Docket No. 19-1004

IN THE

Supreme Court of the United States

October Term, 2019

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

TUMBLING DICE, INC. ET AL., PETITIONER

v.

UNDER MY THUMB, INC., RESPONDENT.

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

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BRIEF FOR PETITIONER

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Counsel for Petitioner

Oral Argument Requested

QUESTIONS PRESENTED

I. May a debtor in possession assume an intellectual property license and continue performance of the contract over the licensor's objection when applicable non-bankruptcy law prohibits assignment of such license?

II. Is 11 U.S.C. § 1129(a)(10) satisfied where all but one classes of impaired creditors vote to accept the joint, multi-debtor plan, and the only non-accepting impaired creditor objects because of non-economic reasons?

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OPINIONS BELOW

The decisions and orders of the U.S. Bankruptcy Court and the Bankruptcy Appellate Panel for the Thirteenth Circuit. The decision for the U.S. Court of Appeals for the Thirteenth Circuit is also unreported. This opinion is set forth in the Decision of the U.S. Court of Appeals for the Thirteenth Circuit in Case No. 18-0805, dated March 4, 2019, and is incorporated in the record on appeal (hereinafter "R.").

STATEMENT OF JURISDICTION

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

STATEMENT OF CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions and evidentiary rules listed below are relevant to determine the present case.

U.S. Const. art. I, § 8, cl. 4;

11 U.S.C. §§ 102, 365, 1107, 1129; and

Fed. R. Bankr. P. 1015.

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BRIEF FOR PETITIONER

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Tumbling Dice Inc., appellant in Docket No. 18-0805 before the U.S. Court of Appeals for the Thirteenth Circuit, respectfully submits this brief on the merits and asks this Court to reverse and remand the decision of the Thirteenth Court of Appeals.

STATEMENT OF FACTS

The Parties. This case involves a software designer's attempt to do in bankruptcy what it could not do in state or federal court—breach a contract. Under My Thumb is a software designer that specializes in customer loyalty and reservations programs for the hospitality industry. (R. at 4). Tumbling Dice, Inc. ("TDI") is a holding company that owns nine wholly-owned debtor-subsidiaries (collectively, the "Debtors"). (R. at 3). Eight of the Debtors operate a casino and resort, while the ninth, Tumbling Dice Development, LLC ("Development") acts solely as the licensee under a non-exclusive software license agreement with Under My Thumb. (R. at 3).

The Agreement. In 2008, Development contracted with Under My Thumb to create a software system to modernize Club Satisfaction, the Debtors' casino loyalty program. (R. at 4). Pursuant to an unsecured promissory note, Development agreed to reimburse $7 million of Under My Thumb's costs to create the Club Satisfaction software (the "Software"). (R. at 4). The two parties entered into a non-exclusive license agreement (the "Agreement") which gave Development and its affiliates permission to use Under My Thumb's copyrighted and patented Software. (R. at 5). The Agreement also allowed the Debtors to assign or sublicense their rights to others, with Under My Thumb's consent. (R. at 5). In exchange, Development would pay a monthly fee based on member's spending activity. (R. at 5). The Software was hugely successful and became an essential part of the Debtors' business model. (R. at 5). As membership tripled and spending activity increased, Under My Thumb received increased monthly payments. (R. at 5). The success even enabled Under My Thumb to license similar versions to third parties. (R. at 5). The Debtors remained current on the note and the Agreement until filing for bankruptcy. (R. at 6).

The Bankruptcy Filing. In 2011, Start Me Up, Inc., a hedge fund, acquired TDI's stock via a leveraged buy-out under which TDI and the Debtors, excluding Development, granted first

priority liens on their assets to a syndicated group of lenders (the "Lenders") in exchange for a $3 billion loan.[1] (R. at 6). In January 2016, with $2.8 billion owed to the Lenders and $120 million owed to unsecured creditors, the Debtors commenced these chapter 11 cases with the primary goal of negotiating with the Lenders to restructure or refinance the debt. (R. at 6).

The Plan. After lengthy negotiations, including non-binding mediation, the Debtors, the Lenders, the unsecured creditors' committee, and certain other stakeholders reached a deal. (R. at 6–7). Under the deal, Start Me Up would fund a pro rata distribution of $66 million (55%) to all unsecured creditors. (R. at 7). Part of the money would be invested by Sympathy for the Devil, LP ("SFD"), a private equity group. (R. at 8). In exchange, SFD and Start Me Up would receive the voting shares of reorganized TDI, but the overall corporate structure would remain unchanged. (R. at 6, 8). The deal was filed as one joint plan (the "Plan"). (R. at 7). Under the Plan, Development would assume the Agreement and continue the monthly payments to Under My Thumb. (R. at 7). Under My Thumb, Development's only creditor, did not vote to accept the Plan after learning that SFD invested in a competing software company. (R. at 7–8). Accordingly, Development had no accepting impaired class. (R. at 8). All other impaired classes voted to accept the Plan. (R. at 8).

The Subsequent Litigation. Under My Thumb objected on the grounds that Development's proposed assumption of the Agreement was impermissible under § 365(c)(1) and that the Plan was not confirmable under § 1129(a)(10). (R. at 8). The bankruptcy court concluded, and the Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed, that Development could assume the Agreement and that the plan was confirmable since all but one class voted to accept the Plan. (R. at 9). The Thirteenth Circuit reversed the lower courts' decisions. (R. at 9). This appeal followed.

[1] The buy-out was not challenged by any parties as a fraudulent transfer, and Development was not required to act as a borrower or guarantor under the credit facility.

SUMMARY OF THE ARGUMENT

The bankruptcy court and Bankruptcy Appellate Panel properly ruled that Development may assume the Agreement and that § 1129(a)(10) was satisfied since at least one impaired class in the joint plan accepted the plan. Under My Thumb is attempting to do in bankruptcy what it could not do before the Debtors' bankruptcy filing—cease performance under a contract.

Section 365(c)(1) precludes trustee, and not a debtor in possession, from assuming a non-exclusive license of intellectual property. The section's plain language and the different functions trustees and debtors in possession play in a chapter 11 proceeding preclude substituting the term debtor in possession for the term trustee in § 365(c)(1). Alternatively, even if this Court finds that the terms trustee and debtor in possession are interchangeable, a debtor in possession may assume an executory contract so long as it has no actual intent to assign the contract to a third party. Such a reading is compatible with the section's literal language, fosters successful reorganization and maximizes the value of the debtor's assets. Since Development is a debtor in possession—not a trustee—and has no intention of assigning the license, Development must be permitted to assume the license in accordance with § 365(c)(1).

Moreover, § 1129(a)(10) merely requires that at least one impaired class in a joint, multi-debtor plan accept the plan. The statute's plain language unambiguously requires acceptance from at least one impaired class of creditors *per plan*. Requiring acceptance by at least one impaired class per debtor is judicial legislating and contrary to the approach followed by the overwhelming majority of courts. Further, even under the per debtor approach followed by an insular minority of courts, the Debtors would be entitled to confirmation of the Plan.

For these reasons, this Court should reverse the Thirteenth Circuit's decision and remand with instructions to allow Development to assume the contract and confirm the Plan.

ARGUMENTS AND AUTHORITIES

The Thirteenth Circuit erred in reversing the bankruptcy court's and Bankruptcy Appellate Panel's decisions since (i) § 365(c)(1) does not preclude Development from assuming the Agreement without Under My Thumb's consent; and (ii) § 1129(a)(10) requires that at least one class of impaired creditors vote to approve the Plan. In this case, the Debtors are not a trustee and have no intent to assign Under My Thumb's contract to a third party. Instead, the Debtors simply ask that Under My Thumb continue to honor its existing contract. Further, since every Debtor besides Development had an impaired accepting class of creditors, the Plan as a whole had acceptance from at least one impaired class of creditors. Accordingly, the Plan complied with § 365(c)(1) and § 1129(a)(10), and the bankruptcy court and Bankruptcy Appellate Panel correctly decided that Under My Thumb could not block the Debtors' lawful reorganization efforts. For these reasons, this Court should reverse the Thirteenth Circuit's decision and remand with instructions to allow Development to assume the contract and confirm the Plan.

Decisions of bankruptcy courts are subject to *de novo* review for conclusions of law and to a clear error standard of review for findings of fact. *Texas v. Soileau (In re Soileau)*, 488 F.3d 302, 305 (5th Cir. 2007) (citation omitted). As both issues in this case involve erroneous conclusions of law, this Court should apply a de novo standard of review.

I. SECTION 365(C)(1) DOES NOT PRECLUDE A DEBTOR IN POSSESSION FROM ASSUMING ITS OWN NON-EXCLUSIVE INTELLECTUAL PROPERTY LICENSE.

The Thirteenth Circuit erroneously held that § 365(c)(1) precludes assumption of a non-exclusive license of intellectual property over the objection of the licensor. (R. at 9). Under § 365(c)(1), a "trustee may not assume or assign any executory contract" if "applicable law excuses a party, other than the debtor, to such contract . . . from accepting performance from or rendering

performance to an entity other than the debtor or the debtor in possession" without obtaining consent. 11 U.S.C. § 365(c)(1). The phrase "applicable law" refers to the applicable non-bankruptcy law which would prohibit assumption or assignment. *In re Commonwealth Mortg. Co.*, 149 B.R. 4 (Bankr. D. Mass. 1992). In regard to intellectual property, federal common law restricts the assignability of patent or copyright licenses. *See Gartner v. Nike, Inc.*, 279 F.3d 774, 779–81 (9th Cir. 2002) (restricting assignability of copyright license); *In re CFLC, Inc.*, 89 F.3d 673, 679–80 (9th Cir. 1996) (restricting assignability of patent license); *Unarco Indus. v. Kelley Co.*, 465 F.2d 1303, 1306 (7th Cir. 1972); *In re Trump Entm't Resorts, Inc.*, 526 B.R. 116, 123-25 (Bankr. D. Del. 2015). Thus, § 365(c)(1) combined with federal intellectual property law, prohibits a trustee from assigning an intellectual property license without the licensor's consent.

Courts disagree, however, on whether this provision prohibits a debtor in possession from assuming an intellectual property license without the licensor's consent. *See N.C.P. Mktg. Grp. Inc. v. BG Star Prods.*, 556 U.S. 1145, 1145 (2009) ("The division in the courts over the meaning of § 365(c)(1) is an important one to resolve for bankruptcy courts and for businesses that seek reorganization."). The "*Footstar* rule" correctly reads the section as applicable only to trustees, and not debtors in possession. *See In re Footstar, Inc.*, 323 B.R. 566, 569 (Bankr. S.D.N.Y. 2005). Another approach, known as the "actual test," construes the section to permit assumption when the debtor in possession does not intend to assign the license. *See Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997). Lastly, the "hypothetical test" holds that a debtor in possession may not assume an intellectual property license, even when the debtor has no intention of ever assigning the license. *See RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257, 265 (4th Cir. 2004); *In re Catapult Entm't, Inc.*, 165 F.3d 747, 751 (9th Cir. 1999); *In re W. Elec.*, 852 F.2d 79, 82–83 (3d Cir. 1988).

In adopting the hypothetical test, the Thirteenth Circuit inappropriately departed from the plain language of the statute to produce a result at odds with longstanding bankruptcy policies. The Thirteenth Circuit should have followed, and this Court should adopt, the *Footstar* rule since the plain language of the section restricts only a trustee's ability to assume or assign the license. Alternatively, this Court should adopt the actual test since it is consistent with the section's literal language and does not violate traditional rules of statutory interpretation. Regardless, the hypothetical test is inconsistent with the bankruptcy policies of fostering a successful reorganization and maximizing the value of the debtor's assets.

A. Section 365(c)(1) Allows Assumption by a Debtor in Possession.

Section 365(c)(1) does not prohibit a debtor in possession from assuming or assigning an intellectual property license. As the Thirteenth Circuit correctly observed, in statutory interpretation cases, the court should begin with the statutory language. *See United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989). In this case, the statute merely restricts a trustee's ability to assume or assign a license:

> (c) The *trustee* may not assume or assign any executory contract or unexpired lease of the debtor, . . . , if— (1)(A) applicable law excuses a party, *other than the debtor*, to such contract . . . from accepting performance or rendering performance to an entity *other than the debtor or debtor in possession* . . .; and (B) such party does not consent to such assumption or assignment.

11. U.S.C. § 365(c)(1) (emphasis added). Courts following both the hypothetical test and the actual test incorrectly substitute debtor in possession with trustee. *See In re Sunterra Corp.*, 361 F.3d at 267 (substituting debtor in possession for trustee and applying the hypothetical test); *Institut Pasteur*, 104 F.3d at 493 (substituting debtor in possession for trustee and applying the actual test). Instead, courts following the *Footstar* rule correctly read the section to apply only to trustees and not debtors in possession—achieving the benefits of, while simultaneously eliminating the

objections to, the actual test. *See In re Adelphia Comm'ns. Corp.*, 359 B.R. 65, 72 (Bankr. S.D.N.Y. 2007); *In re Aerobox Composite Structures, LLC*, 373 B.R. 135, 141 (Bankr. D.N.M. 2007); *Footstar*, 323 B.R. at 570; Saul Ehrenpeis, *Trademark Licenses: Even in a Hypothetical or Actual World, Footstar Got It Right*, 30-JUN Am. Bankr. Inst. J. 60, 63–64 (2011). In substituting debtor in possession for trustee, the Thirteenth Circuit distorted the plain language of the statute and ignored the different roles of debtors in possession and trustees in chapter 11 cases.[2]

1. The Plain Language of the Statute Precludes Substituting Debtor in Possession for Trustee.

The Thirteenth Circuit erroneously held that the terms trustee and debtor in possession are "essentially interchangeable." (R. at 10). Facially, the statute limits only *a trustee's* ability to assume or assign an intellectual property license. *See* 11 U.S.C. 365(c)(1); *Footstar* 323 B.R. at 570. Quite literally, § 365(c)(1) separates the debtor in possession out as a separate entity which, despite the section's limitation on a trustee's power, may assume or assign a contract. *See* 11 U.S.C. § 365(c)(1); Willian N. Eskridge, Jr., Philip P. Frickey, & Elizazbeth Garrett, Cases & Materials on Legislation: Statutes and the Creation of Public Policy 834 (3d. ed. 2001) (noting that where the legislature departs from consistent use of a term, the term was intended to have a different meaning). Nowhere in the Bankruptcy Code (the "Code") does it mandate that debtor in possession be substituted for the trustee. *See Footstar*, 323 B.R. at 571.

In substituting debtor in possession for trustee, the Thirteenth Circuit relied on § 1107(a) to hold that the two terms are interchangeable. (R. at 8–9). Section 1107, however, mandates no such substitution. Instead, § 1107 simply defines the "rights, powers, and duties" of a debtor in possession, and instructs that "[s]ubject to any limitations on a trustee . . . a debtor in possession

[2] Generally, the debtor in possession is assumed to have all the rights, powers, and duties of a trustee, and the terms are thus used interchangeably. *See* 11 U.S.C. 1107(a). In this case, however, the court is not dealing with a right, power, or duty.

shall have all the *rights*, . . . and *powers*, and shall perform all the functions and duties . . . of a trustee." 11 U.S.C. § 1107(a) (emphasis added). Section 1107 thus grants the debtor in possession all the rights, powers, and duties of a trustee, but does not state that the two are one in the same. Certainly, in many situations, the two will be "essentially interchangeable." *See*, *e.g.*, *In re Cybergenics Corp.*, 226 F.3d 237, 243 (3d Cir. 2000) (holding that for all practical purposes, § 544(b)'s avoidance power applies to both a debtor in possession and trustee). In other situations, however, substituting trustee and debtor in possession is inconsistent with the plain language of the statute.

Section 365(c)(1) is one such situation. Initially, it must be noted that the § 1107's title references only the "rights, powers, and duties" of a debtor in possession. *See* 11 U.S.C. § 1107. Moreover, the section's text ascribes only the rights, powers, and duties of a trustee to a debtor in possession. *See id.* Notably, § 365(c)(1) describes a limitation on a trustee rather than a right, power, or duty. Courts have occasionally ascribed a limitation to a debtor in possession based on § 1107's prefatory clause: "subject to any limitations on a trustee." *Footstar*, 323 B.R. at 572–73 (citing numerous decisions where courts applied limitations to debtors in possession). Courts have only done so, however, where the limitation "applies equally to debtors in possession as a matter of simple logic and common sense." *Id.* Thus, "there is no basis to distinguish between a trustee and a debtor in possession with respect to the statutory limitation." *Id.* Such factors do not apply in regard to whether § 365(c)(1)'s limitation as applied to the debtor in possession requires substitution of debtor in possession for trustee. *See id.*

Additionally, the limitation's literal language precludes substitution of debtor in possession for trustee. Section 365(c)(1) allows a licensor to refuse to render performance to an entity "*other than* the debtor or the debtor in possession." 11 U.S.C. § 365(c)(1) (emphasis added). A trustee is

necessarily an "entity other than the debtor or debtor in possession." *Id.*; *Footstar*, 323 B.R. at 573. Applying the limitation to a debtor in possession, however, would read: "the [debtor in possession] may not assume or assign . . . any contract if . . . applicable law excuses a party, other than the debtor, to such contract, from accepting performance or rendering performance to an entity *other than the debtor or debtor in possession*." 11 U.S.C. § 365(c)(1) (emphasis added). Such an interpretation renders the section an oxymoron. *Footstar*, 323 B.R. at 573. Instead, Congress explicitly referenced both a trustee and a debtor in possession in the same section in a way that precludes substituting debtor in possession from trustee. Congress knows how to differentiate between the two, as well as how to use them interchangeably. *Compare* 11 U.S.C. § 365(c)(1) (using debtor in possession and trustee in the same section), *with id.* § 544(b) (mentioning only trustee); *see generally* Antonin Scalia & Bryan A. Garner, Reading Law 170 (2012) (stating that a word or phrase is presumed to have the same interpretation throughout a statute, and any material variations in terms suggest material variations in meaning). This Court must presume that in § 365(c)(1), Congress said what it means and means what it said. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992).

Further, substituting debtor in possession in § 365(c)(1) would require substituting debtor in possession for trustee in other parts of § 365. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 567–69 (1995) (discussing the presumption of consistent usage). Such an interpretation would produce absurd results within § 365(b)(1)(C). Under § 365(b)(1)(C), a trustee must "provide adequate assurance of future performance under such contract or lease." 11 U.S.C. § 365(b)(1)(C). This requirement makes sense when the licensor is dealing with a trustee, with whom they have no prior course of dealings. *See* Thomas M. Mackey, *Post-Footstar Balancing: Constructions of § 365(c)(1) & Beyond*, 84 Am. Bankr. L.J. 405, 425–26 (2010). Adequate assurance of future

performance under the contract is unnecessary, however, where a debtor in possession assumes, without intent to assign, an executory contract. *See id.* In this case, the Debtors did not default on the R&D Note until just shortly before commencing the chapter cases. (R. at 6). In fact, Under My Thumb received higher than expected payments, Club Satisfaction became an essential part of the Debtor's business model, and the Debtors intend to continue the relationship after reorganization. (R. at 5). Requiring the Debtors to provide adequate assurance of future performance before assuming the license would be an unnecessary hurdle for reorganization.

2. The Different Roles Debtors in Possession and Trustees Play in Bankruptcy Preclude Substituting Debtor in Possession for Trustee.

A debtor in possession and trustee are not interchangeable for purposes of § 365(c)(1) since the debtor in possession and trustee play markedly different roles in a chapter 11 case. Under the Code, a debtor in possession refers to a debtor in a case for which no trustee has been assigned. 11 U.S.C. § 1101(1). The debtor remains in possession of the property of the estate and continues to operate its business as usual. *In re Adelphia Commc'ns. Corp.*, 336 B.R. at 655. Since the debtor in possession is considered the most appropriate entity to operate the business due to its knowledge of the business, there is a presumption that the debtor be allowed to remain in possession absent a showing of need for a trustee. *In re China Fishery Grp.*, No. 16-11895 (JLG), 2016 WL 6875903, at *15 (Bankr. S.D.N.Y. 2016); *In re Europark Ind.*, 424 B.R. 621, 627 (Bankr. E.D.N.Y. 2010).

A trustee, on the other hand, is a court appointed entity granted responsibility for the operation of the business and formulation of the plan. 11 U.S.C. §§ 1104, 1106. Once a trustee is appointed, the trustee "succeeds to all the rights of the debtor, which is thereby displaced from its property interests." *Footstar*, 323 B.R. at 574. In a sense, appointing a trustee is a *de facto* assignment, and it thus makes sense to limit a trustee's ability to assume or assign a contract. *Id.* The prepetition debtor and debtor in possession, however, are one and the same. *N.L.R.B. v.*

Bildisco & Bildisco, 465 U.S. 513, 528 (1984). Thus, when the debtor remains in possession, the need to protect the licensor from unlawful assignment of the license is not implicated. *See id.*

Section 365(c)(1)'s legislative history is consistent with an interpretation which allows a debtor in possession to assume an intellectual property license. Legislative history may be examined when either the statutory language is unclear (meaning open to more than one interpretation), or when a literal reading of the statute produces an absurd result at odds with congressional intent. *Crooks v. Harrelson*, 282 U.S. 55, 59-60 (1930); *Mitchell v. United States (In re Mitchell)*, 977 F.2d 1318, 1320 (9th Cir. 1992). In this case, though the literal language of the statute is unambiguous, the section's legislative history is relevant in dispelling the judicial theory that debtor in possession may be substituted for trustee. It is therefore appropriate to examine the section's legislative history to ensure that the section is construed according to Congress's—and not the court's—will.

Congress demonstrated its intent to limit only a trustee's ability to assume or assign in a committee report accompanying the 1980 amendments, which contained the original draft of section 365(c) that would later be adopted in the 1984 amendments.[3] *See RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257, 270 (4th Cir. 2004). The committee report clarified that Congress did not intend to preclude assumption by a debtor in possession:

> 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.

3 Initially, the section used "the trustee" in place of "an entity other than the debtor or the debtor in possession." H.R. Rep. No. 1195, 96th Cong., 2d Sess. 12 (1980). The substitution was proposed in *An Act to Correct Technical Errors, Clarify and Make Minor Substantive Changes to Public Law 95-5985. Id.*

H.R. Rep. No. 96-1195, at 12; *See, e.g.*, *Summit Inv. & Dev. Corp. v. Leroux,* 69 F.3d 608, 613 (1st Cir. 1995). Had Congress intended to preclude assumption by a debtor in possession, they would not have made such an amendment. Instead, Congress chose to preserve the parties' benefit of their bargain while encouraging successful reorganization by limiting only a trustee's ability to assume or assign. Development, as debtor in possession, is not a stranger to Under My Thumb's license. On the contrary, Development is the debtor and the party which Under My Thumb contracted with. (R. at 4). Under My Thumb must not be allowed to now avoid performance through the guise of bankruptcy law, while at the same time encouraging a result that would hinder the Debtors' successful reorganization efforts and devalue the bankruptcy estate.

B. A Chapter 11 Debtor May Assume an Executory Contract Provided it Has No Actual Intent to Assign the License to a Third Party.

Even if this Court finds that trustee and debtor in possession are interchangeable for purposes of § 365(c)(1), this Court should follow the actual test and hold that a chapter 11 debtor may assume an executory contract so long as it has no actual intent to assign the contract to a third party. Courts following either the actual or hypothetical tests focus on the "assume or assign" language in § 365(c)(1). Under the actual test, adopted by the First and Fifth Circuits and the majority of bankruptcy courts, courts conduct a case by case inquiry to determine whether a debtor in possession actually intends to assume and then assign the license, or simply assume the license. *See Institut Pasteur v. Cambridge Biotech Corp*., 104 F.3d 489, 493 (1st Cir. 1997); *Summit Inv. & Dev. Corp.*, 69 F.3d at 608; *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 bankruptcy court decisions favor the actual test). Alternatively, courts following the hypothetical test hold that a debtor may not assume an intellectual property license without the consent of the debtor, even if the debtor has no intention of ever assigning the license. *See In re Sunterra*, 361 F.3d at 265; *In re*

Catapult Entm't, Inc., 165 F.3d at 749; *Matter of W. Elecs., Inc.*, 852 F.2d 79 at 82. If there exists some "hypothetical" third party to whom the license could hypothetically be assigned, under some hypothetical applicable law, then both the assumption and assignment is unlawful in all circumstances. *In re Catapult Entm't*, 165 F.3d at 754–55. This Court should reverse the Thirteenth Circuit's decision following the hypothetical test since the actual test is more consistent with traditional methods of statutory interpretation and since the hypothetical test is contrary to general bankruptcy policies of fostering a successful reorganization and maximizing the value of the debtor's assets.

1. The Actual Test is Compatible with Section 365(c)(1)' Literal Language.

A plain reading of § 365(c)(1) requires that this Court allow a debtor in possession to assume a license when the debtor in possession has no intent to later assign the license. Traditional methods of statutory construction require this Court adhere to the plain language of the statute so long as a straightforward reading is consistent with the legislative history and does not produce absurd results. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004); *In re Sunterra*, 361 F.3d at 269; *In re Sivlus*, 329 B.R. 193, 214 (Bankr. E.D. Va. 2005) ("The plain meaning of legislation should be conclusive, except in rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.") (quoting *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989)). In reading § 365(c)(1), this Court must follow the rule against surplusage and reject an interpretation which renders parts of the section superfluous. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (the court has a duty to "give effect, if possible, to every clause and word in a statute"). In this case, statutory construction also requires that the applicable non-bankruptcy anti-assignment laws and the applicable bankruptcy provisions "be read harmoniously to achieve a consistent result, especially when the two statutes share a common goal." *In re Hartec*

Enters., 117 B.R. 865, 871 n.9 (Bankr. W.D. Tex. 1990), *vacated on other grounds*, *United States v. Hartec Enters., Inc.*, 130 B.R. 929 (W.D. Tex. 1991).

The plain text of the statute requires the actual test based on the section's use of "applicable law." In interpreting the proper definition of "applicable law," courts have looked to § 365(e)(2), which contains similar provisions to § 365(c)(1). *See Bonneville Power Admin. v. Mirant Corp (In re Mirant Corp.)*, 440 F.3d 238 (5th Cir. 2006). In *In re Mirant Corp.*, the Fifth Circuit held that the "plain text" of § 365(e)(2) mandates the actual test since the prohibition on assignment is "tethered . . . to 'applicable' law," which is determined by the unique "set of circumstances" of each case. *Id.* at 249–50. The applicability of a particular law is determined by "the record at hand," and not based on a "hypothetical" set of circumstances. *Id.* In regard to assumption and assignment of intellectual property licenses, the "applicable law" refers to the unassignability doctrine in intellectual property law and was purposefully designed to be interpreted narrowly. *In re Grove Rick Realty Corp.*, 200 B.R. 502 (Bankr. E.D.N.Y. 1996). There is no "applicable law" prohibiting assumption of a license. Thus, where a trustee never intends to assign the license, the "applicable law" which may bar assignment is never triggered. *Summit Inv.*, 69 F.3d at 613. In this case, under the Plan, Under My Thumb would never be required to render performance to anyone other than the entity with whom they specifically contracted.

The hypothetical test also violates the rule against surplusage in that it makes "or assign" inoperative. Assumption is a necessary prerequisite to assignment. *See* 11 U.S.C. § 356(f)(1) (requiring an executory contract must be assumed before it may be assigned). If Congress intended to preclude both assumption and assignment, they need only have included that a "trustee may not assume," since assignment is not possible without assumption. *See In re Cardinal Indus.*, 116 B.R. 964, 977 (Bankr. S.D. Ohio 1990). The reading required by the hypothetical test thus renders "or

assign" surplusage. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("[C]ourts should be reluctant to treat statutory terms as surplusage in any setting."). Moreover, such a reading renders all of § 365(f)(1), which allows a trustee to assign a contract, inoperative and superfluous. *Breeden v. Catron (In re Catron)*, 158 B.R. 629, 636 (E.D. Va. 1993), aff'd, 25 F.3d 1038 (4th Cir. 1994). Instead, the actual test's case by case approach gives effect to every word in the section by requiring a court to consider whether a trustee will assume or assign a license.

Courts following the hypothetical test believe the plain language of § 365(c)(1) is unambiguous, and thus decline to look at the section's legislative history. *See, e.g.*, *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 n.3 (1989). If § 365(c) were completely unambiguous, however, there would have been no room for the birth of the three distinct tests present today. *See* Michelle Morgan Harner, *et al.*, *Debtors Beware: The Expanding Universe of Non-Assumable/Non-Assignable Contracts in Bankruptcy*, 13 AM. BANKR. INST. L. REV. 187, 239 (Spring 2005). Nothing in the section's legislative history mandates the hypothetical test. Instead, as previously shown, the legislative history indicates that Congress did not intend to limit a debtor in possession's ability to assume an intellectual property license. *See, e.g.*, *Summit Inv.,* 69 F.3d at 613. Accordingly, the actual test is consistent with the plain language of the statute and does not produce a result at odds with Congress's intent.

2. The Hypothetical Test is Inconsistent with the Policies of Fostering a Successful Reorganization and Maximizing the Value of the Debtor's Assets.

In adopting the hypothetical test, the Thirteenth Circuit departed from longstanding and fundamental bankruptcy policies. In a chapter 11 proceeding, the Code's two main policies are fostering a successful reorganization and maximizing the value of the debtor's assets. *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. Lasalle St. P'ship*, 526 U.S. 434, 453 (1999). When debtors are

kept out of bankruptcy via chapter 11, the economy grows and people keep their jobs. *N.L.R.B.*, 465 U.S. at 538 ("[T]he fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources."). Section 365's power to assign valuable leases and contracts allows debtors to accurately recognize the value of their estate and successfully reorganize. *See In re Lil' Things, Inc.*, 220 B.R. 583, 591 (Bankr. N.D. Tex. 1998) (noting that the "the basic rationale behind § 365" is to grant debtors "the ability to assign their valuable leases and contracts, while offering some protection to the third parties with which they have contracted"). In many cases, the debtor's contracts and leases are the most valuable assets of the bankruptcy estate. Interpreting § 365(c)(1) to prohibit a debtor in possession from assuming or assigning a contract or lease will often mean paralysis for the debtor in possession. A licensor may simply object to assumption, avoid performance of the contract, and the estate will effectively lose all the rights to which they contracted for. *See* Warren E. Agin, *The Essential Concept, the First Truth, and the Fourth Circuit's Interpretation of Section 365(c)(1) in* In re Sunterra Corporation, 2005 ANN. SURV. OF BANKR. LAW 14 (2005).

The present case exemplifies the hypothetical test's harsh and unreasonable results. Development and Under My Thumb entered into the Agreement in an arm's length transaction. The Agreement turned out to be successful and profitable for both parties and is now an integral part Development's business operation. (R. at 5). The Thirteenth Circuit's decision to deny Development its right to assume the license means the Debtors lose one of their most profitable assets and grants Under My Thumb a right contemplated nowhere in the Code—the right to renege on its contract. Thus, the Debtors are placed in a worse position than before filing for protection under bankruptcy law, which was designed to provide relief and allow successful reorganization, not to penalize troubled debtors. If this Court were to affirm the Thirteenth Circuit's decision and

follow the hypothetical test, the decision would set a devastating precedent and compromise the very goals the Code was enacted to foster. Accordingly, this Court should reverse the Thirteenth Circuit's decision and hold that a debtor in possession may assume an intellectual property license.

II. SECTION 1129(A)(10) REQUIRES ACCEPTANCE FROM AT LEAST ONE IMPAIRED CLASS OF CLAIMS UNDER A JOINT, MULTI-DEBTOR PLAN.

The Thirteenth Circuit erroneously held that § 1129(a)(10) requires acceptance from one impaired class for each debtor under a joint, multi-debtor plan. (R. at 15). Such an interpretation is contrary to the statute, which, as both the bankruptcy court and the Bankruptcy Appellate Panel correctly held, merely requires acceptance from one impaired class per plan. *See* 11 U.S.C. § 1129(a)(10). An impaired class of creditors is a group of creditors with substantially similar claims whose legal, equitable, or contractual rights will be altered under the proposed plan. *Id.* § 1122(a). Generally, plan confirmation requires acceptance from each class of impaired creditors. *Id.* § 1129(a)(8). In some circumstances, however, a plan may be confirmed over the objections of an impaired creditor, so long as the remaining requirements under 1129(a) are met and the plan satisfies 1129(b). *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 641–42 (2012). One such requirement is § 1129(a)(10), which requires that at least one impaired class accepts the plan. 11 U.S.C. § 1129(a)(10); *see U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 963 (2018).

Under the "per plan" approach, once an impaired class accepts the plan, § 1129(a)(10) is satisfied for all debtors being reorganized under a plan, whether it be one plan for one debtor or one jointly administered plan for multiple debtors. *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (In re Transwest Resort Props., Inc.)*, 881 F.3d 724 (9th Cir. 2018); *J.P. Morgan Chase Bank, N.A. v. Charter Commc'ns Operating, LLC (In re Charter Commc'ns)*, 419 B.R. 221, 264–66 (Bankr. S.D.N.Y. 2009); *In re SGPA, Inc.*, No. 1-01-02609, 2001 Bankr.

LEXIS 2291, at *19 (Bankr. M.D. Pa. Sept. 28, 2001). The "per debtor" approach, created by one district court and followed by almost no other courts, reads the statute to require acceptance from an impaired class of creditors of each debtor. *In re Tribune Co.*, 464 B.R. 126, 184 (Bankr. D. Del. 2011). This Court should follow the per plan approach since it is mandated by the plain language of the statute, followed by the overwhelming majority of courts to rule on the issue, and consistent with well-established bankruptcy principles.

A. Traditional Methods of Statutory Interpretation Require the Per Plan Approach.

Traditional methods of statutory interpretation require the per plan approach. Section 1129(a)(10) simply requires approval from one impaired class for any debtor involved:

> (a) The court shall confirm a plan only if all of the following requirements are met: . . . (10) If a class of claims is impaired under the plan, *at least one class of claims that is impaired under the plan has accepted the plan*, determined without including any acceptance of the plan by any insider.

11 U.S.C. § 1129(a)(10); *In re Transwest*, 881 F.3d at 729. All statutory interpretation begins with the language of the statute, and when it is unambiguous, ends there as well. *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989). In this case, § 1129(a)(10)'s language is unambiguous, and the statute must be enforced "according to its terms."[4] *See King v. Burwell*, 135 S. Ct. 2480, 2506 (2015) (Scalia, J., dissenting). Further, interpretations that further rather than obstruct a statute's purpose should be favored over interpretations which would frustrate Congress' purpose. Antonin Scalia & Bryan A. Garner, Reading Law 63 (2012). Courts should not attempt to manipulate the section's plain language and read in terms which are not there. In adopting the per debtor approach, the Thirteenth Circuit misreads the statute to require that, in jointly administered cases, each debtor involved must obtain approval from at least one impaired creditor. Such an

4 The section's unambiguousness is evidenced by the lack of circuit split on its interpretation. *See infra* Part II.B.

approach is at odds with the plain language and statutory context of § 1129(a)(10), and a unique and inappropriate form of judicial legislating.

1. Section 1129(a)(10)'s Plain Language and Statutory Purpose Require the Per Plan Approach.

A correct reading of § 1129(a)(10)'s plain text and statutory purpose requires that a plan receives approval from at least one impaired creditor per plan. In *In re Transwest*, the Ninth Circuit held that the plain language of § 1129(a)(10) mandated the per plan approach. 881 F.3d at 725. Since the statute only references "plan" in the singular and does not differentiate between single-debtor and multi-debtor plans, "once a single impaired class accepts a plan, § 1129(a)(10) is satisfied as to the entire plan." *Id.* at 729. Changing the word "plan" to "plans," pursuant to § 102(7),[5] does not change the interpretation. *Id.* at 730. Section 102(7) simply amends the statute to read: "at least one class of claims is impaired under the plans has accepted the plans." *Id.* Thus, the section's plain language mandates the per plan approach.

Moreover, though nothing beyond the plain language need be considered, the per plan approach's straightforward interpretation of § 1129(a)(10) is consistent with the section's statutory purpose. Section 1129(a)(10) is merely a technical requirement for confirmation and not a substantive protection for impaired creditors. *See In re Transwest*, 881 F.3d at 729; *In re Bataa/Kierland, LLC*, 476 B.R. 558, 578 (Bankr. D. Ariz. 2012) (noting that § 1129(a)(10) is a "purely technical requirement that neither protects nor confers any substantive rights"); *In re Rhead*, 179 B.R. 169, 177 (Bankr. D. Ariz. 1995); *In re 7th St. & Beardsley P'ship*, 181 B.R. 426, 431 (Bankr. D. Ariz. 1994). Though § 1129(a)(10) certainly protects creditors in the sense that debtors may not cramdown a chapter 11 plan that is entirely without support, creditors should not

5 Section 102(7), titled "Rules of construction," says that "the singular includes the plural." 11 U.S.C. § 102(7). The full text of the section is reproduced in Appendix A.

look to § 1129(a)(10) as a source for protection or substantive right. *In re Rhead*, 179 B.R. at 177 ("All authorities agree that the intent and purpose of § 1129(a)(10) was merely to require 'some indicia of creditor support for the debtor's schemes.'"). There are, of course, other requirements under § 1129 and throughout the Code which are meant to protect creditors' rights while ensuring successful debtor reorganization. For example, a creditor claiming they are being mistreated may argue that the plan was not proposed in good faith or by unlawful means. 11 U.S.C. § 1129(a)(3). Or, a creditor could argue that the plan failed the creditors' best interests test. *Id.* § 1129(a)(7). Alternatively, during a cramdown scenario, a creditor could object and claim that the plan is neither fair nor equitable. *Id.* § 1129(b). Each of these sections grant creditors adequate substantive protections while balancing the Code's overall goal of enabling successful business reorganization.[6]

2. The Per Debtor Approach Equates to Judicial Legislating.

The per debtor approach adopted by the Thirteenth Circuit and created by the court in *In re Tribune* is judicial legislating that creates absurd results inconsistent with the Code's policies. In *In re Tribune*, a Delaware district judge drastically departed from precedent and determined that, absent substantive consolidation, "each joint plan actually consists of a separate plan for each Debtor." 464 B.R. at 182. In an apparent disdain for such judicial legislating, however, the Delaware district court and the Thirteenth Circuit ignored the plain language to effectively create a new statute. Notably, the statute does not distinguish between a joint, multi-debtor plan and a single-debtor plan—it merely states "the plan." 11 U.S.C. § 1129(a)(10). As the Ninth Circuit noted in *Transwest*, "Congress could have required plan approval from an impaired class for each debtor involved in a plan, but it did not do so." 881 F.3d at 729. The statute does not read "at least

[6] Had Under My Thumb truly thought their rights as a creditor were being infringed, perhaps they would have plead under one of these sections and not attempted to win on a "technicality" via § 1129(a)(10).

one class of claims *of each debtor* that is impaired," as the Thirteenth Circuit would read it to say. (R. at 27). Congress knows how to differentiate between per debtor and per plan. *See* 11 U.S.C. § 1129(a)(11) (distinguishing between a per debtor requirement and per plan requirement). In this case, courts should avoid modifying the plain language and assume Congress "says in a statute what it means and means in a statute what it says there." *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000).

Moreover, the Delaware district court and Thirteenth Circuit should not have considered substantive consolidation—a judicially created, disfavored equitable doctrine—in analyzing § 1129(a)(10)'s plain language. *See In re Rhead*, 179 B.R. at 177. Unlike substantive consolidation, joint administration is a statutorily created way for businesses and their affiliates to consolidate their cases in a single docket. Fed. R. Bankr. P. 1015(b). Also, whereas substantive consolidation effectively merges the debtors into a single entity, joint administration keeps the estates of each entity separate. *Id.* Importantly, joint administration in no way abridges the Code's requirements and does not alter creditors' rights. *See, e.g.*, *Bunker v. Peyton (In re Bunker)*, 312 F.3d 145, 153 (4th Cir. 2002) ("Joint administration does not affect the substantive rights of either the debtor or his creditors.").

Joint administration is a tool of administrative convenience, designed to expedite cases and make the bankruptcy process less costly. Fed. R. Bankr. P. 1015. This, in turn, allows for more effective restructuring and repayment to creditors. Importantly, and central to the very purpose of joint administration, courts treat a joint plan as a single "plan," and not as individual, separate plans. *See, e.g.*, *In re W.R. Grace & Co.*, 475 B.R. 34, 143 (D. Del. 2012) (confirming one joint plan and holding the plan satisfied § 1129(a)(7)'s best interest of creditors test). Requiring individual acceptance from each impaired class on a per debtor basis would encourage more

substantive consolidation and make joint administration exceedingly more difficult—effectively destroying the benefits and purpose of joint administration.

The per plan approach does not allow for "de facto substantive consolidation" that would allow for joint administration to bypass the requirements for substantive consolidation. *See Reider v. Fed. Deposit Ins. Corp. (In re Reider)*, 31 F.3d 1102, 1109 (11th Cir. 1994). Instead, the per plan approach ensures the differences between joint administration and substantive consolidation are maintained, while adhering to entity separateness principles and respecting the statutory purpose behind joint administration. Most importantly, the per plan approach does not abrogate a creditor's rights in any way—but merely continues to treat joint plans in accordance with long established Bankruptcy principles. If a creditor believes that a joint plan "improperly intermingles different estates" in a way that infringes upon their rights, they may object, and a court may determine whether substantive consolidation was appropriate. *In re Tribune*, 881 F.3d at 731 (Friedland, J., concurring); *W. Real Estate Equities, LLC v. Vill. at Camp Bowie I, LP (In re Vill. At Camp Bowie I, LP)*, 710 F.3d 239, 247–48 (5th Cir. 2013).

The per debtor approach, however, essentially requires courts ignore the plain language of the statute and encourages judicial activism. The Supreme Court has stated that Congress' intent in permitting reorganization is to allow businesses to "continue to provide jobs, to satisfy creditors' claims, and to produce a return for its owners." *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203 (1983). The ultimate end goal and purpose of entering into a chapter 11 reorganization therefore rests on the ability to successfully confirm a workable plan that creates the opportunity to preserve the debtor as a going concern. *See id.* Under the per-debtor approach, courts would essentially determine that Congress' intent in establishing this provision was to give a singular debtor the opportunity to eviscerate all of the substantial work done by the parties and force them

to bend to the will of any dissenting voice. Not only does this interpretation completely derail the reorganization process, but it creates too much power for singular debtors over the process.

The recently passed Small Business Reorganization Act of 2019 confirms that Congress intended § 1129(a)(10) be implemented on a per plan basis. In the Act, Congress prioritized increasing the efficiency and practicality of the chapter 11 process. H.R. 3311, 116th Cong., § 54 (2019) (known colloquially as the "Small Business Reorganization Act of 2019" or "SBRA"). The new subchapter 5 eliminates many of the requirements in a typical chapter 11 reorganization to ease the process for small businesses to confirm a workable plan. Among the most important inclusions in the new process for small businesses is § 1191(b), which permits a reorganization to completely ignore the requirements of § 1129(a)(10) so long as the plan being proposed passes the fair and equitable standard. 11 U.S.C. § 1191(b) This new legislation provides context to support the per-plan rationale: if Congress is willing to ignore the § 1129(a)(10) requirements altogether, certainly the requirement to have an impaired class vote in favor of the plan does not need to be forced on a per-debtor basis.

B. There is No "Circuit Split" Over § 1129(a)(10)'s Requirements.

In following the per debtor approach, the Thirteenth Circuit departed from well-established precedent and followed a minority approach, created and promulgated by one insular district court. Virtually every court to address the issue has adopted the per plan approach. *See In re Transwest*, 881 F.3d at 729; *In re Transwest Resort Props., Inc.*, 554 B.R. 894, 899–901 (D. Ariz. 2016); *In re Charter Commc'ns*, 419 B.R. at 264–66; *In re Enron Corp.*, No. 01-16034 (AJG), 2004 Bankr. LEXIS 2549, at *234–35 (Bankr. S.D.N.Y. July 15, 2004); *In re SGPA, Inc.*, 2001 Bankr. LEXIS 2291, at *19. Conversely, only one court in two separate cases has followed the per debtor approach. *See In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293, 302–03 (Bankr. D. Del.

2011); *In re Tribune Co.*, 464 B.R. at 180–83. However, even applying the court's reasoning in *Tribune* and the version of the per debtor approach adopted in other cases following *Tribune*, Development satisfied § 1129(a)(10)'s requirements.

1. Virtually All Courts to Address the Issue Have Decided in Favor of the Per Plan Approach.

Virtually every court to address the issue has followed the per plan approach, with the exception of one Delaware district court. Prior to the Thirteenth Circuit's ruling in this matter, the first and only circuit court to address the issue ruled in favor of the per plan approach. *In re Transwest*, 881 F.3d at 729. Section 1129(a)(10) was added to the Code as part of the Bankruptcy Reform Act of 1978. Pub. L. No. 95-598, 92 Stat. 2549 (1978). The original language stated that "at least one [non-insider] class of claims has accepted the plan." *Id.* Congress added the word "impaired" to the statute in 1984 in response to confusion about whether acceptance by an unimpaired class satisfied § 1129(a)(10). *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984); *In re Bloomingdale Partners*, 170 B.R. 984, 994 n.15 (Bankr. N.D. Ill. 1994) (citing a 1983 Senate report which stated, "Paragraph (10) makes clear the intent of section 1129(a)(10) that one 'real' class of creditors must vote for the plan of reorganization").

Since the addition of "impaired," there has been little controversy surrounding § 1129(a)(10)'s requirements, and the issue of whether it requires acceptance on a per plan or per debtor basis was addressed by only a few district courts—all adopting the per plan approach. *See In re Dynegy Holdings, LLC*, No. 11-38111 (CGM), 2013 WL 1874640, at *12 (Bankr. S.D.N.Y. May 2, 2013) (adopting the per plan approach in multiple jointly administered multi-debtor cases); *In re Station Casinos, Inc.*, No. 3:09BK52477, 2010 Bankr. LEXIS 5380, at *81–83 (Bankr. D. Nev. Aug. 20, 2010) ("[T]he plain language and inherent fundamental policy behind § 1129(a)(10)

supports the view that the affirmative vote of one impaired class under the joint plan of multiple debtors is sufficient to satisfy section 1129(a)(10)."); *In re Charter Commc'ns*, 419 B.R. at 229-30 ("[I]t is appropriate to test compliance with section 1129(a)(10) on a per-plan basis, not . . . on a per-debtor basis."); *In re SGPA Inc.*, 2001 Bankr. LEXIS 2291, at *12-22 (in a joint plan of reorganization, it is not necessary to have an impaired class of creditors of each Debtor vote to accept the Plan."). The absence of case law exemplifies the unambiguousness of the statute.

In 2011, however, one Delaware district judge departed from this precedence and attempted to create a circuit split. *See In re Tribune Co.*, 464 B.R. at 180–83. In doing so, Judge Carey endeavored to distinguish the three cases adopting the per plan approach and held that "none of the three courts considered the § 1129(a)(10) issue central to its decision in the matter before it." *Id.* at 182. Ironically, the few decisions to follow *Tribune* and adopt the per debtor approach did so despite § 1129(a)(10) not being central to the issues before them, and all come from the same district court. *See In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. at 302–03 (a chapter 11 case involving one single-asset debtor with no unsecured creditors, no proposed plan, and that was dismissed as "bad faith" filing); *In re Woodbridge Grp. of Cos., LLC*, 592 B.R. 761, 778 (Bankr. D. Del. 2018) (a substantive consolidation case involving a Ponzi scheme, where Judge Carey confirmed a plan which was "accepted overwhelmingly by all but one of the impaired classes of creditors entitled to vote"). Thus, prior to the Thirteenth Circuit's decision, the per debtor approach had only been adopted in one case, and "followed" in one district.

2. Even Under the Per-Debtor Line of Cases, the Debtors are Entitled to Confirmation Under § 1129(a)(10).

Even under the reasoning used by the Delaware district court, however, the Debtors would be entitled to confirmation of the plan, and the Thirteenth Circuit should have affirmed the lower courts' rulings. *In re Tribune* involved a highly convoluted jointly administered case with multiple

competing proposed plans for 111 debtors. 464 B.R. at 181–82. The debtors were each distinct, individually managed and operated entities, and the plans were overwhelmingly unsupported by all impaired classes. *Id.* Under these pretenses, the court held that each debtor must individually satisfy § 1129(a)(10). *Id.*

In the present case, there is one single jointly administered plan for the nine debtors—which had unanimous support from the impaired creditor before Under My Thumb decided to object. (R. at 8). Moreover, unlike the plans in *Tribune*, the Plan in this case does not treat Under My Thumb differently than if the cases had been substantively consolidated, and Under My Thumb suffers no adverse consequences if § 1129(a)(10) is applied on a per plan basis. *See id.* Again, unlike in *Tribune*, the Debtors in this case are managed on an integrated basis, and Development was created for the sole purpose of licensing with Under My Thumb. *See In re Charter Commc'ns*, 419 B.R. at 266 (noting that the debtors were managed "on an integrated basis making it reasonable and administratively convenient to propose a joint plan"). In this case, neither the reasons nor concerns for applying the per debtor approach articulated by the *Tribune* court apply in the present case. Instead, it is quite possible that had the present case come before the same Delaware court that decided *Tribune*, the court would have held in favor of the per plan approach. Accordingly, even under the per debtor line of cases, the Debtors would be entitled to confirmation of the Plan under § 1129(a)(10).

Conclusion

Under My Thumb must not be allowed to hinder the Debtor's attempts to reorganize under the Code and repay their debts. Under My Thumb is simply being asked to honor its existing contract with Development. Section 365(c)(1) does not preclude a debtor in possession from assuming a non-exclusive license of intellectual property. Even if this Court finds that it is appropriate to substitute debtor in possession for trustee, a debtor in possession may assume a license provided it has no actual intent to assign the license. Additionally, § 1129(a)(10) is satisfied where at least one impaired class in a joint, multi-debtor plan accepts the plan.

The fundamental purpose of the Code is to maintain a thriving economy and allow businesses to keep their doors open. To do that, the Code is structured to foster successful reorganization and maximize the value of the debtor's assets. Allowing Under My Thumb to prevent assumption of one of the Debtor's most valuable contracts and block confirmation of the Plan over the approval of every other impaired class of creditors improperly places the rights of an unsecured creditor over the rights of debtors to reorganize. Accordingly, this Court should reverse the Thirteenth Circuit's erroneous holdings and reinstate the two bankruptcy court orders that Development could assume the Agreement and that the Debtors satisfied § 1129(a)(10) since all but one of the Debtors' impaired classes voted to accept the Plan.

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully prays that this Court reverse the decision of the Thirteenth Circuit.

Respectfully Submitted,

Team P12
COUNSEL FOR PETITIONER

APPENDIX A: Selected Sections from Title 11 of the U.S. Code.

§ 102. Rules of construction

In this title--

(7) the singular includes the plural;

§ 365. Executory contracts and unexpired leases

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

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

(d) [omitted]

(e) [omitted]

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

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

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and
(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

§ 1107. Rights, powers, and duties of debtor in possession

(a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in section 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

§ 1129. Confirmation of plan

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

(1) The plan complies with the applicable provisions of this title.
(2) The proponent of the plan complies with the applicable provisions of this title.
(3) The plan has been proposed in good faith and not by any means forbidden by law.
(4) [omitted]
(5) [omitted]
(6) [omitted]
(7) With respect to each impaired class of claims or interests--

(A) Each holder of a claim or interest of such class--
(i) has accepted the plan; or
(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date;
or
(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

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

(A) Such class has accepted the plan; or
(B) Such class is not impaired under the plan.

(9) [omitted]
(10) If a class is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.
(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.
(12) [omitted]
(13) [omitted]
(14) [omitted]
(15) [omitted]
(16) [omitted]

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

(2) [omitted]

§ 1191. Confirmation of plan

(b) **Exception.**--Notwithstanding section 510(a) of this title, if all of the applicable requirements of section 1129(a) of this title, other than paragraphs (8), (10), and (15) of that section, are met with respect to a plan, the court, on request of the debtor, shall confirm the plan notwithstanding the requirements of such paragraphs if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under and has not accepted, the plan.