No. 14-4807

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

In re TRUMP ENTERTAINMENT RESORTS, INC., TRUMP ENTERTAINMENT RESORTS HOLDINGS, L.P., TRUMP PLAZA ASSOCIATES, LLC, TRUMP MARINA ASSOCIATES, LLC, TRUMP TAJ MAHAL ASSOCIATES, LLC, TRUMP ENTERTAINMENT RESORTS DEVELOPMENT CO., LLC, TER DEVELOPMENT CO., LLC, and TERH LP INC.,

Debtors-Appellees,

UNITE HERE LOCAL 54,

Appellant.

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

BRIEF FOR DEBTORS-APPELLEES

Kristopher M. Hansen
Kenneth Pasquale
Erez E. Gilad
STROOCK & STROOCK & LAVAN LLP
180 Maiden Lane
New York, NY 10038
Telephone: (212) 806-5400
Facsimile: (212) 806-6006
(Appearances continue on inside cover)

Roy T. Englert, Jr.
Joshua S. Bolian
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street N.W., Suite 411
Washington, DC 20006
Telephone: (202) 775-4500
Facsimile: (202) 775-4510
renglert@robbinsrussell.com

Counsel for Debtors-Appellees

February 5, 2015

(Appearances continued from cover)

Matthew B. Lunn
Robert F. Poppiti, Jr.
Ian J. Bambrick
Ashley E. Markow
YOUNG CONAWAY STARGATT
& TAYLOR, LLP
Rodney Square
1000 N. King Street
Wilmington, DE 19801
Telephone: (302) 571-6600
Facsimile: (302) 571-1253

CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement and Statement of Financial Interest that the Debtors filed in this action on January 1, 2015, remains complete and correct. Pursuant to Federal Rule of Appellate Procedure 26.1(b), the Debtors state:

Debtor Trump Entertainment Resorts, Inc., has no parent corporation. No publicly held corporation owns 10% or more of its stock.

Debtor Trump Entertainment Resorts Holdings, L.P., has one parent corporation: Trump Entertainment Resorts, Inc. No other publicly held corporation owns 10% or more of its stock.

Debtor Trump Plaza Associates, LLC, has two parent corporations: Trump Entertainment Resorts, Inc., and Trump Entertainment Resorts Holdings, L.P. No other publicly held corporation owns 10% or more of its stock.

Debtor Trump Marina Associates, LLC, has two parent corporations: Trump Entertainment Resorts, Inc., and Trump Entertainment Resorts Holdings, L.P. No other publicly held corporation owns 10% or more of its stock.

Debtor Trump Taj Mahal Associates, LLC, has two parent corporations: Trump Entertainment Resorts, Inc., and Trump Entertainment Resorts Holdings, L.P. No other publicly held corporation owns 10% or more of its stock.

Debtor Trump Entertainment Resorts Development Co., LLC, has two parent corporations: Trump Entertainment Resorts, Inc., and Trump Entertainment

Resorts Holdings, L.P. No other publicly held corporation owns 10% or more of its stock.

Debtor TER Development Co., LLC, has two parent corporations: Trump Entertainment Resorts, Inc., and Trump Entertainment Resorts Holdings, L.P. No other publicly held corporation owns 10% or more of its stock.

Debtor TERH LP Inc. has one parent corporation: Trump Entertainment Resorts, Inc. No other publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

The costs of complying with a collective bargaining agreement can make the difference between successful reorganization in bankruptcy and liquidation. That is true—undeniable, in fact—whether or not the agreement has expired, because the National Labor Relations Act (NLRA) compels employers to honor the terms of a collective bargaining agreement even after it expires. The question presented in this case is whether 11 U.S.C. § 1113, the statute Congress passed *specifically* to deal with rejection of collective bargaining agreements in bankruptcy, ceases to be applicable—leaving employers and unions subject to the far more general terms of the NLRA—when a collective bargaining agreement expires shortly after a bankruptcy petition is filed but its terms continue to govern the parties' relationship.

The answer to that question is extremely consequential. Under Section 1113, a bankruptcy court may excuse the debtor from its obligations to its unionized workers *only* if the *only* alternative is to fire everyone and close up shop. This rule protects labor: Most workers would agree that a job with reduced benefits beats no job.

The bankruptcy court here found—and Appellant UNITE HERE Local 54 (the "Union") does not dispute on appeal—that this case meets Section 1113's substantive standard. The Union's workers at the Trump Taj Mahal casino (which the Debtors-Appellees own) may work with reduced pension, health-care, and

other benefits, or the casino will close. There is no third option, and the Union makes no attempt to show error in the bankruptcy court's findings.

Congress expressly contemplated this grim situation, and it enacted Section 1113 to empower bankruptcy courts to deal with it. Section 1113 lets a bankrupt firm prune its labor costs, but only after proving to a court's satisfaction that doing so is absolutely necessary to the firm's survival. It protects labor in other ways, too. To secure relief under Section 1113, a debtor must bargain with its union in good faith and convince a judge that the equities clearly favor that relief. With these procedures, Congress aimed to guard companies and workers at the same time.

The Union argues that Congress's carefully crafted solution to the problem is unavailable when the collective bargaining agreement has expired. It argues, in other words, that moribund companies with expired agreements must shut down and fire everyone rather than be allowed to restructure their labor costs. (Again, Section 1113 has effect only if the only alternative is liquidation.) Not only does the Union contend that workers must be fired; it also claims that the culprit is labor law itself: The NLRA, it says, ousts courts of authority over expired collective bargaining agreements, even though the NLRA does not expressly contemplate the exigencies of bankruptcy as Section 1113 does. In this way, according to the Un-

ion, the terms of an *expired* agreement have greater force than the terms of an *unexpired* agreement, opposite the usual order.

But there is no reason to hold that Congress intended, *sub silentio*, to abandon its carefully drawn statute the minute that a collective bargaining agreement expires. Section 1113 covers any "collective bargaining agreement," expired or not. (When applied to an expired agreement, Section 1113 abrogates the terms on which the NLRA's statutory obligations are based.) Thus, debtors with either type of agreement must comply with the strict procedures and meet the substantive criteria through which Congress balanced bankruptcy policy with labor policy.

What the statute says, the statutory scheme and policy considerations confirm. The closest the Union comes to finding "unexpired" in the statute is the word "executory" in a different chapter of the Code. But the use of that term in a different provision, coupled with its absence from Section 1113, only demonstrates that Congress did *not* intend "executory" to modify "collective bargaining agreement" in Section 1113. (Even if Congress did so intend, the Union still must lose—the agreement in this case *is* "executory.") And it would subvert bankruptcy *and* labor policy to force a company to liquidate—and fire its workers—rather than to reorganize, requiring unions to sacrifice along with the company's other stakeholders.

The Court should affirm the order of the bankruptcy court.

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 157 and 1334(a). This Court granted the parties' joint petition for direct appeal. Order, *In re Trump Entertainment Resorts, Inc.*, No. 14-8137 (3d Cir. Dec. 15, 2014). Accordingly, this Court has jurisdiction under 28 U.S.C. § 158(d)(2)(A).[1]

ISSUE PRESENTED

Whether 11 U.S.C. § 1113 authorizes a bankruptcy court to reject a collective bargaining agreement that expired by its terms after the bankruptcy petition was filed but before the debtor moved for rejection.

RELATED CASES AND PROCEEDINGS

This case has not previously been before this Court. The Union has filed numerous unfair labor practice charges against the Debtors and others, based on the facts underlying this case, before the National Labor Relations Board.

STATEMENT

A. Legal Background

This case involves two statutes: Section 1113 of the Bankruptcy Code, 11 U.S.C. § 1113, and Section 8 of the National Labor Relations Act (NLRA), 29 U.S.C. § 158.

[1] The Union frames its argument in jurisdictional terms, but this case is about the scope of a non-jurisdictional statute. The outcome, however, does not turn on whether the question presented is jurisdictional.

Section 1113 is the only statute that directly addresses how bankruptcy courts should handle collective bargaining agreements. It sets forth the sole procedure and substantive criteria by which a debtor may "reject a collective bargaining agreement." 11 U.S.C. § 1113(a). This procedure requires the debtor to make a proposal that (among other things) is "fair[] and equitable[]" to the union, *id.* § 1113(b)(1)(A); to provide the union with information, *id.* § 1113(b)(1)(B); and to bargain with the union in good faith, *id.* § 1113(b)(2). Even then, the statute offers no relief unless the union has rejected the debtor's proposal "without good cause." *Id.* § 1113(c)(2). Once these things have happened—and if "the balance of the equities clearly favors rejection," *id.* § 1113(c)(3)—then the bankruptcy court must relieve the debtor of the collective bargaining agreement. *Id.* § 1113(c).

In these and other ways, Section 1113 differs from the pre-Section 1113 regime addressed in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984). Most notably, Section 1113 authorizes rejection only if it is "necessary to permit the reorganization of the debtor." 11 U.S.C. § 1113(b)(1)(A). The bankruptcy court, in other words, may grant relief only if the debtor would otherwise be forced to close its doors and liquidate. *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am.*, 791 F.2d 1074, 1088-89 (3d Cir. 1986). The pre-Section 1113 regime lacked this protection for labor. More generally, Section 1113, unlike the statute the Su-

preme Court interpreted in *Bildisco*, provides detailed, collective-bargaining-agreement-specific procedures for rejection.

Section 8 of the NLRA obligates employers to bargain collectively with their unions. Specifically, it makes it an "unfair labor practice," sanctionable by the National Labor Relations Board (NLRB), "to refuse to bargain collectively with" an employer's unions. 29 U.S.C. § 158(a)(5). But "it is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991). Thus, employers violate Section 8 if they change terms of employment (like wages and hours) during collective bargaining unless they first "bargain[] to impasse." *Id.* And one period during which collective bargaining must take place is after a collective bargaining agreement expires—collective bargaining is how the union and the employer reach a new agreement. The upshot, therefore, is that Section 8 obligates an employer to honor terms of a collective bargaining agreement even after that agreement has expired. *Id.*

The NLRB has long recognized, however, that compliance with Section 1113 frees a debtor from the NLRA's obligations. *Mile-Hi Metal Sys., Inc.*, 1997 WL 731480, at *6 (N.L.R.B.G.C. July 30, 1986). The question presented in this case is whether the bankruptcy court correctly construed its authority under Sec-

tion 1113 and therefore correctly relieved the Debtors from the NLRA's obligations.

B. Factual Background

1. Times are hard for Atlantic City casinos. They were for many years the only gambling destinations in the region, but now neighboring states have allowed casinos to open. Dkt. 325 ("Op."), A13.[2] Moreover, online gambling has become more popular, *id.*; Hurricane Sandy and other weather events have hurt casinos and consumers; Dkt. 2 ("Griffin Decl."), DA16 ¶¶ 41-43;[3] and the recession has cut into leisure income. Consequently, "[t]he Atlantic City casinos have seen their revenues fall by approximately half since 2006." Op., A13.

One of the Atlantic City casinos still open—four of twelve closed last year—is the Trump Taj Mahal, which the Debtors-Appellees own and operate.[4] The Taj Mahal is a large complex, covering thirty-six acres with amenities from an exhibition hall to a helipad. Op., A14. To run that complex, the Taj Mahal employs thousands of workers. At the time of the proceedings in the bankruptcy court, 2,953

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[2] "Dkt. __" refers to entries on the docket of the bankruptcy court in this case (Bankr. D. Del. No. 14-12103). "A__" refers to pages of the appendix filed with the Union's brief.

[3] "DA__" refers to pages of the Debtors-Appellees' Appendix, filed herewith. An additional appendix is necessary because the Union did not consult the Debtors regarding the appendix, as Fed. R. App. P. 30(b)(1) requires.

[4] Donald J. Trump owns a small share of Trump Entertainment Resorts, Inc. Debtors license the Trump name. *See* Dkt. 376.

people worked at the Taj Mahal. Op., A16. Of those, about half belonged to a union. *Id.* Most of the union employees (1,136 of them) were affiliated with UNITE HERE Local 54, the Appellant. *Id.*

The Taj Mahal faces the problems that confront Atlantic City as a whole. Its EBITDA (a measure of net earnings) fell from a positive $37.3 million in 2011 to a negative $5.3 million for the year from July 2013 through June 2014. Op., A15. The Taj Mahal and its affiliates (the Debtors) responded by selling significant assets and closing the Taj Mahal's sister casino, the Plaza. Op., A14. The Debtors also favorably settled a property-tax dispute and cut back on staffing and services. Griffin Decl., DA13 ¶ 32. Despite those efforts, the Debtors filed for bankruptcy under Chapter 11 on September 9, 2014. Op., A12.

2. This appeal concerns a major piece of the Taj Mahal's operations: its collective bargaining agreement with the Union. That agreement governed the Debtors' relations with the thousand-plus Taj Mahal employees who are affiliated with the Union, establishing wages, vacation time, seniority policy, and other terms. *See* A102-A182 (excerpts of collective bargaining agreement). Under the collective bargaining agreement, the Debtors contributed about $3.5 million per year to the employees' defined-benefit pension and $10 to $12 million for health insurance and related benefits. Op., A16.

With the collective bargaining agreement set to expire on September 14, 2014, the Debtors tried to start negotiating with the Union on March 7, 2014. Op., A17, A19. The Union did not respond for a month, so the Debtors followed up on April 10. Dkt. 136 ("Keyser Decl."), A91 ¶ 8. On April 30, the Union responded that it was "not ready" and would "contact [the Debtors] within the next several months." *Id.* at A91 ¶ 9. Less than a week later, the Debtors asked for a meeting date, noting the "extremely challenging economic environment." *Id.* The Union did not respond. *Id.* After more back and forth, the Debtors finally met with the Union, but the Union declined to start negotiations until the end of August. Op., A17.

The Debtors filed for bankruptcy on September 9. Op., A12. On September 11, the Debtors asked the Union to extend the term of the collective bargaining agreement. Dkt. 137 ("Lavin Decl."), DA19-DA20 ¶ 2. The Union refused, unless the extension would terminate when the Debtors filed a motion under 11 U.S.C. § 1113. *Id.* at DA20 ¶ 3. The Debtors declined this invitation, *id.* at DA20 ¶ 4, and the collective bargaining agreement expired by its terms on September 14, Op., A19.

3. On September 26, 2014, the Debtors moved the bankruptcy court under 11 U.S.C. § 1113 to reject the collective bargaining agreement. Op., A12.

Before filing that motion, the Debtors had formally proposed changes to the collective bargaining agreement, as Section 1113(b)(1) requires. *See* Keyser Decl.,

A93-A95 ¶ 12 (proposal). Despite an urgent need to reduce the cost of operations to survive, the proposal would not cut employees' hourly wages. *Id.* Instead, it would replace employees' defined-benefit pension with a 401(k) plan with employer matching; replace full-time employees' health insurance with a $2,000 stipend for purchasing insurance under the Affordable Care Act; and eliminate paid meal times, among other changes. *Id.*; *see* Op., A18.

This proposal was just one part of a multi-pronged strategy to avoid forcing the Taj Mahal to close and liquidate. In addition to the $14.6 million in annual savings that the proposal sought from the Union, Op., A18, the Debtors sought major concessions from other stakeholders. In particular, they sought $100 million of new investment and conversion of debt to equity from their main secured creditor. Op., A15. They also sought help from Atlantic City and the State of New Jersey—$25 million in tax credits, plus a reduction in the assessed value of the Taj Mahal, saving tens of millions more on property taxes. *Id.* And "[m]anagement's compensation is tied to pre-petition equity," which "will be worthless." Op., A34. An expert witness testified that, without all of these concessions, the Taj Mahal would be forced to liquidate. Op., A15. The Union did not dispute that testimony.

The Debtors continued their attempts to discuss their proposal with the Union, but little progress was made. On September 17, the Debtors' representatives promised to meet with the Union "on *any* day and at *any* place" within the next

week. Keyser Decl., A92 ¶ 11. The Union picked the latest date the Debtors offered, September 24. *Id.*, A95 ¶ 13. The parties met on September 24 and 30, and the Debtors provided the Union all information it requested. Op., A17. The Union sent a counter-proposal on September 26 that consisted largely of more requests for information. Keyser Decl., Ex. I. The Union did not agree to meet again until October 10. Op., A18. At that time, it made another counter-proposal, *id.*, in response to which the Debtors scaled back their requests, DA40 (10/14 Tr. 49).

Meanwhile, the Union was exercising its right to protest outside of the bargaining room. It staged pickets and distributed flyers that the bankruptcy court called a "program of misinformation." Op., A18. In early October, it scheduled a rally that shut down the traffic on the Atlantic City Expressway. DA24 (10/14 Tr. 33). And it contacted customers who had scheduled conferences at the Taj Mahal, urging them to take their business elsewhere. Op., A18. At least two customers did so, moving conventions that otherwise would have taken place at the Taj Mahal. DA31-DA33 (10/14 Tr. 40-42).

C. The Bankruptcy Court's Order and Opinion

As noted above, on September 26 the Debtors moved under 11 U.S.C. § 1113 to reject the collective bargaining agreement, which had been in effect at the commencement of the bankruptcy case on September 9 but had expired on September 14. After hearings on October 2 and 14, Op., A13, the bankruptcy court

granted the Debtors' motion by order on October 17, A6-A11. It followed its order with a written opinion on October 20. Op., A12-A42.

In its opinion, the bankruptcy court rejected the Union's argument that it lacked "jurisdiction" to grant the motion. Op., A20-A29. It observed that Section 1113 does not contain the word "executory," which might support the Union's argument that only an *unexpired* collective bargaining agreement could be rejected under Section 1113. Op., A23. To the contrary, the statute refers only to the period when a collective bargaining agreement "continues in effect," which refuted the Union's argument. *Id.* The statutory text, the court held, was reinforced by the policy that animated Section 1113. Congress "recognized the need for an expedited process by which debtors could restructure labor obligations" that "provided several checks" to protect labor. Op., A26. Finally, were the court to deny the Debtors' motion, "the Debtors would be forced to close the Casino . . . , resulting in the loss of approximately 3,000 jobs." Op., A27. This "would be an absurd result." *Id.*

The bankruptcy court went on to hold that the Debtors had satisfied the criteria of Section 1113. Op., A29-A37. It was "absolutely clear," the court held, that, "without relief from the CBA, Debtors will be forced to liquidate." Op., A31. The Debtors had, as well, satisfied all of the procedural requirements, providing information timely and meeting in good faith. Op., A32-A33, A36-A37. And the

balance of the equities supported the relief, given the Union's "bad faith" tactics and the certainty that workers otherwise would lose their jobs. Op., A36.

The bankruptcy court certified a direct appeal to this Court, Dkt. 445, which this Court granted on December 15. *Supra* at 4.

On December 23, the Union initiated a proceeding against the Debtors before the NLRB. *Trump Taj Mahal Assocs., LLC* (N.L.R.B. No. 04-CA-143464). It charges that the Debtors' rejection of the collective bargaining agreement, as authorized by the bankruptcy court, constitutes an unfair labor practice. On February 3, 2015, the Union initiated additional proceedings before the NLRB related to the same facts. Those proceedings are pending.

SUMMARY OF ARGUMENT

Section 1113 authorizes debtors—after completing a rigorous procedure, meeting rigorous criteria, and securing a court's consent—to reject a "collective bargaining agreement." A collective bargaining agreement that has expired by its terms is still a collective bargaining agreement. The Union's argument to the contrary conflates the existence of an agreement with the enforceability of an agreement of its own force. And, bizarrely, it gives the collective bargaining agreement's terms *more* force than they had before the agreement expired by rendering them impervious to rejection under Section 1113.

The statutory scheme confirms that "collective bargaining agreement" does not mean "unexpired collective bargaining agreement." A parallel statute, 11 U.S.C. § 365, authorizes debtors to "reject [an] executory contract," and the Union contends that "executory" means "unexpired." But the word's presence in Section 365 only highlights its absence from Section 1113. Section 1113 is the provision specific to collective bargaining agreements, and it is an error to import Section 365's terms into Section 1113. Furthermore, even if "executory" somehow limited Section 1113, the Debtors still would prevail, as the collective bargaining agreement here *is* "executory."

Nor do other provisions of Section 1113 itself require the Court to read the word "unexpired" into "collective bargaining agreement." To "terminate" an agreement, as used in Section 1113(d)(2), cannot mean simply to render it expired, as case law and other provisions of the Bankruptcy Code demonstrate. And the phrase "period when the collective bargaining agreement continues in effect," as used in Section 1113(e), serves only to clear up a possible ambiguity in an inapplicable part of Section 1113. That phrase therefore does not advance the Union's argument.

Declining to read "unexpired" into Section 1113 also accords with the bankruptcy and labor policies that Section 1113 embodies. It allows debtors with expired agreements to reorganize rather than forcing them to liquidate, which would

harm creditors and workers alike. And it upholds the collective-bargaining policy of labor law, as it requires debtors to comply with the rigorous procedures and substantive criteria of Section 1113 before securing relief.

Finally, construing "collective bargaining agreement" to encompass expired and unexpired agreements alike, as the bankruptcy court did, avoids significant anomalies. Most obviously, when a debtor can make the requisite statutory showing, the bankruptcy court's sensible and textually supported interpretation prevents workers from losing their jobs after their collective bargaining agreement has expired. The bankruptcy court's interpretation also affords expired contracts no special treatment, whereas under the Union's approach—in this context alone—unions are better off *after* their contracts expire. Furthermore, the bankruptcy court's construction authorizes relief based on the needs and equities of the situation rather than on the timing of incidental events (as the Union's approach does).

ARGUMENT

Standard of Review: This Court "review[s] the Bankruptcy Court's legal determinations," such as matters of statutory interpretation, "de novo." *In re Makowka*, 754 F.3d 143, 147 (3d Cir. 2014).

I. The Plain Meaning of Section 1113 Demonstrates That Debtors May Reject Expired Collective Bargaining Agreements

The principal argument of the Union and of its amicus, the National Labor Relations Board (NLRB), is that "collective bargaining agreement," as used in the

statute, means an agreement, not an obligation imposed by statute. Union Br. 10-18; NLRB Br. 3-13. By itself, however, that proposition does not advance the Union's case. The Debtors' contract with the Union is just such an agreement, so the bankruptcy court could authorize the Debtors to reject it. That the collective bargaining agreement had expired is of no moment; the statute does not address expiration. It certainly does not give unions with expired agreements *more* power to hold employers to the terms of those agreements than those with *un*expired agreements.

A. "Collective Bargaining Agreement" Does Not Mean "Unexpired Collective Bargaining Agreement"

1. The only statutory text that directly controls the outcome of this case is the phrase "collective bargaining agreement." The Debtors invoked 11 U.S.C. § 1113(c), which allows bankruptcy courts to "approve an application for rejection of a collective bargaining agreement." Section 1113(c), in turn, is the "provision" "in accordance with" which a debtor may "reject a collective bargaining agreement." 11 U.S.C. § 1113(a).

Hence, the first issue to resolve—and possibly the last—is what "collective bargaining agreement" means. "'[W]hen [a] statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Sebelius v. Cloer*, 133 S. Ct. 1886, 1896 (2013) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank,*

N.A., 530 U.S. 1, 6 (2000)). "'When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)).

Because the Bankruptcy Code does not define "collective bargaining agreement," the Court must look to the phrase's ordinary meaning. *See FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1182 (2011) ("When a statute does not define a term, we typically give the phrase its ordinary meaning." (quotation marks omitted)). The ordinary meaning of "collective bargaining agreement" is "[a] contract between an employer and a labor union regulating employment conditions, wages, benefits, and grievances." *Black's Law Dictionary* 320 (10th ed. 2014).

The contract between the Debtors and the Union at issue in this case is a "collective bargaining agreement" within this ordinary meaning. The contract covers employment conditions, *e.g.*, A106-A121, wages, *e.g.*, A142-A144, benefits, *e.g.*, A147-A152, and grievances, *e.g.*, A124-A128. Thus, Section 1113 applies in this case.

The Union contends that Section 1113 does not apply because the collective bargaining agreement had expired, Union Br. 12-13, but Section 1113 does not limit itself to unexpired agreements. "[W]here Congress has intended to provide . . . exceptions to provisions of the Bankruptcy Code, it has done so clearly and

expressly." *FCC v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 302 (2003). The NLRB itself, through an administrative law judge, has recognized that Congress did not expressly exclude expired agreements from Section 1113's scope. "Reference is made [in Section 1113] to applications for rejection of 'a collective bargaining agreement' . . . . There is no reference to periods preceding the expiration date of an agreement nor to any period during the term of an agreement." *Accurate Die Casting Co.*, 292 N.L.R.B. 982, 987-88 (1989) (dicta). The statute applies to "collective bargaining agreements," full stop; it lacks the "unexpired" proviso that the Union would read into it.

The absence of "unexpired" from Section 1113 is all the more stark given that Congress knew how to use that word in the Bankruptcy Code. *E.g.*, 11 U.S.C. § 365(a). Courts should be "loath to infer the exclusion of certain classes of debtors," such as debtors with expired agreements, "from the protections of Chapter 11" where it is clear that "Congress knew how to restrict" those protections. *Toibb v. Radloff*, 501 U.S. 157, 161 (1991). Had Congress intended to give debtors with expired agreements *less* ability to escape from the lasting effects of those agreements through bankruptcy than they had while they were contractually obligated to their unions, Congress would have said so.

2. The Union's argument conflates the issue of whether a contract exists, on the one hand, with the issue of whether a contract is enforceable of its own

force, on the other. It is established that, once a collective bargaining agreement expires, the agreement itself no longer directly imposes obligations on an employer. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 206 (1991) ("Although after expiration most terms and conditions of employment are not subject to unilateral change, . . . [they] no longer have force by virtue of the contract."). The employer must honor the expired agreement's main terms not because of the agreement itself, but because of the combined effect of the agreement and Section 8 of the NLRA. *Id.* at 206-07; *see supra* at 6. In other words, after an agreement expires, unions may sue for violation of Section 8, not for breach of contract, but the terms being enforced are still those contained in the agreement. *E.g.*, *Derrico v. Sheehan Emergency Hosp.*, 844 F.2d 22, 25 (2d Cir. 1988); *Office & Prof'l Emps. Ins. Trust Fund v. Laborers Funds Admin. Office of N. Cal., Inc.*, 783 F.2d 919, 922 (9th Cir. 1986).[5]

That a contract that lacks direct legal force of its own does not mean that it has ceased to exist. An expired collective bargaining agreement exists, if for no other purpose, to establish the terms that the NLRA imposes on an employer. This Court has recognized that "'[t]he terms of an expired agreement . . . retain legal

[5] This case involves interpretation only of the Bankruptcy Code, not of the NLRA. *See* Op., A28. Thus, the NLRB is incorrect to suggest (at Br. 3 & n.3) that its views merit deference. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 143-44 (2002) ("[T]he Board's interpretation of a statute so far removed from its expertise merit[s] no deference.").

significance because they define the *status quo*' from which neither party may depart before bargaining to impasse." *Luden's Inc. v. Local Union No. 6 of Bakery, Confectionery & Tobacco Workers*, 28 F.3d 347, 362 n.27 (3d Cir. 1994) (quoting *Derrico*, 844 F.2d at 26); *see also Intermountain Rural Elec. Ass'n v. NLRB*, 984 F.2d 1562, 1568 (10th Cir. 1993) ("[T]he expired written contract usually defines the status quo" unless superseded by an implied agreement.). For this reason, an expired collective bargaining agreement has "continued existence" so long as an employer must abide by its terms. *In re Northwest Airlines Corp.*, 483 F.3d 160, 171 (2d Cir. 2007).[6]

Although less commonly encountered in litigation than contracts directly enforceable by their own terms, contracts that exist without being directly enforceable have importance in a variety of settings. For example, when a lease on real property expires and thus ceases to be directly enforceable, both landlord and tenant retain some rights defined by the lease's terms if, after the lease expires, the tenant refuses to vacate. In particular, the amount of rent set by the expired lease determines how much the holdover tenant owes the landlord. *E.g.*, 25 Del. C. § 5515(b) ("[I]f the tenant continues in possession of the premises after the date of

[6] The NLRB argues that "a collective bargaining agreement under the NLRA does *not* survive" its expiration. NLRB Br. 23. But the authorities it cites demonstrate only that a collective bargaining agreement is not enforceable of its own force after it expires. *See infra* section I.B.

termination . . . , such tenant shall pay to the landlord a sum not to exceed double the monthly rental under the previous agreement."); N.J. Stat. Ann. § 2A:42-5 ("If a tenant of real estate . . . shall not deliver up the possession of such real estate at the time specified in the notice, such tenant [shall pay] double the rent which he should otherwise have paid."). In this situation, had the lease ceased to exist altogether, then the references to the rent under the expired lease would make no sense.

Here, the expired collective bargaining agreement between the Debtors and the Union continued to exist, even though it was not enforceable of its own force. Because it existed, it constituted a "collective bargaining agreement" within the meaning of Section 1113. When the bankruptcy court granted the Debtors' motion, it "permit[ted]" them "to *abrogate*" the expired agreement. *Northwest Airlines*, 483 F.3d at 173 (discussing rejection of agreements governed by the NLRA). This abrogation had the effect of extinguishing the agreement's terms, including any terms that remained enforceable only by virtue of Section 8 of the NLRA.

B. The Distinction Between Contractual Obligations and Statutory Obligations Does Not Support a Different Result

The Union takes a different view of the language of Section 1113 based on the distinction between contractual obligations and statutory obligations. Before the collective bargaining agreement expired, the Debtors had a "voluntarily assumed contractual obligation." Union Br. 14. After the agreement expired, by

contrast, the Union asserts that the Debtors had a "statutory obligation," based only on Section 8 of the NLRA, "to avoid unilateral changes to the status quo before bargaining to impasse." *Id.*; *see also supra* at 6. The Union contends that Section 1113 cannot apply to this case because it refers only to an "agreement," not to obligations imposed by statute. Union Br. 16. Thus, the logic goes, it is irrelevant whether the statute says "unexpired," because "collective bargaining agreement" can describe only a contractual obligation, whereas this case involves a statutory obligation. *Accord* NLRB Br. 10-13.

But Section 1113 is not phrased in terms of "contractual" and "statutory" obligations. Its trigger is the existence of a "collective bargaining agreement," and the text draws no distinction between expired and unexpired agreements. In other words, Section 1113 does not speak of "obligations imposed by virtue of a collective bargaining agreement." It speaks only of "a collective bargaining agreement." Whether the agreement is enforceable by virtue of a statute or through its own force is beside the point.

The Union's centerpiece authority, *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988), exposes the Union's error. The Court there considered the applicability of the 1980 ERISA amendments to an obligation, imposed by the NLRA, to continue making pension contributions as defined by an expired collective bargaining agreement. What drove the Court's

decision was that the 1980 amendments responded in separate sections to "two concerns that are relevant to the question presented by this case." *Id.* at 545. In the first section, Congress referred separately to an obligation "under one or more collective bargaining . . . agreements" and to an obligation "under applicable labor-management relations law." *Id.* at 546 n.11 (quoting 29 U.S.C. § 1392(a)(1), (2)). In the second section, however, there was no reference to "a noncontractual obligation imposed by the NLRA." *Id.* at 546. Instead, the statute created a "special remedy against employers who are delinquent in meeting their *contractual* obligations," *id.* at 547 (emphasis added), by referring in text only to an employer that was "'obligated to make contributions . . . under the terms of a collectively bargained agreement.'" *Id.* at 546 (quoting 29 U.S.C. § 1145). Because "Congress was aware of the two different sources of an employer's duty to contribute to covered plans," *id.*, the question was whether the "obligat[ions]" arose from the agreement itself or from the NLRA, *see id.* at 549-50 n.16—a distinction that demonstrably mattered to Congress when passing the 1980 ERISA amendments.

Here, by contrast, there is no indication in either text or legislative history that Congress intended the ability to "reject a collective bargaining agreement," 11 U.S.C. § 1113(a), to depend on whether the terms of the agreement remained enforceable directly or instead through the NLRA. What mattered to Congress was setting forth detailed, collective-bargaining-agreement-specific procedures and

substantive criteria to ensure that employers bargained in good faith before rejecting an agreement and that rejection was truly necessary to an effective reorganization. *See generally Wheeling-Pittsburgh*, 791 F.2d at 1085-89. There is no indication in text or legislative history that Congress did want—nor is there any sensible reason why Congress would have wanted—a different and less specific legal regime to govern shortly after the expiration of a collective bargaining agreement than the detailed, specific, and highly labor-protective regime that Congress crafted specifically to deal with employers who cannot reorganize if they must adhere to previously-agreed-to terms and conditions of employment.

The plain meaning of "collective bargaining agreement," as used in Section 1113, is not "unexpired collective bargaining agreement." That an expired collective bargaining agreement is not enforceable on its own does not change that fact.

II. The Statutory Scheme Further Shows That Section 1113 Applies to Expired Collective Bargaining Agreements

"'It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1357 (2012) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)). Here, three parts of the statutory scheme could shed light on the operative phrase "collective bargaining agreement": Section 365, which permits debtors to reject "executory" contracts (a term conspicuously absent from Section 1113); Section 1113(d)(2),

which permits debtors to "terminate" collective bargaining agreements; and Section 1113(e), which authorizes interim relief from collective bargaining agreements. Those provisions each reinforce the conclusion that "collective bargaining agreement" encompasses an expired collective bargaining agreement.

A. Section 365 Does Not Limit Section 1113, but the Debtors Prevail Even if It Does

The Union's search for a term like "unexpired" in the statute leads it to 11 U.S.C. § 365, which governs rejection of "executory contracts." Before Section 1113 existed, Section 365 was the only provision under which an employer might reject a collective bargaining agreement, and courts struggled without textual guidance to reconcile "the special nature of a collective-bargaining agreement, and the consequent 'law of the shop' which it creates," with the general powers of bankruptcy courts. *Bildisco*, 465 U.S. at 524. Today, by contrast, it makes little sense to import standards from the very general Section 365 into the very specific Section 1113.

Nevertheless, because a single word in Section 365—"executory"—seems conveniently to aid the distinction the Union wishes to draw, the Union urges this Court to limit Section 1113 to executory contracts. The better interpretation, though, is that by using "executory" in Section 365 but *not* Section 1113, Congress did not intend "executory" to apply to Section 365. Even if that limitation somehow applied to Section 1113, however, it would avail the Union nothing. The

collective bargaining agreement here *is* "executory," because both sides remain obligated under its terms and because it had not expired when the Debtors filed for bankruptcy.

1. The Term "Executory" Does Not Limit Section 1113, Because Congress Used It Only in Section 365

The Union seeks to graft the word "executory" from Section 365 onto Section 1113 because it could mean "unexpired." Whereas Section 1113 permits debtors to "reject a collective bargaining agreement," 11 U.S.C. § 1113(a), Section 365 permits debtors to "reject [an] executory contract," *id.* § 365(a). "'An executory contract is a contract under which the obligation of both the bankrupt and the other party to the contract are so far underperformed that the failure of either to complete performance would constitute a material breach.'" *In re Exide Techs.*, 607 F.3d 957, 962 (3d Cir. 2010) (quoting *In re Columbia Gas Sys. Inc.*, 50 F.3d 233, 239 (3d Cir. 1995)). "Executory" thus excludes contracts in which one party, but not the other, has discharged its obligations.

The Union, however, gets statutory interpretation backwards—when one statute uses a word that another statute does not, the word does *not* apply to the second statute. "We have often noted that when 'Congress includes particular language in one section of a statute but omits it in another' . . . this Court 'presume[s]' that Congress intended a difference in meaning." *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (quoting *Russello v. United States*, 464 U.S.

16, 23 (1983)); *accord, e.g.*, *Hartford Underwriters*, 530 U.S. at 7 (applying this principle to the Bankruptcy Code). Congress here included "executory" in Section 365 but excluded it from Section 1113. Hence, the Court should interpret Section 1113 to *exclude* the word "executory."

The specificity of Section 1113, contrasted with the generality of Section 365, underscores this interpretation. Section 1113 is specific to collective bargaining agreements, stating in detail what an employer must do, what a union must fail to do, and what a court must find before a collective bargaining agreement can be rejected, 11 U.S.C. § 1113(a)-(c); and providing separately for what must happen before the bankruptcy court rules on a Section 1113 motion, *id*. § 1113(e)-(f). It contrasts with Section 365, which governs rejection in bankruptcy of *any* agreement, including (before Section 1113 was passed) collective bargaining agreements.

"'[I]t is a commonplace of statutory construction that the specific governs the general.'" *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)). That canon applies with vigor here, for "the specific governs the general 'particularly when the two are interrelated and closely positioned, both in fact being parts of [the same statutory scheme].'" *Id.* (quoting *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) (per curiam)). Congress dealt specifically with

rejection of collective bargaining agreements in Section 1113. The more general provisions of Section 365 therefore do not govern cases under Section 1113.

This logic equally defeats the NLRB's effort to burden the word "reject" with the "executory" limitation. The NLRB contends that, by borrowing the word "reject" from Section 365, Congress intended to bring with it the restriction to "executory" contracts. NLRB Br. 23-24. In other words, "if a word is obviously transplanted from another legal source . . . , it brings the old soil with it." *Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013) (quotation marks omitted). But, in Section 1113, Congress specifically substituted new "soil"—it used "collective bargaining agreement" instead of "executory contract." This more specific usage must control. *RadLAX*, 132 S. Ct. at 2071. At any rate, the Bankruptcy Code uses "accept" and "reject" in contexts that have nothing to do with executory contracts. *E.g.*, 11 U.S.C. §§ 1125(b), 1126(a).

2. The History of Section 1113's Enactment Shows That Section 1113 Established a New, Collective-Bargaining-Specific Regime, not a Gloss on Section 365

Before Section 1113 was enacted, the Union contends, Section 365 governed rejection of collective bargaining agreements. Congress enacted Section 1113 to give labor more protection than Section 365 had afforded. Thus, it is unthinkable, the Union asserts, that Section 1113 could afford labor *less* protection, with respect to expired agreements, than it possessed under Section 365. (That is, it is unthinka-

ble that Section 1113 could authorize rejection of non-executory agreements, because Section 365 did not do so.) Union Br. 30-32.

What both the text and the history of Section 1113 demonstrate, however, is that Congress did not start with the structure of Section 365 and build new protections on top of it. Instead, Congress crafted a new regime, specific to collective bargaining agreements. It produces different outcomes on a variety of issues.

For example, Section 1113 and Section 365 produce different outcomes with respect to whether rejection of a contract gives rise to a claim for damages. Under the explicit text of Section 365, "the rejection of an executory contract . . . constitutes a breach of such contract." 11 U.S.C. § 365(g). And that breach, like any other breach, gives rise to a claim for damages. *Id.* § 502(g)(1) ("A claim arising from the rejection, under section 365 of this title . . . , of an executory contract . . . shall be allowed.").

Section 1113, however, provides no parallel protection. The provision that creates the claim for damages, Section 502(g)(1), refers to Section 365 but omits any reference to Section 1113. Accordingly, unions receive no damages when debtors reject collective bargaining agreements under Section 1113. This result makes sense: "[I]f rejection is truly necessary"—that is, if the debtor cannot survive without rejecting the agreement—"then allowing a claim for damages, especially if the amount of that claim represents lost future wages and benefits, would

necessarily assure the failure of the reorganization." *In re Blue Diamond Coal Co.*, 160 B.R. 574, 577 (E.D. Tenn. 1993). The ability to seek damages under Section 1113 would, for that reason, be "inconsistent with Congress's intent in passing § 1113." *Northwest Airlines*, 483 F.3d at 172.[7]

Section 1113 also gives debtors another tool that Section 365 does not. Under Section 1113, courts may authorize debtors to "implement interim changes in the terms" of collective bargaining agreements. 11 U.S.C. § 1113(e). Unlike a rejection under Section 1113(c), an "interim change" under Section 1113(e) is temporary. (It is therefore easier for a debtor to secure an "interim change," just as the threshold for a preliminary injunction is lower than the threshold for a permanent injunction.) But, like a rejection under Section 1113(c), an interim change under Section 1113(e) can deny a union benefits that it otherwise would receive. Yet unions are not entitled to damages for interim changes. *United Food & Commercial Workers Union, Local 328 v. Almac's Inc.*, 90 F.3d 1, 5-6 (1st Cir. 1996). And—here is the point—Section 365 contains no provision comparable to Section 1113(e). Section 1113 thus gives debtors a tool that they lacked under Section 365.

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[7] Some courts that have "peripherally addressed this matter" have suggested that damages are available for rejection under Section 1113. Michael St. Patrick Baxter, *Is There A Claim for Damages from the Rejection of A Collective Bargaining Agreement Under Section 1113 of the Bankruptcy Code?*, 12 Bankr. Dev. J. 703, 710 (1996); *see id.* at 713-14 n.48 (collecting cases). But we know of no case that conflicts directly with *Blue Diamond* and *Northwest Airlines*, and in any event the contractual damages for rejection of an expired agreement are necessarily zero.

These clear textual provisions show that, in Section 1113, Congress gave debtors and unions different protections than they would have had under Section 365. Congress did indeed hand a "victory [to] labor" in Section 1113, *Wheeling-Pittsburgh*, 791 F.2d at 1087, but the victory was in the stringent procedural and substantive requirements placed on the employer and the court by the statute's express terms, not an unexpressed preference for expired collective bargaining agreements over unexpired ones.

3. The Debtors Prevail Even If the Term "Executory" in Section 365 Limits Section 1113

Even if Section 1113 applied only to "executory" collective bargaining agreements, that would not help the Union. The collective bargaining agreement at issue here *is* "executory" because its terms continue to obligate both parties and because it expired only after the Debtors filed for bankruptcy.

An expired collective bargaining agreement that retains force by virtue of the NLRA is an executory contract. As the late Judge Merrick (of the bankruptcy court in Chicago) recognized, "[s]o long as a working relationship between the debtor and covered employees continues, the NLRA mandates the performance of obligations which constitute the core of the definition of executory contract." Richard L. Merrick, *The Bankruptcy Dynamics of Collective Bargaining Agreements*, 19 J. Marshall L. Rev. 301, 329-30 (1986). Because "each party has unfulfilled duties under the contract," *id.* at 330, treating expired agreements as executo-

ry avoids the pitfalls that the "executory contract" limitation seeks to avoid. *See Columbia Gas*, 50 F.3d at 239-40 (explaining these pitfalls).

That point aside, even if only *un*expired collective bargaining agreements are executory, "'[t]he time for testing whether there are material unperformed obligations on both sides is when the bankruptcy petition is filed.'" *Exide Techs.*, 607 F.3d at 962 (quoting *Columbia Gas*, 50 F.3d at 240). Here, the Debtors filed the bankruptcy petition on September 9. The collective bargaining agreement did not expire by its own terms until September 14. So, at the relevant time, the collective bargaining agreement was unexpired—and thus executory. *See In re Waste Sys. Int'l, Inc.*, 280 B.R. 824, 827 (Bankr. D. Del. 2002) ("[T]he time for testing whether there are material unperformed obligations on both sides is when the bankruptcy petition is filed. The mere fact that the Consulting Agreement itself has expired does not render the issue moot." (citation omitted)).[8]

[8] The one court (to our knowledge) that has disagreed was applying a principle that has never been the law in this Circuit and no longer appears to be the law in any Circuit. In a pre-Section 1113 case, a bankruptcy court held that a collective bargaining agreement was not executory, even though it expired after the debtor filed for bankruptcy, because it had expired "before th[e] court could hold a hearing on the debtor's application." *In re Pesce Baking Co.*, 43 B.R. 949, 957 (Bankr. N.D. Ohio 1984). It relied on a Fourth Circuit case. *Gloria Mfg. Corp. v. Int'l Ladies' Garment Workers' Union*, 734 F.2d 1020, 1022 (4th Cir. 1984) (per curiam) ("If the critical date for determining the executory nature of the contract is the date on which the bankruptcy court granted the Union's motion for summary judgment, the bankruptcy court was correct."). But the Fourth Circuit since has adopted this Court's rule that the critical date is the date of the bankruptcy petition. *In re Sunterra Corp.*, 361 F.3d 257, 264 n.12 (4th Cir. 2004). So, it appears, have all other

B. A Debtor's Ability to "Terminate" Collective Bargaining Agreements Does Not Restrict the Meaning of "Collective Bargaining Agreement"

If a bankruptcy court fails to rule on a debtor's Section 1113 motion within thirty days after holding a hearing, then the debtor may "terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on" an application for rejection. 11 U.S.C. § 1113(d)(2). This provision gives teeth to the statute's direction that "[t]he court *shall* rule on such application for rejection within thirty days." *Id.* (emphasis added); *see* 7 Henry J. Sommer & Alan N. Resnick eds., *Collier on Bankruptcy* ¶ 1113.03[2][b] (16th ed. 2014) (hereinafter *Collier*). This timing requirement is one way that Congress achieved its goal of "affording debtors the flexibility to restructure their labor costs on a comparatively expedited basis." *See* Op., A25.

The Union contends that this use of "terminate" proves that Section 1113 lacks application where a collective bargaining agreement has expired. Union Br. 18-21. Citing two dictionaries and nothing else, the Union claims that "[t]o 'terminate' means '[t]o put an end to; to bring to an end,' or simply '[t]o end; to conclude.'" Union Br. 18. An expired collective bargaining agreement has already

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courts of appeals. *In re Penn Traffic Co.*,524 F.3d 373, 381 (2d Cir. 2008); *In re Pomona Valley Med. Grp., Inc.*, 476 F.3d 665, 669 n.4 (9th Cir. 2007); *Dick ex rel. Amended Hilbert Residence Maint. Trust v. Conseco, Inc.*, 458 F.3d 573, 577 (7th Cir. 2006); *In re Murexco Petroleum, Inc.*, 15 F.3d 60, 62-63 (5th Cir. 1994); *accord* 3 *Collier on Bankruptcy* ¶ 365.02[2][e] (16th ed. 2014).

been brought to an end. Thus, the Union argues, it is impossible to "terminate" an expired collective bargaining agreement—and, therefore, "collective bargaining agreement," as used throughout Section 1113, cannot encompass expired collective bargaining agreements.

An inference from dictionary definitions of one word in a subsection not directly at issue, however, cannot make the Union's case. Courts must "consider not only the bare meaning of [a] word but also its placement and purpose in the statutory scheme. The meaning of statutory language, plain or not, depends on context." *Bailey v. United States*, 516 U.S. 137, 145 (1995) (quotation marks and alterations omitted); *see also Southern Railway Co. v. ICC*, 681 F.2d 29, 34 (D.C. Cir. 1982) ("[P]laying with dictionary definitions devoid of legislative context can be a dangerous business in statutory construction.").

As used in Section 1113(d)(2), the ability to "terminate" is a *temporary* power that the debtor has in the event a court has not made a timely ruling. That usage, whether or not in accordance with any particular dictionary definition, was a natural choice for Congress after the Supreme Court in *Bildisco* addressed whether "*terminating* or modifying a collective-bargaining agreement before rejection of that agreement has been approved by the Bankruptcy Court" (465 U.S. at 516 (emphasis added)) was an unfair labor practice, and held that it was not. *See also In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 989 (2d Cir. 1990) (holding that, under

Bildisco, a debtor "could terminate unilaterally the collective bargaining agreement . . . prior to seeking bankruptcy court approval").

Because a collective bargaining agreement "terminated" in accordance with Section 1113(d)(2) has *not* been brought to an end—only suspended unless and until the court rules—the Union's dictionary definitions are not helpful in ascertaining the meaning of the term. The Union's further leaps—that an expired agreement cannot be brought to an end, and that "collective bargaining agreement" as used throughout Section 1113 therefore cannot include expired agreements—become irrelevant once it is recognized that "terminate" does not carry in this context the dictionary-derived meaning the Union espouses.

The rest of the Union's "terminate" argument merely rehashes its argument about contractual obligations versus statutory obligations. Union Br. 19-21. But, as explained above (at 21-24), Section 1113 does not authorize courts to reject statutory obligations.

C. Section 1113(e) Supports the Bankruptcy Court's Holding

Section 1113(e) permits a court to authorize debtors to "implement interim changes in the terms" of a collective bargaining agreement. Subsection (e) applies only "during a period when the collective bargaining agreement continues in effect," a phrase found nowhere else in the Bankruptcy Code.

The phrase "continue in effect after expiration of a collective-bargaining agreement" does, however, appear in *Litton*, 501 U.S. at 200. From *Litton*, the bankruptcy court concluded that "continue in effect" is a term of art used to refer to the employer's post-expiration *status quo* obligations. Op., A23. Citing other parts of *Litton*, the Union attacks that usage. The bankruptcy court was not wrong, but in any event Section 1113(e) is not directly at issue in this case, and parsing the phrase "continue in effect" is unnecessary to support the bankruptcy court's holding. The larger point is that Section 1113 *as a whole* (including subsection (e)) reflects Congress's unmistakable intent to allow bankruptcy judges to grant relief in a wide variety of situations in which it is needed and the debtor has met the statute's very stringent requirements. Disabling a bankruptcy court from acting when previously-agreed-to terms apply via statute, even though the bankruptcy could have negated the terms while they were in effect directly by contract, would be thoroughly inconsistent with the intent of Congress.

The issue in this case has rarely been litigated directly under Section 1113(e),[9] but a related effort by labor unions to defeat relief under that subsection on a technicality has been hotly debated, and courts have consistently upheld

[9] In *In re 710 Long Ridge Rd. Operating Co.*, No. 13-13653 DHS, 2013 WL 796721 (Bankr. D.N.J. Mar. 4, 2013), however, the court did allow a debtor to modify, on an interim basis under Section 1113(e), "the terms of an expired CBA where those terms continue in effect." *Id*. at *7.

the authority of bankruptcy courts. Just as the Union here asserts that the Debtors were required to file their rejection application before the collective bargaining agreement expired (or else lose the ability to gain any relief in a bankruptcy court and instead have to go to the NLRB), labor unions in other cases have asserted that debtors could not secure interim relief under subsection (e) because they had not yet filed their rejection applications.

The courts have disagreed. For example, in *In re United Press International, Inc.*, the union argued that the debtor could not "even have a § 1113(e) hearing without first seeking rejection of the CBA." 134 B.R. 507, 513 (Bankr. S.D.N.Y. 1991). The court turned that argument down "because the only requirement in the statute is that the application be made 'during a period when the collective bargaining agreement continues in effect.'" *Id.* (quoting 11 U.S.C. § 1113(e)). All other courts that have confronted the issue appear to have reached the same result by the same route. *See* 7 *Collier* ¶ 1113.07[1] & n.1 (collecting cases). In so doing, they have agreed with Senator Hatch: "[I]f it is essential to the continuation of the business or if irreparable damage might occur, the court may authorize the business to make whatever alterations in the labor contract which will avoid those harms. This process may become necessary during the negotiations prior to the debtor's filing an application for rejection or during the period when the court is consider-

ing the application or any other time 'when the collective bargaining agreement continues in effect.'" 130 Cong. Rec. S8892 (daily ed. June 29, 1984).[10]

The role that the phrase "continues in effect" has played, then, is to expand bankruptcy courts' tool kit to deal with urgent situations. It is not the only word choice in Section 1113 with that effect. As the bankruptcy court here correctly observed, Congress "could have very easily used the word 'executory' to mirror Section 365 of the Bankruptcy Code" if its intent had been as the Union asserts. Op., A23. What Congress did, instead, was to provide the bankruptcy courts and debtors an expansive set of powers—limited by stringent substantive criteria and procedures—to deal with a broad range of situations: fully ripe rejection applications (subsections (b)-(c) and (d)(1)); situations in which the court has not ruled (subsection (d)(2)); and interim changes "during a period when the collective bargaining agreement continues in effect," whether or not a rejection application has already been filed (subsection (e)). This is a comprehensive *bankruptcy-court-centered* scheme, not the NLRA-centered scheme the Union describes.

III. The Bankruptcy Court's Interpretation of Section 1113, Unlike the Union's, Is Consistent with the Policies Animating the Bankruptcy Code and Labor Law

The "evident purpose of what a text seeks to achieve is an essential element of context that gives meaning to words." Antonin Scalia & Bryan A. Garner, *Read-*

[10] All pages of the Congressional Record cited in this brief are reproduced for convenience in the Debtors-Appellees' Appendix at pages DA42-DA82.

ing Law 20 (2012). The Bankruptcy Code, in particular, "must be construed" "[i]n the light of th[e] policy" that animates it. *Burlingham v. Crouse*, 228 U.S. 459, 473 (1913); *accord, e.g.*, *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 248 (2010) (considering "the language of the statute, together with other evidence of its purpose"); *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 667 (2006) ("[W]e are guided in reaching our decision by the . . . objective[s] underlying the Bankruptcy Code.").

The bankruptcy court's interpretation reflects both the general policy of the Code and the specific policy of Section 1113, which balances bankruptcy and labor policy. The Code as a whole, particularly in the Chapter 11 context, aims to promote the debtor's reorganization—an aim that the Union's interpretation would undermine. Section 1113 also accommodates labor policy by requiring good-faith bargaining and allowing debtors relief only if workers would otherwise lose their jobs. The Union's interpretation is likewise at odds with these labor policies. The Court should therefore affirm the bankruptcy court's interpretation of Section 1113.

A. The Bankruptcy Court's Interpretation Is Consistent with the Policies Behind Chapter 11 of the Bankruptcy Code

Although the Bankruptcy Code serves many purposes, *e.g.*, *Toibb*, 501 U.S. at 163, one purpose is paramount in the Chapter 11 context: reorganization. "In a reorganization under Chapter 11, a bankruptcy court's objective is to preserve, if possible, an ongoing business." *In re Jason Realty, L.P.*, 59 F.3d 423, 429 (3d Cir.

1995); *accord, e.g.*, *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 389 (1993) (in Chapter 11, courts are "guided by the overriding goal of ensuring the success of the reorganization"); *Exide Techs.*, 607 F.3d at 962. A reorganization proceeding is "not an ordinary proceeding"; its "sole aim" is to "bring about a reorganization." *Cont'l Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & P. Ry.*, 294 U.S. 648, 676 (1935) (cited for this proposition in *Celotex Corp. v. Edwards*, 514 U.S. 300, 311 (1995)). Accordingly, courts should disfavor any approach that would "prevent the attainment of that object" and "render [Chapter 11's] provisions futile." *Id.*

The Union's proffered interpretation of Section 1113 is 180 degrees from this policy. By its terms, Section 1113 is a last-ditch statute; it applies only when nothing else will spare the debtor from liquidation. *Wheeling-Pittsburgh*, 791 F.2d at 1088-89. Thus, any construction that would render Section 1113 inapplicable would destine an entire category of otherwise-viable debtors for liquidation. The Union's construction, in every case, would force the debtor to liquidate rather than to reorganize merely because the debtor's collective bargaining agreement had expired. The Union's approach therefore would "seriously undermine[]" the "purpose of Chapter 11" because it would keep debtors from "reorganiz[ing] as going concerns." *In re Visual Indus., Inc.*, 57 F.3d 321, 327 (3d Cir. 1995) (quotation marks omitted).

B. The Bankruptcy Court's Interpretation Is Also Consistent with the Policies of Section 1113, Which Include Protecting Unions

In Section 1113, Congress balanced bankruptcy policy with labor policy and determined how to accommodate each when a debtor seeks to reject a collective bargaining agreement. The bankruptcy court's interpretation gave broad effect to Section 1113 and thus to the policy choices that Congress embodied in it. Specifically, the bankruptcy court's interpretation applies the rigorous, labor-protective procedures of Section 1113 to all collective bargaining agreements, not just unexpired ones. The Union cannot explain why the policies embodied in Section 1113 require treating unexpired collective bargaining agreements and expired collective bargaining agreements differently.

1. Chapter 11's core policy—ensuring the success of a debtor's reorganization—is central to Section 1113. This Court has recognized that, when it enacted Section 1113, Congress had the "goal of preventing the debtor's liquidation." *Wheeling-Pittsburgh*, 791 F.2d at 1089. The legislative history, on which this Court relied, amply supports that conclusion. *E.g.*, 130 Cong. Rec. H7495 (daily ed. June 29, 1984) (statement of Rep. Morrison) ("The conference report strikes the necessary balance between the threat to companies in risk of being liquidated because of financial problems and the possibility of abuse of chapter 11 bankruptcy proceedings merely to vitiate union contracts."); *id.* (statement of Rep. Lungren) (provisions of Section 1113 "underscore[] the primary purpose of chapter 11; that is, to

maintain the debtor's business so that both the debtor and his employees can keep their jobs."); *id.* at S8898 (statement of Sen. Packwood) ("[O]nly modifications which are necessary to a successful reorganization may be proposed."). The Union's interpretation of Section 1113 would frustrate that core policy.

2. Section 1113 also accommodates the labor policy of requiring employers to bargain collectively with their unions. To secure relief under Section 1113, it is not enough that the relief is "necessary to permit the reorganization of the debtor." 11 U.S.C. § 1113(b)(1)(A). In addition, the debtor must make a proposal that treats the union "fairly and equitably," *id.*, and "confer in good faith" with the union, *id.* § 1113(b)(2). Then, Section 1113 affords unions a protection that they would lack if the parties had bargained to impasse outside of bankruptcy: A court must find that "balance of the equities clearly favors" the employer before the employer may implement its proposal. *Id.* § 1113(c)(3).

Congress and the NLRB itself have recognized that Section 1113's procedures give effect to labor policy. The NLRB has held that Section 1113 "clearly recognizes the basic propositions of labor law," under which "terms and conditions of the [collective bargaining] agreement remain in force during the pendency of negotiations" and employers may not implement changes unilaterally. *Accurate Die Casting*, 292 N.L.R.B. at 987. Senator Moynihan, speaking in favor of Section 1113, agreed: "The conference agreement also provides that a company must meet

with its employee representatives in good faith, to reach an agreement concerning the labor contract modifications. This provision, then, embodies the basic principles of collective bargaining established by Congress in the National Labor Relations Act." 130 Cong. Rec. S8900 (daily ed. June 29, 1984).

Congress determined that Section 1113's procedural gauntlet and stringent substantive criteria amply "accommodate[d]" the "statutory regime[]" of "collective bargaining under the NLRA." *See* Union Br. 37. Under the bankruptcy court's interpretation of Section 1113, debtors with expired collective bargaining agreements—just like debtors with *un*expired collective bargaining agreements—must run that gauntlet and meet those criteria to secure relief. This requirement ensures that debtors are not "us[ing] Chapter 11 as medicine to rid themselves of corporate indigestion," in contravention of labor policy. *In re Century Brass Prods., Inc.*, 795 F.2d 265, 272 (2d Cir. 1986). The bankruptcy court's interpretation thus gives labor policy the full weight it deserves. Here, at the intersection of bankruptcy and labor law, applying a Bankruptcy Code section that takes explicit account of labor policy makes far more sense than applying an NLRA provision that takes no account of bankruptcy policy.

Indeed, it is the Union's approach that would frustrate the policy of collective bargaining. Section 1113 embraces labor policy in part by requiring the parties to negotiate in "good faith." 11 U.S.C. § 1113(b)(2). But, thumbing its nose at that

requirement, the Union here approached negotiations in "bad faith," Op., A36—a finding that the Union does not contest on appeal. The Court should not pave the way for the Union's bad-faith tactics whenever a collective bargaining agreement happens to have expired.

3. The Union responds that the bankruptcy court ignored labor policies because (i) bargaining to impasse under the NLRA (the Union's preferred procedure) is not a protracted process, and (ii) Section 1113 supposedly codifies Congress's agreement with the dissenters in *Bildisco*. Union Br. 33-39.

Both responses suffer from a common flaw: They provide no reason to differentiate between expired collective bargaining agreements and unexpired collective bargaining agreements. Because the Union concedes that Section 1113 applies to unexpired agreements, it must explain why labor policy bestows special treatment upon expired agreements. This it does not do. The NLRA impasse process is no faster for expired agreements than for unexpired agreements. And the NLRA's collective-bargaining obligations, discussed by the *Bildisco* dissent, apply equally to expired and unexpired agreements—indeed, they apply when there is no collective bargaining agreement at all. *Litton*, 501 U.S. at 198. Thus, neither of the Union's policy arguments supports the distinction that the Union would read into Section 1113.

That common flaw aside, each response fails on its own terms. First, the Union insists that bargaining to impasse under the NLRA does not take that long. Union Br. 33-37; *accord* NLRB Br. 31-32. To support its argument, though, the Union cherry-picks cases holding that the process takes "eight to ten weeks." Union Br. 35. That unscientific survey ignores the many cases that take much longer. *E.g.*, *Erie Brush & Mfg. Corp. v. NLRB*, 700 F.3d 17, 21 (D.C. Cir. 2012) (ten months); *Graphic Commc'ns Int'l Union, Local 508 v. NLRB*, 977 F.2d 1168, 1169 (7th Cir. 1992) (six months). And, more importantly, Congress decided that, in bankruptcy, the process should take no more than forty-four days. 11 U.S.C. § 1113(d)(1) (court must hold hearing within fourteen days of motion); *id.* § 1113(d)(2) (court must rule within thirty days of hearing). Where *un*expired agreements are concerned, at least, the NLRA process was not fast enough for Congress. Why would it be fast enough where expired agreements are concerned? The Union does not say.

The NLRB contends that its "economic exigency" doctrine answers any concerns about speed, NLRB Br. 31-32, but it is wrong. The lone authority that the NLRB cites, *RBE Electronics*, 320 N.L.R.B. 80 (1995), makes clear that this doctrine "requir[es] a heavy burden," satisfied only by "extraordinary events which are an unforeseen occurrence." *Id.* at 81 (quotation marks omitted). That is true in practice: Just three of the 110 NLRB decisions citing *RBE* even arguably find an

economic exigency. Moreover, accepting the NLRB's argument in a case involving an insolvent employer would substitute the NLRB's judgment for that of the bankruptcy court in determining whether an "economic exigency" exists.

Second, the Union warns the Court not to "repeat th[e] error" of the *Bildisco* majority by giving short shrift to the NLRA's collective bargaining requirements. Union Br. 38. But affirming the bankruptcy court would produce no such "error."

The holdings of *Bildisco* were (1) that the standard for rejection of a collective bargaining agreement was a simple balancing of the equities, 465 U.S. at 526; *see also Wheeling-Pittsburgh*, 791 F.2d at 1086; and (2) that, "from the filing of a petition in bankruptcy until formal acceptance, the collective-bargaining agreement is not an enforceable contract within the meaning of NLRA § 8(d)," 465 U.S. at 532, with the result that an employer could "terminat[e] or modify[] [the] agreement" (*id*. at 516) without prior judicial approval and without being subjected to an unfair-labor-practice charge. Congress responded by passing Section 1113—the very statute that, the Union says, embraced the *Bildisco* dissent and "codified [Congress's] intent to accommodate" the NLRA. Union Br. 38.

Bildisco holding (1)—which was unanimous—was overturned by passage of the criteria in subsections (b)-(d). *Bildisco* holding (2)—which was the sole focus of Justice Brennan's dissent—was overturned by passage of the criteria and procedures in subsections (d)(2) and (e)-(f), *none* of which "accommodates" the policies

of the NLRA by giving the NLRB a role to play when an employer in bankruptcy proceedings seeks to reject a collective bargaining agreement. To detract from the comprehensiveness of Section 1113 on the theory that some free-floating "accommodation" of the policies of the NLRA justifies giving more protection to unions with expired contracts, than to those with unexpired contracts, makes no sense and would be the true error.

IV. The Union's Interpretation of Section 1113 Would Produce Grave Anomalies that the Bankruptcy Court's Interpretation Avoids

Although a statute's consequences cannot trump its plain text, the Court should construe statutes to avoid "creat[ing] anomalies." *Small v. United States*, 544 U.S. 385, 391 (2005); *accord, e.g.*, *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 725 n.5 (2011); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68-69 (1994). Indeed, this Court has construed Section 1113 to avoid anomalous results. *In re Roth American, Inc.*, 975 F.2d 949, 956 (3d Cir. 1992). This canon further undermines the Union's interpretation of Section 1113, which would yield anomalies as numerous as they are significant. By contrast, the anomalies that the Union and the NLRB see in the bankruptcy court's interpretation are not anomalies at all.

A. The Union's Interpretation of Section 1113 Would "Protect Labor" by Firing Workers, Provide More Protection After a Contract Expires than Before, Give Small Differences in Timing an Outsized Role, and Conflict with Interpretations of Similar Statutes

1. The most obvious anomaly in the Union's proposed interpretation is that it would lead to scores of union workers losing their jobs. A debtor may reject a collective bargaining agreement only if doing so is "necessary to permit the reorganization of the debtor." 11 U.S.C. § 1113(b)(1)(A). This means that, unless the court authorizes the rejection, the debtor would be forced to liquidate. *Wheeling-Pittsburgh*, 791 F.2d at 1088-89. And, when a debtor liquidates, it ceases operations, retaining only the employees necessary to turn the lights off. So, under the Union's interpretation, bankruptcy courts must force a debtor with an expired collective bargaining agreement to fire its workers rather than allowing it to restructure its labor obligations. That is no "'victory for labor.'" *See* Union Br. 22 (quoting *Wheeling-Pittsburgh*, 791 F.2d at 1087).

What makes this an anomaly, not just a senseless result, is that it occurs *only* if a debtor's collective bargaining agreement has expired. The bankruptcy court could not fathom "a good reason for such a distinction between an expired and [an] unexpired collective bargaining agreement." Op., A29. Nor has the Union offered one.

2. But that is not all—the Union's approach would upend basic contract principles by affording unions *with* unexpired contracts fewer rights than unions *without* them. Under the ordinary common law of contracts, "an expired contract has by its own terms released all its parties from their respective contractual obligations, except obligations already fixed under the contract but as yet unsatisfied." *Litton*, 501 U.S. at 206. Labor law changes this rule, but only up to a point. Under the NLRA, "*some* terms and conditions of employment . . . survive expiration of an agreement." *Id.* at 199 (emphasis added). The others, however, do not. Thus, even under the NLRA, a union has more rights before its collective bargaining agreement expires than afterward.

The Union's reading of Section 1113 would turn these principles upside down. Rather than divesting unions of some rights when their contracts expire—or even giving them the same bundle of rights—the Union's approach would give unions a *new* right. Namely, under the Union's approach, the expiration of a collective bargaining agreement would give unions the newfound right to prevent application of Section 1113. In no other context, to our knowledge, does a contract's expiration give a party thereto more rights than it had before.

The Union's approach therefore transgresses a cardinal rule of statutory construction: Congress is presumed not to depart from established common-law principles without saying so expressly. *E.g.*, *Norfolk Redevelopment & Hous. Auth.*

v. Chesapeake & Potomac Tel. Co., 464 U.S. 30, 35 (1983) ("It is a well-established principle of statutory construction that '[t]he common law . . . ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose.'" (quoting *Fairfax's Devisee v. Hunter's Lessee*, 11 (7 Cranch) U.S. 603, 623 (1812)). Affirming the bankruptcy court would avoid an anomalous result and preserve a sensible common-law principle.

3. The Union's interpretation of Section 1113 would also hinge the fate of a debtor and its employees on the timing of incidental events. These events include:

- Debtor's effort to continue collective bargaining – The Union concedes that a Section 1113 motion is proper if a debtor lets a collective bargaining agreement roll over, but not if the debtor seeks to open a new round of bargaining. Union Br. 3.
- Expiration of the collective bargaining agreement – The Union concedes that a debtor may seek Section 1113 relief before a collective bargaining agreement expires, but not afterward. Union Br. 12-13.
- Filing of the Section 1113 motion – The Union concedes that a Section 1113 motion is proper if it is filed the day before a collective bargaining agreement expires, but not the day after. Union Br. 13.

None of these events is rationally related to bankruptcy or labor policy. Thus, under the Union's interpretation, the procedural tail would wag the substantive dog.

The Union responds that it is logical to condition the availability of Section 1113 relief on the timing of these events because rejection is necessary only before a contract has expired. Union Br. 42. The premise of this argument, however, appears to be that parties may not renegotiate a contract before it expires. That premise is incorrect. What is more, the point of the Bankruptcy Code's rejection provisions is not to prompt renegotiation; it is to shed contracts that do not benefit the bankruptcy estate. *E.g.*, *Cinicola v. Scharffenberger*, 248 F.3d 110, 119 (3d Cir. 2001).

The Union continues that, because debtors control the timing of the relevant events, they cannot complain that those events are fortuitous. Union Br. 42-44. False. Debtors lack real control over when they end up in bankruptcy—that depends largely on what markets, stakeholders, customers, and others do. (Indeed, debtors may be put into bankruptcy involuntarily. 11 U.S.C. § 303.) Debtors likewise have no control over when and how unions will act. This case proves that point: The Debtors here struggled for most of 2014 to get the Union to the bargaining table. *Supra* at 9-11. And Section 1113 itself constrains how quickly debtors may move to reject a collective bargaining agreement. *E.g.*, 11 U.S.C. § 1113(b),

(d)(1). Even were the Union correct that debtors have full control, it still does not explain why the timing of these particular events should doom a debtor's reorganization.

4. Finally, ruling for the Union would open an inexplicable rift between the NLRA and a similar statute, the Railway Labor Act (RLA). Whereas the NLRA is not industry-specific, the RLA is limited to the railroad and airline industries. 45 U.S.C. §§ 151-188. Like the NLRA, however, the RLA "'obligate[s] [the parties] to maintain the status quo'" while they renegotiate collective bargaining agreements. *Northwest Airlines*, 483 F.3d at 167 (quoting *Consol. Rail Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S. 299, 302 (1989)).

The few courts that have considered whether a debtor may reject an expired collective bargaining agreement under the RLA have concluded that it may. 7 *Collier* ¶ 1113.02[1][d] & n.22. In particular, a court recently held, in a comprehensive opinion, that a collective bargaining agreement under the RLA that had "expired by its terms" was "subject to Section 1113." *In re AMR Corp.*, 471 B.R. 51, 53 (Bankr. S.D.N.Y. 2012). (Although that court observed that the NLRA might be distinguishable, *id.* at 66, it took no position on the issue.) Congress gave no indication that a "collective bargaining agreement" means one thing in the RLA context and another in the NLRA context. It would be inconsistent, therefore, to treat the two contexts differently.

To avoid these anomalies, the Court should adhere to the text of Section 1113 and hold that an expired collective bargaining agreement is still a "collective bargaining agreement."

B. The "Anomalies" that the Union Attributes to the Bankruptcy Court's Interpretation of Section 1113 Are Not Actually Anomalies

The Union and the NLRB contend that construing Section 1113 to encompass expired collective bargaining agreements would "lead[] to several obvious absurdities." Union Br. 39. Specifically, they object that the bankruptcy court's interpretation would (i) expand Section 1113 beyond the purview of Section 365; (ii) permit debtors to reject expired collective bargaining agreements, but not assume them; (iii) withhold from unions the "executory" limitation that is available to all other counterparties of debtors; and (iv) logically apply before any "collective bargaining agreement" is in place. These purported anomalies, however, are not anomalies at all. They are what Congress intended.

1. The Union first contends that the bankruptcy court's interpretation would expand Section 1113 beyond the scope of Section 365, contrary to the history of Section 1113's enactment. Union Br. 30-32, 39. This is an anomaly, however, only if one agrees that Congress intended Section 1113 merely to add requirements to Section 365, rather than to be an independent provision with its own scope. And, as discussed above, Congress intended no such thing. *Supra* at 28-31. Instead, Congress gave debtors under Section 1113 multiple powers that are

not available under Section 365. Thus, it is no anomaly that Section 1113 applies to non-"executory" contracts, whereas Section 365 does not.

2. Next, the Union asserts that, under the bankruptcy court's interpretation, debtors may "reject" expired collective bargaining agreements, but not "assume" them. Union Br. 21-23, 39. This is an anomaly, the Union says, because it "creates a one-way ratchet" against labor—after an agreement expires, bankruptcy law could make unions worse off, but not better off. Union Br. 39.

The Union's reading of the law is accurate. "Assumption" is in some ways the opposite of "rejection." It is a commitment to perform the contract. *See In re Univ. Med. Ctr.*, 973 F.2d 1065, 1075 (3d Cir. 1992). Section 365 governs assumption or rejection of an "executory contract," 11 U.S.C. § 365(a); Section 1113 governs assumption or rejection of a "collective bargaining agreement," *id.* § 1113(a). But, whereas Section 365 provides a procedure for assumption, Section 1113 speaks only about rejection—it says nothing more about assumption. Thus, courts have held that Section 365, not Section 1113, governs the assumption of collective bargaining agreements. *E.g., Am. Flint Glass Workers Union v. Anchor Resolution Corp.*, 197 F.3d 76, 82 (3d Cir. 1999). This produces the result to which the Union objects: If Section 1113 applies to expired agreements, but Section 365 does not (because they are not "executory"), then a debtor may reject an expired

agreement, but not assume it. The Union contends that this is an anomaly, and that the remedy is to read the "executory" limitation into Section 1113.

But the Union is wrong to view this result as problematic. If a debtor wished to assume an expired collective bargaining agreement, that would be easy—the debtor would need only to extend the term of the agreement. Then, the agreement would again be "executory" and thus subject to assumption under Section 365. The only possible obstacle would be the union's refusal to extend the term of the agreement. But, presumably, the union would do so only if it opposed assumption. So, under this scheme, a debtor is hardly less able to assume an *expired* collective bargaining agreement than it would be able to assume an *unexpired* agreement. The only difference is that the union must consent. And giving a union veto power that it otherwise would lack hardly makes this scheme an anti-union "ratchet."

3. Finally, the Union objects that the bankruptcy court's interpretation of Section 1113 "singles out unions . . . as the *only* creditors for whom those protections that survive contract expiration can be rejected in bankruptcy." Union Br. 39-40. In other words, why should unions lack the benefit of the "executory" limitation that everyone else has?

This objection fails because it ignores the forest of Section 1113 to focus on a lone tree. One goal of Section 1113, as the Union itself recounts, was to provide unions more protection than they had under Section 365. *E.g.*, Union Br. 30-32.

Section 1113 achieves that goal in myriad ways. A debtor under Section 1113, unlike a debtor under Section 365, cannot just decide to stop honoring a collective bargaining agreement. 11 U.S.C. § 1113(f). Instead, it must go through a rigorous, if expedited, process of bargaining with its union. *Id.* § 1113(b). Moreover, the union can reject the debtor's pleas for any "good cause." *Id.* § 1113(c)(2). The list of protections for labor goes on. *E.g.*, *id.* § 1113(b)(1)(A) (necessity requirement); *id.* § 1113(c)(3) (balance-of-equities requirement). On the whole, therefore, Section 1113—as correctly interpreted by the bankruptcy court—singles unions out for especially favorable treatment, not "especially harsh treatment." *See* Union Br. 41.

In any event, there is nothing anomalous about treating different kinds of contracts differently. "In the field of labor relations, the technical rules of contract law do not determine the existence of an agreement." *Mack Trucks, Inc. v. Int'l Union, United Auto., Aerospace & Agr. Implement Workers*, 856 F.2d 579, 591-92 (3d Cir. 1988). This case demonstrates one way in which that is true: Unlike normal contracts, collective bargaining agreements have continued effect beyond their expiration dates. Thus, it is sensible—after following the detailed procedures specified by statute and after judicial findings that the stringent criteria necessary to permit rejection are met—to allow debtors to reject collective bargaining agreements after expiration, even if they may not reject normal contracts after expiration.

4. The NLRB adds one item to the Union's anomaly list. The NLRA's "status quo" obligation, it points out, applies not only after a collective bargaining agreement expires but also before the parties ever reach an agreement. NLRB Br. 5-6. The obligation is the same before and after, so, "logically," Section 1113 should apply equally in both contexts. NLRB Br. 28. But, under the bankruptcy court's interpretation, Section 1113 has effect only after an agreement expires, not before one is reached. This result, according to the NLRB, is incongruous. *Id.*

This purported anomaly reflects the same error that the Union and the NLRB make throughout: It assumes that the bankruptcy court's interpretation authorizes debtors to reject "statutory obligations." NLRB Br. 28. Not so. Section 1113 permits debtors to reject a "collective bargaining agreement." Thus, it is not the case that Section 1113 applies to statutory obligations at one time but not another. Rather, Section 1113 applies to "collective bargaining agreements" at all times. If the parties have reached no collective bargaining agreement, Section 1113 cannot apply; if they have, Section 1113 applies.

CONCLUSION

For the foregoing reasons, the Court should affirm the order of the bankruptcy court.

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Respectfully submitted,

By: s/ Roy T. Englert, Jr.

Kristopher M. Hansen
Kenneth Pasquale
Erez E. Gilad
STROOCK & STROOCK & LAVAN LLP
180 Maiden Lane
New York, NY 10038
Telephone: (212) 806-5400
Facsimile: (212) 806-6006

Roy T. Englert, Jr.
Joshua S. Bolian
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street N.W., Suite 411
Washington, DC 20006
Telephone: (202) 775-4500
Facsimile: (202) 775-4510
renglert@robbinsrussell.com

Matthew B. Lunn
Robert F. Poppiti, Jr.
Ian J. Bambrick
Ashley E. Markow
YOUNG CONAWAY STARGATT & TAYLOR, LLP
Rodney Square
1000 N. King Street
Wilmington, DE 19801
Telephone: (302) 571-6600
Facsimile: (302) 571-1253

Counsel for Debtors-Appellees

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Counsel certifies as follows:

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3. Pursuant to 3d Cir. LAR 28.3(d), I am a member of the bar of this Court.

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Dated: February 5, 2015

s/ Roy T. Englert, Jr.
Roy T. Englert, Jr.
Counsel for Debtors-Appellees

CERTIFICATE OF SERVICE

I hereby certify that, on February 5, 2015, I caused a true and correct copy of the foregoing Brief for Debtors-Appellees to be filed with the Court by CM/ECF. All parties that have appeared are Filing Users and are served electronically by the Notice of Docket Activity generated by CM/ECF.

Dated: February 5, 2015

s/ Roy T. Englert, Jr.
Roy T. Englert, Jr.
Counsel for Debtors-Appellees