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PRESENTED BY

THE HON. JOHN C. FORD AMERICAN INN OF COURT DALLAS/FORT WORTH, TEXAS	THE DELAWARE BANKRUPTCY AMERICAN INN OF COURT DELAWARE

CONFIDENTIAL BENCH MEMORANDUM

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CONFIDENTIAL BENCH MEMORANDUM

To: Judge Carey, Chief Judge Houser, and Judge Trust

Date: February 4, 2014

Subject: *TicketKing Corp. v. Goodell Gaming Cor. (In re TicketKing Corp.)*

This memorandum has been prepared to assist the judges in mooting representatives of the Hon. John C. Ford American Inn of Court and the Delaware Bankruptcy American Inn of Court. On behalf of both Inns, thank you to each of the judges who have graciously agreed to serve on this panel. This bench memorandum, in conjunction with the fact pattern for *In re TicketKing*, will provide for both issues on appeal (1) a discussion of the relevant authorities, (2) an analysis of the law, and (3) the likely arguments to be made by the advocates.

I. ISSUES ON APPEAL

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.

II. PROCEDURAL POSTURE

TicketKing Corporation ("TicketKing") filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code ("Bankruptcy Code") in the United States Bankruptcy Court for the District of Valley Ranch on September 1, 2011.

TicketKing's Plan of Reorganization was confirmed on August 10, 2012 and became effective on September 15, 2012.

Prior to confirmation of TicketKing's Plan of Reorganization, on July 4, 2012, Goodell Gaming Corporation ("GGC") filed its motion ("Motion") to deem its software license agreement ("Agreement") with TicketKing rejected pursuant to 11 U.S.C. § 365. At the same time it filed the Motion, GGC also filed an adversary proceeding ("Adversary") against TicketKing seeking damages for various alleged breaches of the Agreement. TicketKing responded to the Adversary with a general denial and to the Motion by asserting that Section 365 of the Bankruptcy Code was inapplicable because the Agreement was not an executory contract. The Bankruptcy Court issued a

memorandum opinion and order ("Order") and determined that it had jurisdiction over the Adversary as a core proceeding under 28 U.S.C. § 157(b)(2)(A) and granted summary judgment in favor of TicketKing. In addition, the Bankruptcy Court denied the Motion holding that TicketKing could assume 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 United States Court of Appeals for the Fourteenth Circuit. 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.

On December 31, 2013, the Fourteenth Circuit issued its opinion finding that the Bankruptcy Court erred, and therefore the Court vacated the Bankruptcy Court's order granting summary judgment in the Adversary in favor of TicketKing, reversed the Bankruptcy Court's order denying the Motion and remanded both proceedings to the Bankruptcy Court for further proceedings as may be appropriate.

GGC timely filed its writ of certiorari, which was granted on January 21, 2014.

III. SUMMARY OF THE FACTS

GGC is a software development company for the ticketing industry. GGC's software products are used by entities in the ticketing industry, such as TicketKing, for ticket sales and transfer management. TicketKing was a ticket provider for sporting events, concerts, and theater shows. TicketKing was also the exclusive ticket provider for various professional sports organizations.

TicketKing launched a program called TicketKing Reseller (the "Reseller Program") in 2005. Reseller Program members could sell or trade tickets they already purchased for events that they did not want to attend. TicketKing needed to develop an integrated computer system to assist in its management of the Reseller Program due to the volume of customers. 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 the Agreement. Pursuant to the Agreement, GGC granted TicketKing a nonexclusive license to use the Fair Weather Fan® Software (the "Software"). Effective April 1, 2010, GGC was required under the Agreement 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.[1] The Agreement authorized TicketKing to utilize the Software to develop its own software system because the Software as marketed did not meet TicketKing's requirements. 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.

IV. STANDARD OF REVIEW

In reviewing a decision of an appellate court, this Court reviews the appellate court's legal determinations *de novo* and its factual findings are reviewed for clear error. *Brown v. Plata*, 131 S. Ct. 1910, 1929 (2011); *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 105 S. Ct. 1504 (1985); *Interface Group-Nevada, Inc. v. Trans World Airlines, Inc.* (*In re Trans World Airlines, Inc*.), 145 F.3d 124, 130 (3d Cir. 1998); *see also*, *Delta Fin. Corp. v. W. Chester Surplus Lines Ins. Co., et al.*, 409 B.R. 709, 711 (D. Del. 2009).

V. LEGAL ANALYSIS

Issue 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.

A. Inconsistent Case Law Applying § 365(c)(1)

Courts generally agree that § 365(c)(1) prohibits a debtor from assuming and assigning a license absent consent of the licensor. However, courts disagree on the issue of whether a debtor may simply assume (and not assign) an intellectual property license without first obtaining consent from the licensor. The divergence among courts results from differing constructions of the "assume or assign" language in § 365(c)(1) and whether the disjunctive "or" is strictly construed to mean what it says, or instead interpreted to mean the conjunctive "and." 11 U.S.C. § 365(c)(1) (emphasis added); *see RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257, 265 (4th Cir. 2004).

Two competing judicial approaches have developed at the circuit court level: the "hypothetical" test and the "actual" test. The hypothetical test, which requires the licensor's consent for either assumption or assignment, has been adopted by the Third, Fourth, Ninth, and Eleventh circuits and is frequently applied in cases involving technology companies. *See, e.g.*, *In re Sunterra Corp.*, 361 F.3d at 271 (4th Cir. 2004) ("Without [the licensor's] consent, [the debtor] was precluded from assuming the agreement."); *Perlman v. Catapult Entm't, Inc. (In re Catapult Entm't, Inc.)*, 165 F.3d 747, 750 (9th Cir. 1999) (applying the plain meaning of § 365(c)(1) and adopting the hypothetical test); *City of Jamestown, Tenn. v. James Cable Partners, L.P. (In re James Cable Partners, L.P.)*, 27 F.3d 534, 537 (11th Cir. 1994) (holding that § 365(c)(1)

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

"presents a hypothetical question"); *In re West Elecs. Inc.*, 852 F.2d 79, 83 (3d Cir. 1988) (holding that the language of § 356(c)(1) supports the use of the hypothetical test). Conversely, the First Circuit and the majority of bankruptcy courts that have addressed this issue have adopted the actual test, which does not require explicit consent for assumption. *See Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997) (declining to follow the hypothetical test); *see also United States v. TechDyn Sys. Corp. (In re TechDyn Sys. Corp.)*, 235 B.R. 857, 861 (Bankr. E.D. Va. 1999) (noting that a clear majority of the lower courts follow the actual test).

1. The Hypothetical Test

Courts adopting the hypothetical test hold that a debtor may not assume an intellectual property license subject to § 365(c) without consent of the licensor, even if the debtor has no intention of ever assigning the license. *See Sunterra*, 361 F.3d at 265 (4th Cir. 2004); *In re Catapult Entm't, Inc.*, 165 F.3d 747 (9th Cir. 1999); *In re West Elec., Inc.*, 852 F.2d 79, 82 (3d Cir. 1988). The hypothetical test provides that if applicable non-bankruptcy law prohibits a debtor from assigning the license to a third party, then the debtor cannot even assume the contract irrespective of whether it intends later to assign the license to a third party. *West Elec.*, 852 F.2d at 82. These courts create a "hypothetical" third party—to whom the license could "hypothetically" be assigned—to determine whether an assignment would otherwise be impermissible under § 365(c). *Catapult Entm't*, 165 F.3d at 754-55. Thus, this test is referred to as the "hypothetical test." *Id.*

The Third Circuit was the first to adopt the hypothetical test. *See In re West Electronics Inc*. 852 F.2d at 83. *West* involved an executory contract between a defense contractor and the United States. *Id.* at 80. West Electronics filed for bankruptcy and the government sought to terminate its executory contract with the debtor. The issue facing the Third Circuit was whether the debtor could assume the executory contract even if it had no intention of later assigning it to a third party. *Id.* at 82-83. The court held that it could not assume the contract, because 41 U.S.C. § 15 prevents transfers of government contracts to third parties. The court rejected the debtor's argument that Bankruptcy Code § 365(f) nevertheless made the executory contract freely transferable, stating "West could not force the government to accept the 'personal attention and services' of a third party without [the government's] consent." *Id.* at 83. Thus, West was barred from assuming the contract. *Id.* In reaching its conclusion, the court examined the plain meaning of the Statute and stated that

> 11 U.S.C. § 365(c)(1) creates a hypothetical test—*i.e.*, under the applicable law, could the government refuse performance from "an entity *other* than the debtor or the debtor in possession." . . . [T]he relevant inquiry is not whether 41 U.S.C. § 15 would preclude an assignment from West as a debtor to West as a debtor in possession, but whether it would foreclose an assignment by West to another defense contractor.

Id. Even though West did not involve an intellectual property license, it is the genesis of the hypothetical test that was later applied by courts in those contexts. *Perlman v. Catapult Entm't, Inc. (In re Catapult Entm't, Inc.)*, 165 F.3d 747, 750 (9th Cir. 1999) (adopting hypothetical test in the context of patent licensing).

The Fourth and the Ninth Circuits have expressly adopted the hypothetical test in cases involving disputes over assumption or assignment of an intellectual property license, holding that "applicable law" within the meaning of § 365(c)(1), prevents a debtor from assigning an intellectual property license without the express consent of the licensor. *In re Sunterra Corp.*, 361 F.3d 257; *In re Catapult Entertainment, Inc.*, 165 F.3d 747. In *Catapult*, the Ninth Circuit held that a debtor could not assume a nonexclusive patent license over the licensor's objection because the plain meaning of § 365(c)(1) dictates application of the hypothetical test. 165 F.3d at 750-51 (in applying the hypothetical test, the court stated that "federal patent law excuses [the licensor] from accepting performance from or rendering performance to an entity other than [the debtor] . . . and [the licensor] does not consent to such assumption."). However, the severe impact to the debtor in *Catapult* was diminished somewhat by the facts of that case. The debtor had, in fact, planned to change the nature, albeit not the identity, of the licensee through the mechanism of a merger. *Id.* Allowing the debtor to assume the license would have allowed the debtor to complete a transaction resulting in the functional equivalent of a prohibited assignment.

More recently, the Fourth Circuit adopted the hypothetical test in *Sunterra*, 361 F.3d 257 (4th Cir. 2004). However, that case lacked facts to justify the harsh result to the debtor, such as those that were present in *Catapult*. In *Sunterra*, the prepetition debtor entered into a software license agreement with RCI in which RCI granted Sunterra a nonexclusive license for the use of its software. *Id.* at 260. During the bankruptcy, RCI filed a motion to have the software license deemed rejected, asserting that the license was an executory contract and that the debtor was prohibited by section 365(c) from assuming the license without its consent. *Id.* at 261. RCI further contended that because it had not given the debtor permission to assume the license, the court was required, as a matter of law, to deem the license rejected. *Id.* The bankruptcy court adopted the actual test and held that section 365(c) did not prohibit the debtor from assuming the license. *Id.* at 262-63. Under this interpretation, the debtor "was entitled to assume the [license] because it did not intend to assign, and RCI would not actually be forced to accept performance from a party other than the [debtor]." *Id.* at 263. RCI appealed and the district court affirmed. *Id.* On appeal, the Fourth Circuit rejected the lower courts' adoption of the actual test and instead adopted the hypothetical test. *Id.* at 267. The court, in rejecting the actual test, stated that it refused to interpret the "or" in the statutory phrase "assume or assign" as a conjunctive "and." *Id.*

2. The Actual Test

A more pragmatic approach has been adopted by the First Circuit and most bankruptcy courts, which have expressly rejected the hypothetical test in favor of the "actual test." *See Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489 (1st Cir. 1997), *abrogated on other grounds by Hardemon v. City of Boston*, 1998 WL 148382 (1st Cir. 1998). The actual test was first developed by the First Circuit in *Summit Investment & Development Corp. v. Leroux*, 69 F.3d 608 (1st Cir. 1995). In *Leroux*, the court relied on the legislative history to conclude that Congress intended section 365(c) to provide the nondebtor party with the benefit of its bargain. *Id.* at 612-13. The court noted that, in drafting § 365(c), Congress did not intend to prohibit assumption when the debtor-in-possession is the party who will be performing the debtor's duties and

accepting performance from the nondebtor party. *Id.* at 613 (citing H.R. Rep. No. 96-1195, at 12 (1980)). The court noted that this type of analysis requires a "case-by-case inquiry into the actual consequences . . . to the nondebtor party," instead of the abstract rule of the hypothetical test. *Id.* The court further stated that in order to prevent assumption of the contract, the nondebtor party "must make an individualized showing that it would not receive the 'full benefit of [its] bargain' were an entity to be substituted for the debtor from whom performance is due." *Id.* (alteration in original).

Although *Leroux* did not involve an intellectual property license, it was not long before the First Circuit applied the actual test in a case that did involve such a license. In *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489 (1st Cir. 1997), Cambridge Biotech entered into a license agreement with Institut Pasteur. After Cambridge Biotech filed for bankruptcy, it proposed through its reorganization plan to assume the license so it could continue its operations. *Id.* at 490. The plan also provided for a sale of the debtor's equity to a subsidiary of one of Pasteur's direct competitors. *Id.* Pasteur objected and contended that the plan amounted to an assumption and de facto assignment of the license. *Id.* at 490-91.

The First Circuit followed *Leroux* and rejected the hypothetical test. *Id.* at 493. Instead, the court applied the actual test and conducted an inquiry into whether the nondebtor party (i.e., Pasteur) was actually being forced to accept performance from someone other than the debtor. *Id.* In this context, the First Circuit held that "the bankruptcy court cannot simply presume as a matter of law that the debtor-in-possession is a legal entity materially distinct from the prepetition debtor with whom the nondebtor party . . . contracted." *Id.* Rather, the focus should be "on the performance actually to be rendered by the debtor-in-possession," and whether Pasteur would be denied the full benefit of its bargain. *Id.* (citing S. Rep. No. 95-989, at 59 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5845). Thus, the court held that the debtor could assume the license over the licensor's objection. *Id.* The court also approved of the debtor's sale of equity to Pasteur's competitor. *Id.*

The Fifth Circuit has also adopted the "actual test," albeit in the context of interpreting §365(e)(2), which contains provisions similar to § 365(c)(1). *Bonneville Power Admin. v. Mirant Corp. (In re Mirant Corp.)*, 440 F.3d 238, 246 (5th Cir. 2006) (noting that the dispute involved essentially the same issue as the apparent conflict between subsections 365(c) and 365(f)—namely whether a prohibition on assumption applies in cases where no assignment is actually sought). The Fifth Circuit held that the "plain text" of section 365(e)(2) requires the use of the actual test because the prohibition on assignment is "tethered . . . to 'applicable' law" and the "applicable law must apply to a set of circumstances." *Id.* at 249-50. The court held that "[t]he applicability of the law under § 365(e)(2)(A) is determined not in the abstract but on the record at hand." *Id.* at 250. Furthermore, the court criticized the hypothetical test as being too abstract and complained that it could force courts to decide whether an assumption or assignment would be permitted under consideration of circumstances that were not even pending before the court. *Id.* Accordingly, even though the Fifth Circuit has not addressed which test applies when interpreting § 365(c)(1), *Mirant* serves as a strong indication that the Fifth Circuit would adopt the actual test.

3. Recent Trends in Case Law

Although the hypothetical test has been adopted by a majority of circuits that have addressed the issue, a recent trend suggests increasing momentum toward allowing assumption based on a "plain meaning" interpretation of § 365(c). Under the plain meaning approach, courts focus on the plain meaning of the statute to reach a conclusion which is consistent with both the objective sought to be obtained in Section 365(c)(1) and the overall objectives of the Bankruptcy Code, without construing "or" to mean "and." The case on this approach is *In re Footstar, Inc*. 323 B.R. 566 (Bankr. S.D.N.Y. 2005). In that case, the prepetition debtor entered into a series of agreements providing for Kmart to operate a separate "Shoemart Corporation." The agreements prohibited assignment and also gave the debtor the exclusive right to operate footwear departments in particular Kmart stores. *Id.* at 568. The debtor subsequently sought to assume the agreements after it filed for bankruptcy. Kmart objected, arguing that assumption was prohibited based on § 365(c) and the anti-assignment clause. *Id.* at 567.

In *Footstar*, the court considered both the actual and hypothetical tests before concluding that that neither test applied. *Id.* at 567-68. Instead, the court focused on the "plain meaning" of the statute "to reach a conclusion which is entirely harmonious with both the objective sought to be obtained in Section 365(c)(1) and the overall objectives of the Bankruptcy Code, without construing 'or' to mean 'and.'" *Id.* at 570. Specifically, the court held that the hypothetical test was flawed because it is based on the premise that the term "trustee" is synonymous with "debtor" or "debtor in possession." *See id.* The court stated that neither the Bankruptcy Code nor its legislative history equates a "trustee" with a "debtor" or "debtor in possession," and as a result, Bankruptcy Code references to a "trustee" and a "debtor" or "debtor in possession" must mean those terms have different meanings. *Id.* at 571. Thus, the court concluded that the *debtor-in-possession* is not prevented from assuming a contract under § 365(c) because it only refers to limitations on the *trustee's* ability to assume or assign the contract. *See id.* Furthermore, the court concluded that the debtor should not be subject to "the perverse and anomalous consequence of the 'hypothetical test' rule under which a debtor may lose the benefit of a non-assignable contract vital to its economic future solely because it filed for bankruptcy." *Id.* at 574.

Other bankruptcy courts have recently adopted the rationale set forth in *Footstar*. *See, e.g.*, *In re Adelphia Commc'ns Corp.*, 359 B.R. 65, 72 (Bankr. S.D.N.Y. 2007) (distinguishing between the assumption of a contract and the assignment of a contract). In *In re Adelphia Communications Corp.*, the bankruptcy court rejected the hypothetical test and concluded that the "the right to object to assignment does not by itself affect the right to assume." *Id.* Similarly, in *In re Aerobox Composite Structures, LLC*, the bankruptcy court applied the *Footstar* analysis in a case involving an intellectual property license. 373 B.R. 135 (Bankr. D.N.M. 2007). In that case, the debtor had a nonexclusive license for the use of certain patent rights and confidential information. *Id.* at 137. The license agreement contained an *ipso facto* clause terminating the agreement if the debtor filed for bankruptcy. *Id.* at 138. When the debtor later filed for bankruptcy, the licensor sought an order deeming the license rejected based on the fact that it could not be assumed or assigned under the hypothetical test. *Id.*

The court adopted the analysis used in *Footstar* and agreed that it "makes no sense to read 'trustee' to mean 'debtor in possession'" because "[d]oing so would 'render the provision a virtual oxymoron.'" *Id.* at 142 (quoting *In re Footstar, Inc.*, 323 B.R. 566, 573 (Bankr. S.D.N.Y. 2005)). It also held that § 365(c)(1) is intended to protect the nondebtor party from being forced to accept performance from an entity other than the party with whom it originally contracted. *Id.* at 141. Because the debtor "is not materially distinct from the pre-bankruptcy entity that is a party to the [license]," the court denied the licensor's motion to compel rejection. *Id.* at 141-42. Not all bankruptcy courts have followed the *Footstar* court's analysis however. In particular, the bankruptcy court in *Federal Insurance Co. v. Continental Casualty Co*., 2006 WL 3386625 (Bankr. W.D. Pa. Nov. 22, 2006), rejected the plain meaning approach articulated in *Footstar* and applied the broad interpretation set forth in *West Electronics*.

B. Statutory Interpretation of Section 365(c)(1)

It is well-settled that the plain-meaning rule of statutory interpretation (the "Plain Meaning Rule") requires that when the statutory language "is plain and admits of no more than one meaning," the court should not try to "interpret" the statute. *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *see also Hillman v. IRS*, 263 F.3d 338, 342 (4th Cir. 2001) ("[U]nless there is some ambiguity in the language of a statute, a court's analysis must end with the statute's plain language . . . ."). The language of § 365(c) reads, in part, that "[t]he trustee may not assume or assign any executory contract . . . of the debtor." 11 U.S.C. § 365(c) (emphasis added). Although the statute clearly says "assume or assign," the dispute between the hypothetical and actual tests typically centers on whether the "or" in the phrase should be read as a disjunctive "or" or as a conjunctive "and." *See RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257, 262 nn.8-9 (4th Cir. 2004) (explaining the difference between the hypothetical and actual tests).

1. Disjunctive "or" versus conjunctive "and"

Courts applying the hypothetical test premise their decisions on a literal interpretation of the text of § 365(c)—namely, reading the "or" as a disjunctive. *See id.* As such, those courts state that the debtor can neither assume nor assign an executory contract if "applicable law excuses a party, other than the debtor, . . . from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession . . . [and] such party does not consent to such assumption or assignment." 11 U.S.C. § 365(c)(1). Under this interpretation, the act of assumption is an event separate and distinct from assignment. It follows then that § 365(c)(1)'s conditions must apply equally to assumption or assignment.[2] These courts conclude that a debtor has no choice but to reject a contract if applicable law forbids the debtor from assigning the contract. *In re Sunterra*, 361 F.3d at 269 (stating that interpreting § 365(c) to mean "assumption and assignment" would intrude on legislative function).

[2] Applying the conditions of § 365(c)(1) to assumption only, the statute would read, "The trustee may not assume . . . any executory contract or unexpired lease of the debtor . . . if applicable law excuses a party . . . from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession." 11 U.S.C. § 365(c)(1)(A).

Under this literal interpretation of § 365(c), the debtor could not assume or assign an executory copyright license without consent. Courts that have adopted this interpretation have applied § 365(c)'s prohibition even where the debtor-in-possession has no intention of assigning the license in question. *See In re Sunterra*, 361 F.3d at 262 n.8 (finding irrelevant the debtor's intention to assign to a third party due to a literal reading of the Statute).

Proponents of the actual test generally state that the disjunctive "or" must be read as a conjunctive "and." *See Bonneville Power Admin. v. Mirant Corp. (In re Mirant Corp.)*, 440 F.3d 238, 249 (5th Cir. 2006) (adopting the actual test); *Summit Inv. & Dev. Corp. v. Leroux*, 69 F.3d 608, 612-13 (1st Cir. 1995) (same). Although these courts typically acknowledge that § 365(c) is, in fact, constructed in the disjunctive and by its plain language prohibits assumption or assignment, they maintain that the plain-meaning rule should not apply for the following three reasons: (1) the literal reading creates inconsistencies within the Bankruptcy Code, (2) the literal reading is incompatible with the legislative history of § 365, and (3) the literal reading goes against sound bankruptcy policy. *See In re Catapult*, 165 F.3d at 751 (analyzing arguments against the plain meaning rule); *see also Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997); *Sullivan v. CIA*, 992 F.2d 1249, 1252 (1st Cir. 1993). *But see Leroux*, 69 F.3d at 610 ("Plain statutory language does not prompt recourse to countervailing legislative history."). These courts state that the proper interpretation of section 365(c) requires a case-by-case inquiry into whether the nondebtor's contract will actually be assigned, or whether the nondebtor will actually be asked to accept performance from a third party. *See In re Mirant*, 440 F.3d at 248 (emphasizing the importance of whether a contract will actually be assigned or whether a nondebtor will actually be forced to accept performance from a third party); *Leroux*, 69 F.3d at 612-13 (interpreting the legislative history to require "a case-by-case inquiry into the actual consequences . . . of permitting these executory contracts to be performed by the debtor party").

2. Section 365(c)(1) and Internal Inconsistencies

Several courts have adopted the actual test after determining that a literal reading of § 365(c) would implicate the absurdity exception to the plain meaning rule of statutory interpretation. *See, e.g.*, *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 304 (4th Cir. 2000) (noting that an exception to application of a statute's plain language exists when "a literal reading of a statute . . . 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'" (citation omitted)). In order to achieve internal consistency, these courts interpret the statute so as to minimize discord among related provisions. *See* 2A Norman J. Singer & J.D. Shambie Singer, Statutes and Statutory Construction § 46:6 (7th ed. 2007) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error."). Specifically, these courts maintain that a literal reading of section 365(c) renders section 365(f)(1) inoperative and superfluous. *See In re Sunterra*, 361 F.3d at 265-66 (noting the seemingly contradictory provisions of § 365(c)(1) and § 365(f)(1)).

Subsection (f)(1) provides that executory contracts, once assumed, may be assigned notwithstanding any contrary provisions contained in the contract or applicable law:

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

11 U.S.C. § 365(f)(1). The conflict arises from subsections (c)(1) and (f)(1)'s treatment of "applicable law." The plain language of subsection (c)(1) bars assumption whenever "applicable law" would bar assignment. Subsection (f)(1), however, states that executory contracts may be assigned, contrary provisions in applicable law notwithstanding. But, in order for a contract to be assigned, the debtor must first assume it. 11 U.S.C. § 365(f)(2)(A) (providing that the trustee may assign an executory contract if the trustee first assumes such a contract in accordance with the provisions of section 365). A literal reading of section 365(c)(1) would thus render section 365(f)(1) inoperative and superfluous. *See In re Catron*, 158 B.R. at 636 (concluding that the "[c]onflict between subsections (c) and (f) of § 365 is inescapable").

The Sixth Circuit, however, reconciled the two provisions in *In re Magness*, noting that "each subsection recognizes an 'applicable law' of markedly different scope." *Rieser v. Dayton Country Club Co. (In re Magness)*, 972 F.2d 689, 695 (6th Cir. 1992). Subsection (f)(1) serves as the default rule by nullifying applicable nonbankruptcy law that "prohibits, restricts, or conditions the assignment of" an executory contract. *See In re Magness*, 972 F.2d at 695 (acknowledging subsection (f) as the default); *see also In re James Cable*, 27 F.3d at 538 (same). Subsection (c), however, operates as an exception to this default rule. *See* 11 U.S.C. § 365(f)(1) (stating that its provisions apply "[e]xcept as provided in subsection (c)"). "Thus, the 'applicable law' to which subsection (c) refers must mean 'applicable law' other than general prohibitions barring assignment." *In re James Cable*, 27 F.3d at 538.

To determine whether subsection (f)(1) nullifies a law prohibiting assignments, a court must inquire into why "applicable law" prohibits the assignment. *See Perlman v. Catapult Entm't, Inc. (In re Catapult Entm't, Inc.)*, 165 F.3d 747, 752 (9th Cir. 1999). Section 365(c) provides an exception to the default rule only where the law prohibits assignment of the contract on the rationale that the identity of the contracting party is material to the agreement and is therefore "non-delegable." *See In re Magness*, 972 F.2d at 700. The federal common law principle of copyright nonassignability states that a licensor is not required to accept performance from an entity other than the entity with which it originally contracted. Because these courts find that this policy fits within §365(c)'s exception, they read that Section to prevent the debtor-licensee from assuming or assigning the license without the licensor's consent. Those courts claim this neither creates inconsistency with section 365(f)(1) nor renders subsection (f)(1) inoperative or superfluous. *See RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257, 266-67 (4th Cir. 2004) (concluding that subsections (c) and (f) are not irreconcilable

when applied to a software license agreement); *In re Catapult*, 165 F.3d at 752 (concluding that section 365(c) is not at odds with section 365(f)).

Proponents of the actual test also contend that a literal reading of §365(e) is incompatible with § 365(c), because subsection (e) prohibits enforcement of *ipso facto* clauses. *See Summit Inv. & Dev. Corp. v. Leroux*, 69 F.3d 608, 612 (1st Cir. 1995). Section 365(e)(1)(B) states:

> Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on . . . the commencement of a case under this title.

11 U.S.C. § 365(e)(1)(B). Section 365(e) also provides an exception to the general anti–*ipso facto* rule in subsection (e)(2)(A): "Paragraph (1) of this subsection does not apply to an executory contract . . . if (A)(i) applicable law excuses a party . . . from accepting performance from or rendering performance to the trustee or to an assignee of such contract . . . and (ii) such party does not consent to such assumption or assignment . . . ." 11 U.S.C. § 365(e)(2)(A).

These courts state that the subsection (e)(2)(A) exception requires the nondebtor party to make an "actual showing—prior to any termination of the debtor's postpetition contract rights—that the nondebtor party . . . would not be forced to accept performance under its executory contract from someone other than the debtor party with whom it originally contracted." *Leroux*, 69 F.3d at 612. Thus, the hypothetical test is inappropriate because, unless the nondebtor party can make a showing of the debtor's actual intent to assign the contract, the subsection (e)(2)(A) exception cannot be triggered. *Id.* If subsection (e)(2)(A)'s exception is not triggered, then the anti–*ipso facto* provision of subsection (e)(1)(A) will remain in effect, leaving the statute at odds with the anti-assignment provision of subsection (c)(1)(A). *Id.* at 613; *see also Bonneville Power Admin. v. Mirant Corp. (In re Mirant Corp.)*, 440 F.3d 238, 248-49 (5th Cir. 2006). Courts applying the actual test generally conclude that the subsection (e)(2)(A) exception does not apply in the context of copyright licensing because "applicable law" does not excuse the nondebtor party from accepting performance from the trustee or debtor in possession. *See In re Mirant Corp.*, 440 F.3d at 248-49. Thus, lower courts often disagree regarding whether § 365(c), which prohibits the assignment of contracts, and section 365(e), which nullifies *ipso facto* clauses, create internal inconsistency. Courts adopting the hypothetical test find that subsection (e)'s exceptions apply, and the *ipso facto* provision does not create internal inconsistency. Conversely, courts in favor of the actual test conclude that subsection (e) creates internal inconsistency with subsection (c) because applicable non-bankruptcy law does not excuse the nondebtor party from accepting performance from the debtor.

3. Legislative History of Section 365

When a statute is clear and unambiguous on its face, the Supreme Court has repeatedly stated that consideration of the statute's legislative history is inappropriate. *See, e.g.*, *Toibb v. Radloff*, 501 U.S. 157, 162 (1991) ("[T]his Court has repeated with some frequency: 'Where, as here, the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.'" (quoting *Blum v. Stenson*, 465 U.S. 886, 896 (1984))). But, a court may look beyond an unambiguous statute to consult legislative history if a literal reading of the statute produces an outcome that is "demonstrably at odds" with clearly expressed congressional intent or results in an "absurd" outcome—one that is "so gross as to shock the general moral or common sense." *Crooks v. Harrelson*, 282 U.S. 55, 59-60 (1930); *see also United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989).

Courts adopting the actual test have held that the literal reading of section 365(c) is at odds with the legislative history of the statute. *See, e.g.*, *Bonneville Power Admin. v. Mirant Corp. (In re Mirant Corp.)*, 440 F.3d 238, 249-51 (5th Cir. 2006) (adopting the actual test based on an interpretation of Congress's intent and the legislative history of section 365(c)). Section 365(c), as it now reads, was added to the Bankruptcy Code in 1984 (the "1984 Act"). Pub. L. No. 98-353, 98 Stat. 333. Section 362(a) of the 1984 Act amended 11 U.S.C. § 365(c)(1)(A) by substituting the phrase "an entity other than the debtor or the debtor in possession" for the words "the trustee." Compare 11 U.S.C. § 365(c)(1)(A) (1982), *with* Pub. L. No. 98-353, sec. 362(a), § 365(c)(1)(A), 98 Stat. at 362. No relevant legislative history exists for the 1984 Act; however, the 1984 amendments were originally drafted in a 1980 house amendment to an earlier Senate technical corrections bill. *See RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257, 270 (4th Cir. 2004). Those amendments were accompanied by a 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 service nature of the contract.

H.R. Rep. No. 96-1195, at 12. This legislative history supports the decisions of courts adopting the actual test. *See, e.g.*, *Summit Inv. & Dev. Corp. v. Leroux*, 69 F.3d 608, 613 (1st Cir. 1995). The committee report indicates that Congress did not intend section 365(c)(1) to preclude assumption of an otherwise nonassignable executory contract if "the performance to be given or received . . . will be the same as if no petition had been filed." *Id.* at 613 (quoting H.R. Rep. No. 96-1195, at 12). Courts adopting the actual test maintain that "§ 365(c)(1) provides that a debtor in possession can assume a personal service contract that is nonassignable . . . as long as its performance [would] be the same as if no petition had been filed." *In re Cardinal Indus., Inc.*, 116 B.R. 964, 979 (S.D. Ohio 1990).

Furthermore, these courts note that the actual language of subsection (c)(1) is consistent with the legislative history because it says "the debtor or the debtor in possession" and not simply "the debtor in possession." Thus, neither a debtor nor a

debtor-in-possession is barred from assuming the underlying contract under section 365(c). *See Leroux*, 69 F.3d at 613. In their view, the hypothetical test is inappropriate because the debtor should not be prohibited from simply assuming the contract when Congress clearly intended to allow such an assumption.

Courts adopting the hypothetical test, however, state that a literal reading of the statute does not produce an absurd outcome that is "demonstrably at odds" with its legislative history. Those courts generally discredit the congressional statement as insufficient to render the literal reading of section 365(c) improper. *See In re Cardinal*, 116 B.R. at 979 (acknowledging that "[s]ection 365(c) continues to bar the trustee from assuming a contract in those cases where applicable law excuses the nondebtor from accepting performance from the trustee"). These courts typically decline to look to legislative history because they find no ambiguity in the statute's plain language. *See, e.g.*, *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 n.3 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute.").

4. The Plain Meaning of § 365(c) and General Bankruptcy Policies

Proponents of the actual test also contend that "a literal reading of [section 365(c)] conflicts with general bankruptcy policy, implicating the absurdity and intent exceptions to the [plain-meaning rule]." *See In re Cardinal Indus., Inc.*, 116 B.R. 964, 976 (Bankr. S.D. Ohio 1990) ("The literal application of these provisions, argues the Trustee, makes no sense. Therefore, the [the] Court must look to the legislative history and ascertain the intent of Congress."); 3 *Collier on Bankruptcy*, ¶ 365.06[1][d][iii] (Alan N. Resnick & Henry J. Summer eds., 15th rev. ed. 2009) (stating that sound bankruptcy policy supports the actual test). They maintain that the hypothetical test's literal reading undermines "the general bankruptcy policy of fostering a successful reorganization and maximizing the value of the debtor's assets," because it undermines the debtor party's ability to restructure itself effectively. *In re Sunterra*, 361 F.3d at 268. The literal reading of section 365(c) prevents a debtor party from assuming a copyright license, even in situations where the debtor has no intention of actually assigning it to a third party. Because the Statute allows the licensor to compel rejection of the license, the debtor could lose a substantial asset that could seriously affect its ability to conduct business. *See, e.g.*, *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 490-91 (1st Cir. 1997) (describing how the patent licenses in question were essential to the debtor's line of business).

As the case law has demonstrated, bankruptcy courts tend to favor the actual test rather than a literal reading under the hypothetical test, likely because of the inherent conflict between § 365(c)(1) and general bankruptcy policies. *See, e.g.*, *Bonneville Power Admin. v. Mirant Corp. (In re Mirant Corp.)*, 440 F.3d 238, 254-55 (5th Cir. 2006) (upholding the bankruptcy court's application of the actual test). Conversely, courts favoring the hypothetical test have held that consideration of general bankruptcy policies is inappropriate, even if there were merit to the public policy argument, because "such arguments must necessarily fail in the face of an unambiguous statute." *Nelson v. George Wong Pension Trust (In re Nelson)*, 391 B.R. 437, 452 (B.A.P. 9th Cir. 2008). These courts state that, if the Statute has not been applied as it was intended, it is up to Congress, not the courts, to amend it. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004)

("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent.").

Issue 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.

Below the critical cases concerning consent and the likely arguments to be made by the advocates are summarized. To serve as a reference during competition, this discussion is organized by individual case summaries and bullet points for arguments and sample questions.

A. Relevant Case Law

***Commodities Futures Trading Commission v. Schor*, 478 U.S. 833 (1986).** In *Schor*, a customer brought a claim for reparations against his commodities futures broker before the CFTC, and the broker filed a state-law counterclaim for the same amount. As a result, the plaintiff (Schor) had consented to an Article I body's determination of his claim. After an adverse ruling by the CFTC, Schor challenged the constitutionality of the CFTC's ruling, arguing that Article III reserved final-order authority on the private rights in dispute to a court constituted with Article III powers.

The Supreme Court held that the CFTC's final determination of the claim did not offend Article III. But the court stressed its basis for upholding the final order *was not* solely consent, but rather other factors that prevented a separation of powers violation. Specifically, the Court found persuasive that (1) the CFTC dealt only with "a narrow class of common law claims" in a "particularized area of law;" (2) jurisdiction over state-law counterclaims was the only respect in which the CFTC's adjudicatory powers departed from the traditional agency model; (3) the area of law in question was governed by "a specific and limited federal regulatory scheme" as to which the tribunal had "obvious expertise;" and (4) the CFTC's findings were only enforceable by a district court after its factual findings were reviewed under a "weight of the evidence" standard and its legal conclusions *de novo*.

Consent was ineffective itself to solve the Article III problem because Article III, § 1 protects two interests—safeguarding the parties' rights to litigate before independent and impartial judges *and* the structural concerns of the three branches. Private litigants may waive their own personal constitutional rights, but may not waive the structural concerns of the separation of powers. So "[t]o the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent."

***Executive Benefits Insurance Agency, Inc. v. Arkinson (In re Bellingham Insurance Agency, Inc.)*, 702 F.3d 553 (9th Cir. 2012).**[3] In *Executive Benefits*, the Ninth Circuit held that (1) a § 548 fraudulent transfer claim involved private rights, and, thus, pursuant to *Stern* and *Granfinanciera*, a final order on such a claim was beyond the bankruptcy court's constitutional authority; (2) the permissive power that a bankruptcy court "may hear and determine" a proceeding under § 157(b)(1) incorporates the power to issue "proposed findings of fact and conclusions of law" under § 157(c)(1); and (3) Executive Benefits Insurance Agency ("EBIA") had consented, by its litigation conduct, to a final order by the bankruptcy court under § 157(c)(2).

EBIA argued that a statutory gap exists where Article III makes hearing and determining a core proceeding beyond the bankruptcy court's power, but § 157 does not otherwise grant the bankruptcy court authority to issue proposed findings and conclusions in such a proceeding. The panel in *Executive Benefits* denied such a gap exists, concluding that the power to "hear and determine" includes the power to issue proposed findings and conclusions. Because Congress enumerated the examples in § 157(b)(2) "with a view toward expanding the bankruptcy court's jurisdiction to its constitutional limit," the panel reasoned that Congress intended for a bankruptcy court the be "vest with as much adjudicatory power as the Constitutional will bear." By this logic, where Article III concerns are implicated, the bankruptcy court may exercise discretion to issue proposed findings and conclusions under § 157(b) *rather than* issuing a final order.[4]

But the Ninth Circuit went further to find that the implied consent of the litigants could support the bankruptcy court's final order in *Executive Benefits*. First, the panel reasoned that "[i]f consent permits a non-Article III judge to decide finally a non-core proceeding, then it surely permits the same judge to decide a core proceeding in which he would, absent consent, be disentitled to enter final judgment." *Id.* at 567. Additionally, the court compared § 157(c) and (e) to conclude only consent simpliciter was required under § 157(c)(2) and not express consent like under § 157(e).[5] Next, the panel concluded that EBIA had impliedly consent to the bankruptcy court's authority by (1) joining a motion to stay a district court's consideration of a motion to withdraw the reference[6] while the bankruptcy court ruled on summary judgment; (2) arguing the

[3] The second issue of the hypothetical fact pattern draws heavily upon the *Executive Benefits* case currently before the Supreme Court. In particular, the arguments advanced in the briefing and at the oral arguments on January 14 are similar to the hypothetical issues here. As a result, the facts of the Ninth Circuit's decision in *Executive Benefits* and other cases in the current circuit split are discussed in this section, but the arguments related to the Supreme Court case are cast in the form of potential arguments to be made by the competitors in *In re TicketKing*.

[4] In *In re TicketKing*, footnote 12 was included in the fact pattern to narrow the argument on appeal—that is, to take the "statutory gap" out of the argument. But the analysis may still be relevant if the parties argue the Adversary actually is a core proceeding. Or, alternatively, the analysis may be relevant because the circuit courts discuss the topic in the respective opinions. As a result, the circuit courts' analysis on the statutory gap has been included in the summaries.

[5] The opinion does not discuss the express language in FED. R. BANKR. P. 7008(a), 7012(b).

[6] EBIA initially demanded a jury trial pursuant to *Granfinanciera*, and the District Court elected to treat the demand as a motion to withdraw the reference.

motion for summary judgment; and (3) appealing only the bankruptcy court's ruling on summary judgment and not the district court's denial of the motion to withdraw the reference.

***Waldman v. Stone*, 698 F.3d 910 (6th Cir. 2012).** In *Waldman*, a chapter 11 debtor in possession filed an adversary proceeding against its principal creditor seeking to discharge the creditor's debts on account of fraud and to obtain compensatory and punitive damages. The bankruptcy court held a bench trial and granted both the discharge and significant monetary damages. The creditor appealed on numerous grounds, including that the bankruptcy court lacked final-order authority as to the fraud claims. The Sixth Circuit held that bankruptcy court had authority to have entered a final order as to the discharge, but not to have granted the damages, which were solely based on state law fraud claims.

The Sixth Circuit likened the debtor in possession's fraud claims to the state-law counterclaims at issue in *Stern*. Both claims existed without regard to the bankruptcy case, were not part of the effort to restructure the debtor's debts, and were merely claims for monetary damages. As a result, the claims implicated Article III concerns, and thus the structural concerns at issue in *Schor*. With minimal discussion beyond outlining the reasoning of *Schor*, the panel concluded that the structural concerns on Article III were beyond the curing power of the litigants' consent, thus the bankruptcy court lacked final-order authority.

As to the statutory gap, in contrast to the Ninth Circuit in *Executive Benefits*, the Sixth Circuit reasoned that a gap does exist because "§ 157(b)(1) authorizes the bankruptcy court to '*enter* appropriate orders and judgments,' not to propose them." *Id.* at 921. Any alternative, however practical, imposes a remedy that the statute does not expressly permit. But the Sixth Circuit avoided the statutory gap because the claims at issue were non-core—contrary to the belief of the litigants and the bankruptcy court—and thus § 157(c)(1) was an option on remand. Because the Sixth Circuit held consent was ineffective, the panel did not reach the issue of implied consent.

***Frazin v. Haynes & Boone, L.L.P. (In re Frazin)*, 732 F.3d 313 (5th Cir. 2013).** In *Frazin*, a chapter 13 debtor employed two firms (Griffith & Nixon, P.C. and Haynes & Boone, L.L.P.) as special counsel to represent him state court proceedings. After success at both the trial court and court of appeals, the estate professionals filed applications for compensation with the bankruptcy court. The debtor object to the fee applications and counterclaimed against them for negligence, breach of fiduciary duty, and claims under the Texas Deceptive Trade Practices Act ("DTPA"). Following a six-day trial, the bankruptcy court overruled the objections and ruled against the debtor on the merits of the negligence and DTPA claims.

On appeal, the Fifth Circuit he Fifth Circuit affirmed in part and reversed in part. First, the Fifth Circuit affirmed the 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. Likewise, the Fifth Circuit upheld the bankruptcy court's factual findings relating to claims under the Texas Deceptive Trade Practices Act ("DTPA"), but reversed the bankruptcy court's final disposition of the DTPA claims.

The panel reasoned that *Stern's* broad reasoning as to § 157(b)(2)(C) encompassed the counterclaims at issue in *Frazin*. As a result, the court applied the test from *Stern* to determine whether any of the counterclaims would necessarily have been resolved in the claims-allowance process. The panel concluded that the fee applications, related malpractice claims, and the factual findings under the DTPA claim all directly affected the allowance and the value of the estate professionals' administrative expense claims, and, as a result, these claims were all within the bankruptcy court's authority. But the legal conclusions applying the facts of the DTPA claim were not so necessarily resolved and, therefore, beyond the court's authority.

Importantly, the panel in *Frazin* cited *Schor* when commenting in footnote three of the opinion that the debtor's apparent consent by his litigation conduct did not ameliorate the structural concerns implicated by the separation of powers issue. As a result, the panel appeared to adopt the reasoning of *Waldman*.

***BP RE, L.P. v. RML Waxahachie Dodge, L.L.C. (In re BP RE, L.P.)*, 735 F.3d 279 (5th Cir. 2013).** The Fifth Circuit dispelled any enigmatic support in *Frazin* of the Sixth Circuit's reasoning in *Waldman* by expressly adopting that reasoning in *BP RE*. There, the Fifth Circuit vacated a bankruptcy court's final order in an adversary proceeding involving various tort and contract claims. The claims related to negotiations between the debtor (BP RE) and a counterparty (RML) over the sale and lease of a car dealership and related property. Although the debtor indicated in the adversary complaint that it consented to the bankruptcy court's final order in the non-core matters, the debtor subsequently moved to withdraw the reference based on a lack of consent. After the bankruptcy court denied all of BP RE's claims, BP RE appealed on the grounds that the bankruptcy court lacked constitutional authority to enter a final order because § 157(c)(2) was unconstitutional.

Describing the reasoning in *Waldman* as "compelling" and "thorough," the Fifth Circuit followed the Sixth Circuit's rubric[7] of applying *Schor* and the structural concerns of the separation of powers to bar the bankruptcy court's final order by consent in "a common law cause of action, when the action neither derives from nor depend upon any agency regulatory scheme." The panel then bootstrapped its reasoning by relying on the earlier panel's conclusions in *Frazin*. Specifically, the *BP RE* court rejected an argument that the district court's supervisorial role allayed constitutional concerns because such supervision was only effective when exercised—thus, the argument was meaningless *unless* the reference was withdrawn. Without such a withdrawal, a final order by the bankruptcy court was still a final, biding judgment by a court with broad substantive jurisdiction that would be enforceable and entitled to deference upon appellate review.

***Wellness International Network, Ltd. v. Sharif (In re Wellness International Network, Ltd.)*, 727 F.3d 751 (7th Cir. 2013).** In *Sharif*, the Seventh Circuit held a bankruptcy court had final-order in an adversary proceeding as to a § 727 non-dischargeability claim, but not as to an alter-ego claim. The facts and procedural history

[7] Neither the Fifth Circuit's opinions in *Frazin* nor *BP RE* cite or discuss the Seventh Circuit's opinion in *Sharif*, although *Sharif* was released over two months either decision. Nonetheless, the Fifth, Sixth, and Seventh Circuits have all reaches the same conclusion that consent is insufficient.

in *Sharif* are a complicated affair—reminiscent of *Stern*—but the principle question rested on whether the Sixth or Ninth Circuits had the better view of consent. The panel joined the Sixth Circuit to hold the inability of consent to cure the constitutional problems created a statutory gap and deprived the bankruptcy court of authority.

Although eventually joining the Sixth Circuit, the Seventh Circuit noted the fine distinctions and nuance drawn in *Schor*. Specifically, the panel noted some middle ground must exist between the personal and structural protections in Article III—that is, a situation exists wherein parties can waive their personal constitutional rights without implicating the structural concerns. Without this middle ground, *Schor's* discussion of waiving personal rights would be meaningless because such waivers would *always* raise structural concerns. *Sharif*, 727 F.3d at 769.

To analyze this middle ground, the panel analogized the CFTC body in *Schor* with a magistrate judge, finding that the similar supervisory role of the district court allayed the structural concerns. Because the Supreme Court in *Stern* had already concluded that a bankruptcy court's adjudication over core claims implicated structural concerns, the panel reasoned that the middle ground did not exist in *Sharif*. But the panel's analysis leaves open the argument that such "middle ground" may exist in a *non*-core claim under § 157(c).

B. <u>Petitioner Arguments and Sample Questions</u>

1. Possible Arguments

- **The Adversary was non-core and did not involve the statutory gap.**
  - TicketKing will likely concede that the Adversary is properly characterized as non-core because it involves private rights that arise neither in nor under title 11 and do not otherwise relate to the claims allowanced process.
  - If not conceded, TicketKing will argue the Ninth Circuit view in *Executive Benefits* that the power to "hear and determine" necessarily incorporates the lesser power to "propose" findings and conclusions.
- **The structural concerns at issue in *Schor* are not present here.**
  - *Schor* involved an agency determining finally the claims reserved for an Article III judges—that is, the overlap of the Congressional and Judicial branches. In comparison, adjudication by consent under § 157 is a wholly intra-branch allocation of authority.
  - Bankruptcy judges perform their functions entirely within the confines of the judicial branch. The statute gives district courts the freedom to use or ignore bankruptcy judge at their pleasure. As a result, the structural concerns at issue in *Stern* are not present here, and the litigants need only waive their own personal constitutional rights.
- **Alternatively, consent works in bankruptcy like it worked in *Schor*.**
  - TicketKing may also argue that bankruptcy courts align with *Schor's* "other factors" in addition to consent to allay structural concerns. Specifically,

TicketKing may argue bankruptcy is a particularized area of law governed by a specific and limited federal scheme. Like the CFTC, bankruptcy court are subject to the oversight and review of the district courts.

- **Consent has historically been sufficient.**
  - Under the Bankruptcy Act's former summary/plenary distinction, referees generally had summary jurisdiction over property within the actual or constructive possession of the debtor. *Katchen v. Landy*, 382 U.S. 323, 327 (1966). Yet the parties could still consent jointly to proceed before a referee even in a summary proceeding, even with respect to an otherwise plenary matter. *MacDonald v. Plymouth Cnty. Trust Co.*, 286 U.S. 263, 267 (1932).
  - Following *Northern Pipeline*, Congress abandoned the independent bankruptcy court model and returned to a two-step approach to authority, although abandoning summary/plenary and adopting the core/non-core terminology used by the Court in *Northern Pipeline*. Although the mix of what was core/non-core changed between pre-1978 and post-1984, the application of consent should remain consistent.
  - **Lack** of consent, not the validity of consent, has historically been the distinguishing factor. *Compare Northern Pipeline* (no consent; unconstitutional); *Stern* (same); *Granfinanciera* (same), *with Schor* (consent; upheld as constitutional), *Langenkamp* (same)
- **The Magistrate System provides the example of constitutional consent.**
  - Federal courts have long upheld the practice of special masters to oversee matters by consent of the parties. *Kimberly v. Arms*, 129 U.S. 512, 524 (1889); *Heckers v. Fowler*, 69 U.S. (2 Wall.) 123 (1864).
  - The modern analogues of the special master—magistrate judges—continue to try private rights by consent, and this system has been upheld. *Roell v. Withrow*, 538 U.S. 580 (2003) (implied consent upheld in magistrate system); *Peretz v. United States*, 501 U.S. 923 (1991) (upholding magistrate judge conducting jury selection by consent); *Gomez v. United States*, 490 U.S. 858 (1989) (prohibiting magistrate judge from conducting *voire dire* without consent).
  - The legislative history to the 1984 Act indicates Congress's intention to mirror the magistrate system with the consent scheme in bankruptcy. And the application of the statutes is the same.
- **GGC consented to bankruptcy court's entry of a final order.**
  - TicketKing will argue that GGC **expressly** consented by designating the Adversary pursuant to Rule 7008 as core. Because an affirmative representation of consent is only required if the matter is non-core, TicketKing will argue consent is implied with a core designation. Any alternative construction allows GGC to sandbag its way to a second chance.

- TicketKing will argue that GGC **impliedly** consented by its litigation conduct. Specifically, the conduct sufficient to constitute consent was (1) not demanding a jury trial; (2) not moving either the bankruptcy or district court to withdraw the reference; and (3) litigating the motion for summary judgment in the bankruptcy court.

2. Sample questions

- Do you concede that the Adversary involved non-core claims?
- If not, why is this proceeding not trapped in the "statutory gap"?
- How does GGC's consent address the structural concerns at issue in *Schor*?
- How is the Adversary any different than the state-law counterclaims at issue in *Stern*?
- How can the district court oversee the bankruptcy court if sitting in appellate review?
- How was GGC's consent knowing and voluntary in this case?
- Has this Court ever upheld consent as the basis for *bankruptcy* court authority?

C. Respondent Arguments

1. Possible Arguments

- **The Adversary involved non-core issues.** If not otherwise conceded, GGC will likely argue the Adversary is non-core for the reasons discussed above.
  - Alternatively, GGC may argue that the proceeding was core and that the statutory gap prevented the bankruptcy court from taking any action.
- **The Adversary implicates the structural protections of the separation of powers.**
  - District court oversight that was so vital in *Schor* is not present in bankruptcy.
  - Bankruptcy courts' final orders have binding effect on the executive for enforcement and on judicial branch by collateral estoppel and res judicata—not simply limited to private parties.
  - Bankruptcy courts have broad authority to address numerous areas of law so long as the determination of the matter involves the claims allowance process or the administration of the debtor's estate.
- **The magistrate system is distinguishable because the function of the judges and the jurisdictional grant are more limited.**
  - Magistrate judges limited roles in a case—single motions, *voire dire*; bankruptcy judges take whole proceedings and try to finality.
  - Magistrate statute (28 U.S.C. § 636(c)) requires *express* consent as a statutory limitation, thus providing a safeguard. Not such safeguard present in bankruptcy.

- Moreover, the Supreme Court noted in *Stern* and *Granfinanciera* that "the notion of 'consent' does not apply in bankruptcy proceedings as it might in other contexts" because of the limited alternative forums. *Stern*, 131 S. Ct. at 2615 n.8.

- **GGC did not consent to bankruptcy court's entry of a final order.**
  - GGC will argue consent, if constitutional, must be **knowing** and **voluntary**. As a result, implied consent cannot satisfy the standard.
  - GGC did not expressly consent because did not affirmatively state intent to submit to the authority of the bankruptcy court—no statement was required. As mistaken belief that a proceeding was core cannot be construed as express consent.
  - Not demanding a jury trial cannot be inferred to mean consent to the bankruptcy court's authority; such reasoning is an improper logical inversion.

2. Sample Questions

- GGC did not consent to bankruptcy court's entry of a final order.
- Didn't the bankruptcy court have the power to issue proposed findings and conclusions in the Adversary?
- What structural concerns are implicated here? Why does *Schor* apply?
- Are you advocating that we upend the magistrate system too?
- How is the magistrate system different?
- How is this not the claims allowance process because of the result of a deemed rejection?
- How does *Stern* apply here if it was limited to § 157(b)(2)(C)?
- Wasn't GGC's consent knowing and voluntary in this case?
- Doesn't GGC stating the Adversary was a core proceeding bar it from arguing it did not consent to the bankruptcy court's authority?

EXHIBIT A

Case Chart for *In re TicketKing Corp.*

The following chart outlines, for the benefit of the advocates, which arguments the respective parties (the Inn teams) will be making at oral argument (the joint meeting). For clarity, we have also included the procedural history of the case.

Issues	§ 365 Assumption	Constitutionality of Consent
Bankruptcy Court Holding	YES, could assume contract (adopting "actual" test)	Not raised; found to be statutorily core under § 157
Direct Appeal to 14th Circuit	*Appellant: GGC (Licensor) Appellee: TicketKing (Debtor/Licensee)*	*Raised issue of bankr. court's authority first time on appeal*
14th Circuit Holding	NO, could not assume contract (adopting "hypothetical" test)	NO, implied consent was not valid (following reasoning of 5&6CA); Bk ct lacked authority
SCOTUS	*Certiorari granted on both issues*	
Petitioner TicketKing (Debtor)	**DE Inn Barrister** Arguing § 365 **permitted** assumption of contract ("actual" test)	**DFW Inn Barrister** Arguing consent **is** valid (following reasoning of 9CA in *Executive Benefits*)
Respondent GGC (Licensor)	**DFW Inn Barrister** Arguing § 365 **prohibited** assumption of contract ("hypothetical" test)	**DE Inn Barrister** Arguing consent **is not** valid (following reasoning of 5CA in *Frazin/BP RE*)
Rebuttal	**DE Inn Master**	**DFW Inn Master**