. Geiger*, 523 U.S. 57, 64 (1998); *United States v. Noland*, 517 U.S. 535, 541-42 & n. 3 (1996); *Union Bank v. Wolas*, 502 U.S. 151, 162 (1991)).

amendment to an earlier Senate technical corrections bill. That amendment was accompanied by a relatively obscure committee report, which states:

> 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 nature of the contract.

H.R. 1195, 95th Cong., 2d Sess. § 27(b) (1980). The First Circuit relied on the 1980 Report in its adoption of the actual test. *Summit Invest. & Dev. Corp. v. Leroux*, 69 F.3d 608, 613 (1st Cir. 1995). TicketKing contends that a literal reading of the § 365(c) is at odds with the 1980 Report, and that this contradiction supports its position. But legislative history suggesting an interpretation contrary to a statute's plain meaning is not necessarily sufficient to override the Plain Meaning Rule.

For at least three reasons, the 1980 Report is not conclusive on congressional intent concerning the 1984 Act. First, the 1980 Report relates to a never-enacted1980 proposal, rather than to the 1984 Act. Courts are not free to replace a statute's plain meaning with "unenacted legislative intent." *United States v. Morison*, 844 F.2d 1057, 1064 (4th Cir. 1988). Second, the 1980 Report was prepared several years Congress enacted § 365(c). Finally, the 1980 Report reflects the views of only a single House committee. For these reasons, we agree with the Ninth Circuit's holding in *In re Catapult Entertainment* that the 1980 Report is not "the sort of clear indication of contrary intent that would overcome the unambiguous language of subsection (c)(1)." 165 F.3d at 754. Thus, we decline to reject the plain meaning of § 365 on this basis.

D. GGC Never Consented to an Assumption of the Agreement

Finally, we turn to TicketKing's contention that, in any event, GGC consented to TicketKing's assumption of the Agreement. A debtor in possession may assume or assign an executory contract if the non-debtor party consents. 11 U.S.C. § 365(c)(1)(B). TicketKing

maintains that GGC had agreed in the Agreement that it would not prohibit TicketKing from transferring the License to a successor in interest if the transfer included substantially all of TicketKing's assets, and that in so doing, GGC consented to its assumption of the License.

The provision of the Agreement at issue provides that the assignment section of the Agreement shall not preclude the transfer of the License to a successor in interest of substantially all of TicketKing's assets if the assignee agrees in writing to be bound by the License (the "Transfer Provision"). TicketKing maintains that GGC had consented, in the Transfer Provision, to permit transfer of the License to a successor in interest under certain circumstances. GGC contends that any consent it provided to TicketKing in the Transfer Provision is irrelevant because, under the § 365, the issue is whether applicable law prohibited the transfer *irrespective of the provisions of the Agreement*. In support of this proposition, GGC observes that § 365(c)(1) applies "whether or not such contract . . . prohibits or restricts assignments of rights . . . ." *Id.* § 365(c)(1)(A).

GGC's reliance on this aspect of the § 365 language is misplaced. The Transfer Provision does not *prohibit* or *restrict* TicketKing from transferring its rights under the Agreement; the Transfer Provision *favors* assignment—it entitles TicketKing to assign the Agreement without GGC's consent so long as the assignment includes substantially all of TicketKing's assets. Rather than being irrelevant, therefore, the issue of contractual consent in the Transfer Provision could be determinative of whether the § 365 barred TicketKing's assumption. *See In re Midway Airlines, Inc.*, 6 F.3d 492, 497 (7th Cir. 1993) (finding pro-assignment contract language determinative of assignment issue under § 365(c)). Accordingly, this Court must disagree with GGC that the Agreement, in *permitting* TicketKing to transfer the License to a successor in

interest, is irrelevant to whether § 365(c) precluded TicketKing from assuming or assigning the Agreement.

Finally, GGC maintains that, even if it consented to TicketKing's transfer of the License to a successor in interest under certain circumstances, the Transfer Provision applies only to assignments, and not to assumptions. We agree. The Transfer Provision is set forth in the "Assignment" section of the Agreement, and all other provisions of that section apply, by their terms, *exclusively* to assignments.

In sum, this Court draws the following conclusions. GGC consented to TicketKing's assignment of the License to a successor in interest under certain circumstances. The Transfer Provision, however, does not apply to an *assumption* of the Agreement by a chapter 11 debtor in possession. Because the terms assumption and assignment describe "two conceptually distinct events," *In re Catapult*, 165 F.3d at 752, and because the Transfer Provision pertains to an assignment rather than an assumption, GGC did not consent to TicketKing's assumption of the Agreement. Without GGC's consent, TicketKing was precluded from assuming the Agreement.

III. CONCLUSION

Pursuant to the foregoing, the bankruptcy court erred, and therefore this Court vacates the bankruptcy court's order granting summary judgment in the Adversary in favor of TicketKing, reverses the bankruptcy court's order denying the Motion, and remands both proceedings to the bankruptcy court for such other and further proceedings as may be appropriate.

REVERSED AND REMANDED.