Team 19-R

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QUESTIONS PRESENTED

1. May a debtor-in-possession assume an executory contract over the objection of the non-debtor party to such contract when non applicable non-bankruptcy law excuses the non-debtor party from accepting performance from or rendering performance to a party other than the debtor in possession?

2. In a case where a class of claims is proposed to be impaired under a joint, multi-debtor plan, does 11 U.S.C. § 1129(a)(10) require acceptance from at least one impaired class of claims of each debtor or, alternatively, acceptance from one impaired class of claims of any one debtor?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Thirteenth Circuit is unreported but appears on pages 2-32 of the Record.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 1, Section 8, Clause 8 of the United States Constitution states: "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;" U.S. Const. art. I, § 8, cl. 8.

11 U.S.C.A. § 102(7) states: "the singular includes the plural"

11 U.S.C.A. § 362(a) states: (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title. 11 U.S.C.A. § 362(a) (West, Westlaw Edge through P.L. 116-91).

11 U.S.C.A. 365(a) states: “Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C.A. § 365(a) (West, Westlaw Edge through P.L. 116-91).

11 U.S.C.A. 365(c)(1) states: “The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if--

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

(B) such party does not consent to such assumption or assignment….” 11 U.S.C.A. § 365.

11 U.S.C.A. 365(f)(1) states: “Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.” 11 U.S.C.A. § 365 (West).

11 U.S.C.A. § 502(a) states: "A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title [11 USCS §§ 701 et seq.], objects."

11 USC 541(a) states, in relevant part, “The commencement of a case under section 301, 302, or 303 of this title creates an estate.” 11 U.S.C.A. § 541 (West, Westlaw Edge through P.L. 116-91.)

11 U.S.C.A. § 1129(a)(3) states : "The court shall confirm a plan only if all of the following requirements are met . . . The plan has been proposed in good faith and not by any means forbidden by law."

11 U.S.C.A. § 1129(a)(10) states: "The court shall confirm a plan only if all of the following requirements are met . . . 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."

STATEMENT OF JURISDICTION

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

STATEMENT OF THE CASE

I. FACTUAL HISTORY.

Under My Thumb, Inc. ("Thumb") is a creditor of Tumbling Dice Development, LLC ("Development"), one of nine wholly-owned subsidiaries of the holding company Tumbling Dice, Incorporated ("TDI").[1] Eight of the debtor-subsidiaries each operate a luxury casino and resort, while Development acts as the licensee under a non-exclusive software license agreement with Thumb.[2] Pursuant to a R&D Agreement ("Agreement")with Development, Thumb incurred about $10 million in costs to create software for Development, which agreed, in an unsecured R&D Note ("Note"), to reimburse Thumb $7 million towards those costs.[3]

After completing the software, Thumb granted Development the non-exclusive right to use Thumb's copyrighted and patented software, and the agreement allowed Development to "extend the benefits" of the software to entities affiliated with Development, even though such affiliated entities were technically not parties to the agreement between Development and Thumb.[4] This licensing agreement broadly prohibited Development from assigning or sublicensing its rights without Thumb's consent, and it required Development to pay a monthly fee for the use of the software.[5] The license agreement (on which Development's payments are current) was separate from any obligations under the R&D note, on which Development ceased making payments in July 2015.[6]

[1] R. at 4.
[2] *Id*.
[3] *Id*.
[4] R. at 5.
[5] *Id*.
[6] R. at 6.

Three years after the agreement between Development and Thumb, TDI was acquired by hedge fund, Start Me Up, Inc. ("Start").[7] Start purchased TDI's stock through a leveraged buy-out.[8] As part of the leveraged buy-out, TDI and eight of TDI's subsidiaries granted first priority liens on their assets to a group of lenders (the "Lenders") in exchange for Start receiving a $3 billion loan.[9] Development did not grant a lien on its assets with the other eight subsidiaries.[10] In light of Development's limited purpose, the non-exclusive nature of the software license, and certain restrictive covenants in the loan agreement, the Lenders did not require Development to act as a borrower or guarantor under the credit facility.[11]

Eventually, Start could not repay the borrowed funds, so TDI and its nine subsidiaries, including Development, filed for Chapter 11 bankruptcy.[12] At the date of the bankruptcy petition, TDI and its eight subsidiaries other than Development jointly and severally owed $2.8 Billion to the lenders who financed Start.[13] TDI and all nine of its subsidiaries, including Development, owed an estimated $120 million to their unsecured creditors, including Thumb, which was owed $6 million under the R&D Note.[14] Development, the only debtor obligated to pay Thumb under the software licensing agreement, was current on its payments.[15]

Negotiations for the bankruptcy included non-binding mediation ordered by the bankruptcy court involving the Debtors, Start, Lenders, and the unsecured creditors committee and other stakeholders—but notably, not Thumb.[16] The Debtors and creditors (except Thumb)

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[7] *Id*.
[8] *Id*.
[9] *Id*.
[10] *Id.*
[11] *Id*.
[12] R. at 6.
[13] *Id*.
[14] *Id.*
[15] *Id.*
[16] R. at 6, 7.

reached a deal and memorialized it in a support agreement ("Plan"), which contemplated that the Debtors would restructure the secured debt to the Lenders with a lower interest rate and extended payments.[17] Consistent with the Plan, the Debtors filed the Plan and disclosure statement.[18] The Plan was a joint plan on behalf of all of the Debtors and stated that "the Debtors' estates are not being substantively consolidated and no Debtor is to become liable for the obligations of another."[19]

The Plan requires Start to inject new capital into TDI to fund a 55% distribution to unsecured creditors of TDI or any of its subsidiaries, including Thumb.[20] Thumb receives fifty-five percent of their initial loan under the agreement.[21] In exchange for this new capital, Start would be entitled to retain its equity interest in the Debtors.[22] In that regard, the plan support agreement called for the cancellation of the existing shares and membership interests in the Debtors and the issuance of new shares and membership interests in the reorganized Debtors, without changing the overall corporate structure.[23] The Plan proposed to assume Development's license Agreement with Thumb under sections 365 and 1123(b)(2), so Thumb would continue to receive monthly payments for the use of the Software.[24]

Thumb initially viewed the Plan favorably; however, Thumb eventually learned that Start was only funding part of the capital required by the Plan.[25] More than half of the injected capital would be from Sympathy for the Devil, LP ("Devil"), and Devil would receive 51% of the voting

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[17] *Id*.
[18] *R.* at 7.
[19] *Id*.
[20] *Id*.
[21] *Id*.
[22] *Id*.
[23] *Id*.
[24] R. at 7.
[25] *Id*.

shares in TDI.[26] Devil owns a competitor to Thumb, and this competitor had been trying to replicate Thumb's software.[27]

The Plan enjoyed near universal support from all creditor groups.[28] After creditor ballots were reviewed and tallied, each of TDI and the Operating Debtors had at least one impaired accepting class of creditors.[29] The same was not true for Development. Concerned with Devil's potential access to the software, Thumb, who controlled Development's only class of creditors, voted to reject the Plan.[30] Development thus had no impaired accepting class of creditors.[31]

Thumb objected to the reorganization plan under section 11 U.S.C § 365(c)(1) because non-bankruptcy law excuses Thumb's performance without its consent.[32] It also objected under section 11 U.S.C. § 1129(a)(10) because no impaired class of creditors of Development voted to accept the Plan.[33] The bankruptcy court overruled Thumb's objections and confirmed the reorganization Plan.[34] The Bankruptcy Appellate Panel affirmed.[35] However, the Thirteenth Circuit reversed, and held for Thumb on both issues.[36] The Thirteenth Circuit held specifically that Section 365(c)(1) Precludes Assumption of a Non-Exclusive License of Intellectual Property Over the Objection of the Licensor,[37] and that Section 1129(a)(10) requires acceptance from an impaired class of claims of each debtor under a joint, multi-debtor plan.[38]

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[26] R. at 7, 8.
[27] R. at 8.
[28] R. at 8.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] R. at 8.
[34] *Id*.
[35] R. at 9.
[36] R. at 21.
[37] R. at 15.
[38] R. at 21.

ARGUMENT

II. THE THIRTEENTH CIRCUIT CORRECTLY FOUND THAT 11 U.S.C. § 365 (C)(1) PRECLUDES THE DEBTOR IN POSSESSION FROM ASSUMING AN EXECUTORY CONTRACT OVER THE OBJECTION OF THUMB.

The policy goal of bankruptcy reorganization is to permit successful rehabilitation of debtors.[39] One way the Bankruptcy Code manifests this goal is to provide a debtor in possession with the broad power, except as provided in Subsection (c), to assume executory contracts held by the debtor prior to bankruptcy.[40] However, an entity's successful rehabilitation is not the exclusive concern of bankruptcy courts.[41] In *N.L.R.B. v. Bildisco & Bildisco*, this Court notes that a successful rehabilitation involves balancing the interests of the affected parties-the debtor, creditors, and employees.[42] One method The Bankruptcy Code uses to balance a creditor's interest is by placing a limitation on the debtor in possession's power to assume executory contracts as outlined in subsection (c).

a. 11 U.S.C § 365(c)(1) is a narrow limitation on the debtor in possession's right to assume an executory contract held by the debtor before bankruptcy defined in 11 U.S.C § 365(a).

When a debtor files for bankruptcy, a new legal person, the bankruptcy estate, is automatically created.[43] The debtor's pre-bankruptcy interests in property are transferred to the bankruptcy estate.[44] If no trustee is assigned to the estate, the debtor takes on the rights, duties, and limitations of a bankruptcy trustee as the "debtor in possession."[45] As a result, courts have viewed the term "trustee" and "debtor in possession" as interchangeable.[46] To ensure that the

[39] *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984)
[40] 11 U.S.C.A. § 365 (West, Westlaw Edge through P.L. 109-8).
[41] *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1665 (2019).
[42] *N.L.R.B.*, 465 U.S. at 527.
[43] 11 U.S.C.A. § 541(a) (West, Westlaw Edge through P.L. 116-91).
[44] 11 U.S.C.A. § 541(c).
[45] 11 U.S.C.A. § 1107 (West, Westlaw Edge through P.L. 116-91).
[46] *In re Cybergenics*, 226 F.3d 237 (3rd Cir. 2000).

new legal person is able to step into the debtor's pre-bankruptcy contract, Congress enacted code section 365.

Section 365(a) gives a debtor in possession a powerful right—the ability to step into an executory contract held debtor prior to bankruptcy.[47] The court defines an executory contract as a contract where "… neither party has finished performing."[48] This power to assume executory contracts is limited by Subsection (c):

> The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if--
>
> > (1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and
> >
> > (B) such party does not consent to such assumption or assignment….[49]

In constructing the statute using the plain meaning of the text, the Thirteenth Circuit correctly found that TDI may not assume a license contract with Development, a party other than the debtor to the license agreement, without Development's consent. TDI may not assume the contract because applicable non-bankruptcy law excuses Development from accepting or rendering performance to an entity other than the debtor or debtor in possession, regardless of

[47] 11 U.S.C.A. § 365(a).
[48] *Mission*, 203 L. Ed. at 876 (2019).
[49] 11 U.S.C.A. § 365.

TDI's intent to transfer the contract to a different party. The Thirteenth Circuit's application of the statute to this case is known as the hypothetical test.

b. The Court should employ the "hypothetical test" to interpret U.S.C. § 365(c)(1) because the hypothetical test is derived from the plain meaning of the statute, is clear and unambiguous, and not contrary to other subsections of 11 U.S.C § 365 or good bankruptcy policy.

i. The "hypothetical test" states that a debtor in possession must have the right to assign an executory contract in order to assume the contract.

The hypothetical test states that a debtor in possession may only assume an executory contract if it would hypothetically be permitted to assign the contract to a third party.[50] The hypothetical test is used by a majority of circuit courts of appeal having addressed this issue.[51] The hypothetical test does not require that the debtor in possession have the intent to transfer the executory contract to a different party.[52] This test is derived from a plain text reading of the statute.

ii. The hypothetical test derives from a literal reading of 11 U.S.C § 365(c)(1).

This Court has well established that that statutory interpretation begins with reading the text, and that clear and unambiguous language requires a plain language reading of the text.[53] The relevant section of subsection (c) states that the "trustee may not assume or assign an executory contract…."[54] The hypothetical test derives from a literal reading of the word "or" in the phrase "assume or assign" as disjunctive, meaning that a debtor in possession is barred from assuming an executory contract if applicable non-bankruptcy law precludes the debtor in possession from assigning the contract in question.[55]

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[50] *N.C.P. Mktg. Grp., Inc. v. BG Star Prods., Inc.*, 556 U.S. 1145 (2009).
[51] *Id.*
[52] *Id.*
[53] *Zuni Public School Dist. No. 89 v. Dept. of Ed.* 550 U.S. 81, 93 (2007); *see also Lamie v. Trustee*, 540 U.S. 526, 534; *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989).
[54] 11 U.S.C.A. § 365(c).
[55] *In re Catapult Entm't, Inc.*, 165 F.3d 747, 750 (9th Cir. 1999).

The present case involves TDI's attempt to assume a non-exclusive license of Development's intellectual property. Non-exclusive licenses of intellectual property are generally accepted as executory contracts.[56] Federal law on intellectual property holds that a non-exclusive license to be personal and non-assignable.[57] This holding reflects the fundamental policy goal of the patent system to "encourage the creation and disclosure of new, useful, and non-obvious advances in technology and design" by granting the inventor the reward of "the exclusive right to practice the invention for a period of years".[58] Since it is acknowledged that applicable intellectual property law makes a non-exclusive license agreement personal and non-assignable, Thumb, a party other than the debtor, is excused from accepting performance or rendering performance to a party other than Development. Consequently, Development may not assume the non-exclusive license agreement.

Debtor petitioners will argue that the hypothetical test is improper. They will argue that the court should use the actual test because the hypothetical test produces inconsistencies with other subsections of 365. Alternatively, debtors will argue that the hypothetical test produces surplusage, or that it is at odds with bankruptcy policy. An investigation into each claim will show that each claim is misplaced.

c. The Court should not divert from the plain meaning of 11 U.S.C. 365(c)(1) to apply the "actual test" because the statue is clear and unambiguous.

i. **The actual test requires the Court to add meaning to the literal text.**

Debtors urge the court to use a different construction than ordinary meaning to interpret section 365(c)(1). Debtors argue that "actual test" should be used because the hypothetical test

[56] *In re Kmart Corp.*, 290 B.R. 614, 618 (Bankr. N.D. Ill 2003).
[57] *In re CFLC, Inc.*, 89 F.3d 673, 679 (9th Cir. 1996); *see also Unarco Industries, Inc. v. Kelley Co., Inc.*, 465 F.2d 1303, 1307 (7th Cir. 1972).
[58] *In re CLFC, Inc.*, 89 F.3d at 679; *see also* U.S. Const. art. I, § 8, cl. 8.

produces results that are absurd or incompatible with other subsections of 365. The actual test provides that an executory contract may be assumed by the debtor in possession if the debtor in possession has no intent to assign the contract to a third party.[59] The actual test is derived from reading the "or" in the phrase "the trustee may not assume or assign" as a conjunctive "and." With this construction, subsection (c)(1) can be interpreted that a debtor in possession may assume, but not assign: "The debtor in possession may not *assume and assign* any executory contract…." (italics added). This reading precludes a debtor in possession from assuming a contract only when the debtor in possession has the actual intent to assign the executory contract after assumption.[60]

The court should reject the debtor's argument for reading the "or" as a conjunctive "and". As stated before, this court has well established that if the intent of Congress is clear and unambiguously expressed by the statutory language at issue, that would be the end of analysis.[61] However, debtors argue that adherence to the Plain Meaning Rule produces a result that is absurd and at odds with legislative intent. Again, this analysis is misplaced.

ii. **The actual test addresses non-existent conflicts between within 11 U.S.C. §§ 365(c)(1) and (f)(1).**

Specifically, the debtors argue that the plain meaning of section 365(c)(1) renders section 365(f)(1) inoperative and superfluous. This apparent inconsistency comes from Section 365(f)(1)'s use of the phrase "applicable law":

> Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in *applicable law*, that prohibits, restricts, or conditions the assignment of such

[59] *Institut Pasteur v. Cambridge Biotech Corp.,* 104 F.3d 489 (1st Cir. 1997).
[60] *In re Aerobox Composite Structures, LLC*, 373 B.R. 135, 138 (Bankr. D.N.M. 2007)
[61] *Zuni Public School Dist. No. 89 v. Dept. of Ed.* 550 U.S. at 93.

> contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection. (Italics added.)[62]

Subsections 365(c)(1) and 365(f)(1) both refer to "applicable law." Subsection (f)(1) provides that notwithstanding any contrary to provisions of "applicable law" notwithstanding, executory contracts, may be assigned.[63] Subsection (c)(1) prohibits assumption by the debtor in possession when "applicable law" prevents debtor from assigning the contract to a third party.[64] The two subsections may seem to conflict with each other because they both recognize "applicable law"; however, "each subsection recognizes an applicable law of a markedly different scope."[65] *In re Catapult* continues:

> Subsection (f)(1) states the broad rule—a law that, as a general matter, "prohibits, restricts, or conditions the assignment" of executory contracts is trumped by the provisions of subsection (f)(1). Subsection (c)(1), however, states a carefully crafted exception to the broad rule—where applicable law does not merely recite a general ban on assignment, but instead more specifically "excuses a party ... from accepting performance from or rendering performance to an entity" different from the one with which the party originally contracted, the applicable law prevails over subsection (f)(1). In other words, in determining whether an "applicable law" stands or falls under § 365(f)(1), a court must ask why the "applicable law" prohibits assignment. Only if the law prohibits assignment on

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[62] 11 U.S.C.A. § 365.
[63] *In re Catapult Entm't, Inc.*, 165 F.3d at 751.
[64] *Id*.
[65] *Id* at 752 (citing *In re Magness*, 972 F.2d 689, 695 (6th Cir. 1992)).

> the rationale that the identity of the contracting party is material to the agreement will subsection (c)(1) rescue it.[66]

As subsection (f)(1) deals with general prohibitions of assignability, while (c)(1) deals with the materiality of the identity of the contracting parties, a literal reading of subsection (c)(1) is not inevitably in conflict with (f)(1). The debtors may finally argue that a literal reading of subsection (c)(1) is somehow at odds with good bankruptcy policy. This idea undermines the need to balance the debtor's goals with the rights and powers of non-debtor parties to an executive contract.

iii. **The hypothetical rule balances the rights of the debtor with other parties affected by the contract.**

The debtors will argue that a literal reading of subsection (c)(1) would produce a result that is inconsistent with the general bankruptcy policies of Chapter 11. However, the bankruptcy code contains many provisions that preserve the rights of non-debtor parties from its general debtor-favorable application. Section 362(b) provides exceptions for to the automatic stay;[67] while sections 555-557 protect the rights of non-debtor parties under security contracts, commodities contracts, and grain storage contracts from effects of automatic stay, avoidance powers, and provisions of 365.[68] The Thirteen Circuit court correctly stated that it should not be assumed that "sections of the Bankruptcy Code unfavorable to debtors were enacted in error." Further, without absurd results, the court must enforce what Congress has written whether or not the court agrees with the policy choices.[69] Fortunately, in this case, application of the hypothetical test from a literal reading of the statute produces the outcome that is most fair.

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[66] *Id*.
[67] 11 U.S.C.A. § 362(a) (West, Westlaw Edge through P.L. 116-91).
[68] *In re Sunterra Corp.*, 361 F.3d 257, 268 (4th Cir. 2004).
[69] *In re Caldor Corp.*, 303 F.3d 161, 176 (2d Cir. 2002).

iv. **The hypothetical test is the appropriate test because it balances the rights of both Development and Thumb.**

The specific facts of this case highlight the need to ensure that the rights of a non-debtor party to an executive contract are balanced against the debtor's goal to reorganize and maximize assets. Development was originally excluded from the leveraged buyout, and the debtors acknowledge that licensing and other restrictive covenants were a concern.[70] However, the Plan expressly stated that the Debtors' estates are not being substantively consolidates and no Debtor is to become liable for the obligations of the other.[71] The Plan would requires Thumb to render performance as part of the executory contract, but Thumb's compensation would be a pro-rata share of the total payout to all unsecured creditors. [72] And Thumb would have to provide the benefits of its intellectual property to Devil, the parent company of a competitor who has been trying to replicate the Software. The Plan would deprive Thumb of its constitutionally guaranteed "…exclusive right to practice the invention for a period of years."[73]

To balance the rights of all parties to this executory contract and to respect the requests of the Debtors to not intermingle their individual estates, this Court must place Thumb's right to be excused from rendering service to or accepting service from a party other than the debtor in possession on equal footing with the desire of the debtor to reorganize. The Court should affirm the finding of the Thirteenth Circuit.

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[70] R. at 6.
[71] R. at 7.
[72] *Id*.
[73] U.S. Const. art. I, § 8, cl. 8.

III. THIS COURT SHOULD UPHOLD THE 13TH CIRCUIT COURT OF APPEALS AND ADOPT THE PER DEBTOR INTERPRETATION OF 1129(A)(10).

Development is one of nine subsidiaries to TDI.[74] Thumb is a creditor to Development, and none of the other subsidiaries.[75] After TDI and its nine subsidiaries, including Development, filed for Chapter 11 bankruptcy, Thumb became a proposed impaired creditor under the reorganization plan.[76] The bankruptcy court jointly administered the bankruptcy estates for Start, TDI, and it's nine subsidiaries.[77] This dispute boils down to whether section 1129(a)(10) of the Bankruptcy Code requires Thumb's consent to the jointly administered reorganization plan, or whether section 1129(a)(10) requires the consent of only one impaired class of creditors to any debtor under the plan.

Section 1129(a)(10) requires each debtor to obtain the consent of at least one class of impaired creditors in a jointly administered bankruptcy case. This interpretation of 1129(a)(10) is colloquially known as the "per-debtor approach".[78] This conclusion is not explicit in the language of the statute, however, and some bankruptcy courts across the country hold a different view.[79] The opposing interpretation argues that 1129(a)(10) only requires one impaired class of creditors of any debtor in a jointly administered bankruptcy case to approve a chapter 11 reorganization plan.[80] This competing interpretation is known as the "per plan approach".[81]

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[74] R. at 4.
[75] *Id.*
[76] R. at 7.
[77] R. at 3.
[78] Suzanne T. Brindise, *Note and Comment: Choosing the "Per-Debtor" Approach to Plan Confirmation in Multi-Debtor Chapter 11 Proceedings*, 108 Nw. U.L. Rev. 1355, 1368 (2014).
[79] *Id.* at 1358; *see also In re SGPA, Inc.*, No. 1-01-02609, 2001 Bankr. LEXIS 2291 (Bankr. M.D. Pa. 2001).
[80] Brindise, *supra* note 5, at 1369.
[81] *Id.*

This Court should interpret 1129(a)(10) in the statutory context of 1129(a) and apply the per debtor rule. The per debtor interpretation of 1129(a)(10) is more consistent with the overall statutory structure of 1129(a) because all other sections of 1129(a) require each debtor to comply, and the "singular includes the plural" in the bankruptcy code.[82] 1129(a)(10) is not a distinct section of 1129(a) that courts should interpret in isolation.

Further, bankruptcy law should not ignore state corporate law unless it is absolutely necessary. It is a fundamental tenet of state corporate law that separate corporate entities are treated separately.[83] Each corporation under a state incorporation statute has a distinct identity that is not combined with the identity of a related entity.[84] Bankruptcy courts generally respect these distinctions, and should continue to do so, absent the judicially created, equitable remedy of substantive consolidation.[85]

a. The per debtor approach captures the entirety of the statute.

The Supreme Court has held that a "cardinal rule" of statutory construction requires the statute to be read as a whole.[86] Therefore, this Court must read 1129(a)(10) in the broader context of 1129(a), and the entire bankruptcy code, to understand its role.

The Delaware Bankruptcy court applied this rule and adopted the per debtor approach in the *Tribune* case.[87] In *Tribune*, the Delaware bankruptcy court compared the outcome under the per debtor and per plan approaches and concluded that the per debtor interpretation made the most logical sense in the statutory context of 1129(a).[88] In reaching its conclusion, the court

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[82] 11 U.S.C.S. § 1129 (LEXIS through Pub. L. no. 116-91; *see also* 11 U.S.C.S. § 102(a)(7) (LEXIS through Pub. L. no. 116-91).
[83] *Butner v. United States*, 440 U.S. 48, 55 (1979).
[84] *Id.*
[85] *Id.*
[86] *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991).
[87] *In re Tribune Co.*, 464 B.R. 126 (Bankr. D. Del. 2011).
[88] *Id.*

highlighted that 1129(a)(3) required the plan to be consistent with other bankruptcy law and proposed in good faith.[89] The court then reasoned that other courts would only confirm reorganization plans if all debtors under the proposed plan complied with the bankruptcy code.[90] The *Tribune* court recognized it would be ridiculous for 1129(a) to require only one debtor in a multi-debtor bankruptcy to comply with the bankruptcy code, but let other debtors ignore the code's requirements.[91] The court saw no reason to treat 1129(a)(10) differently.[92]

Further, the *Tribune* court applied the explicit language of 102(7) and interpreted 1129(a)(10) using the plural.[93] This application allowed the plain meaning of 1129(a)(10) to contemplate jointly administered, multi-debtor bankruptcies while respecting the distinct corporate nature of each debtor.[94] When using this technique, the *Tribune* court reasoned that 1129(a)(10) requires the consent of at least one impaired class of creditors to each debtor because each debtor has its own confirmation plan, outside substantive consolidation.[95] The result should be identical even when there is one proposed reorganization plan for multiple debtors and creditors.

This court would not confirm the reorganization if Development, or any other of the nine debtors, proposed the reorganization plan in bad faith or acted inconsistently with other bankruptcy law. If the bankruptcy court found bad faith on the part of any debtor, it would certainly dismiss the petitions with prejudice.[96] This court should not hold 1129(a)(10) to a different standard.

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[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*; *see also* 11 U.S.C.S. § 102(a)(7) (LEXIS through Pub. L. no. 116-91).
[94] *See Tribune*, 464 B.R. 126.
[95] *Id.*
[96] See *In re Hebb Hendrix*, Inc., 32 B.R. 29 (Bankr. S.D. Fla. 1983).

Further, 102(7) and 1129(a)(10) together eliminate the inevitable confusion that results from a single reorganization plan for Development and its nine affiliated debtors. 102(7) allows 1129(a)(10) to contemplate a single plan for multiple, distinct debtors. 102(7) achieves this result with the plain meaning of 1129(a)(10) by the legal fiction of dividing up the single plan into ten identical plans for each debtor. All ten debtors then submit the proposed plan to their creditors, allowing every impaired creditor its rights under the bankruptcy code. This interpretation respects the underlying requirement of bankruptcy procedure that mandates each debtor file its own bankruptcy petition in voluntary, corporate, chapter 11 bankruptcy proceedings, and allows internal consistency between 1129(a)(10) and the remainder of the bankruptcy code.[97]

The dissent in the 13th circuit appellate decision argues that 1129(a)(10) should not be read in conjunction with other parts of 1129(a) because 1129(a)(10) is phrased differently.[98] The dissent goes further and believes that Congress could have demonstrated its support for the "per debtor" approach if it so desired.[99] The dissenting judge cites his own string of supreme court caselaw in defense of this conflicting argument based on statutory interpretation.[100]

This opposing interpretation should fail to persuade this Court. Each section of 1129(a) is capable of co-existence only if courts require each debtor to meet all the requirements of 1129(a)(10). There is no reason to separate 1129(a)(10) from the rest of the statute.

Under the per plan approach, this co-existence is blurred. The per plan approach plucks 1129(a)(10) from the rest of 1129(a) and treats it differently.[101] For example, the per plan approach presumably requires all debtors to comply with 1129(a)(3), but not 1129(a)(10). The

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[97] 11 U.S.C.S. § 102(a)(7) (LEXIS through Pub. L. no. 116-91).
[98] R. at 29.
[99] *Id.*
[100] Id.; *see also In re Transwest Resort Props., Inc.*, 881 F.3d 724, 730 (9th Cir. 2018).
[101] R. at 29-30.

dissent justifies this odd interpretation by stating Congress could have explicitly ordered the conflicting per debtor approach in the plain language of the statute.[102] Accordingly, the per plan approach is consistent with a plain reading of the statute because the plain reading of the statute allows for it.[103] While this reasoning represents sound legal advice from a bankruptcy practitioner, it implicitly abdicates this courts duty to determine what the law is. Section 1129(a) only makes sense as a whole if each debtor must comply with all its requirements.

b. The per debtor interpretation of 1129(a)(10) protects the distinction between joint administration and substantive consolidation.

Courts may order joint administration of estates when a debtor and its affiliates file bankruptcy petitions.[104] When courts jointly administer bankruptcy estates, they may jointly handle purely administrative matters for the estate, including the filing and notification requirements of the parties.[105]

Creditors to one debtor in a jointly administered bankruptcy cannot vote to accept the plan of a different debtor.[106] Sections 502(a) and 1126(a) of the bankruptcy code demonstrate this rule.[107] Thus, creditors to each debtor can only vote to accept the plan of their own debtor unless the debtors substantively consolidate their bankruptcy estates. Joint administration of bankruptcy estates does not create a consolidated bankruptcy estate, nor does joint administration affect the, "separate corporate existence", of each debtor.[108]

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[102] R. at 29.
[103] *Id.*
[104] Bankr. R. 1015(b)(4).
[105] Bankr. R. 1015(b) advisory committee's note to subdivision (b).
[106] Bruce H. White and William L. Medford, *Practice & Procedure, The New Gerrymandering: Cross-classification of Claims in a Joint Reorganization Plan Prior to Substantive Consolidation*, 23-4 ABIJ 24 (2004).
[107] 11 U.S.C.S. § 502(a) (LEXIS through Pub. L. no. 116-91); see also 11 U.S.C.S. § 1126(a) (LEXIS through Pub. L. no. 116-91).
[108] Robert P. Simons, *The Eye of the Storm: Strategies to Deal with Distressed Companies*, supplement to The Legal Intelligencer and Pennsylvania Law Weekly (March 18, 2002).

Bankruptcy courts recognize that joint administration of bankruptcy estates may cause conflict among creditors.[109] However, joint administration does not change the rights of the debtors or creditors.[110] The bankruptcy code requires the court to consider potential conflicts of interest between the affiliates creditors and debtors before entering the order for joint administration.[111]

This Court would conflate joint administration and substantive consolidation by adopting the per plan approach. A defining characteristic of joint administration is that there is no consolidation of bankruptcy estates, and each debtor and creditor entirely retains its rights. Courts allow joint administration purely for convenience, and it functions properly when bankruptcy courts do not overlook creditors situated like Thumb, which have a relatively small debtor-fish in a large bankruptcy-pond. Thumb's opponents will argue that courts should not allow small creditors like Thumb to hold up large corporate reorganizations, and Thumb agrees. Thumb concedes that section 1129(a)(10) can create headaches for small debtors in a jointly administered bankruptcy estate. But the solution to this problem is not to eliminate the requirements of 1129(a)(10) by adopting the "per plan" approach admittedly preferred by the majority of other bankruptcy circuits in the country. Instead, this Court should substantively consolidate the bankruptcy estate and exercise the remedy that already exists for this 1129(a)(10) problem. Under the per plan approach, substantive consolidation of bankruptcy estates would be superfluous because the per plan approach would treat the estates as if they were already substantively consolidated.

c. The per debtor interpretation of 1129(a)(10) demonstrates the only way that small creditors like Thumb have meaningful creditor rights.

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[109] 9 Collier on Bankruptcy ¶ 1015.03 (16th ed. 2019).
[110] *Id.*, *citing Bunker v. Peyton*, 312 F.3d 145, 153 (4th Cir. 2002) ("Joint administration does not affect the substantive rights of either the debtor or his or her creditors.").
[111] Bankr. R. 1015(b).

Thumb has a right to full repayment of Development's debt. Development has proposed a plan that only pays Thumb fifty-five percent of the money Development owes.[112] This makes Thumb an impaired creditor, and as an impaired creditor under the proposed reorganization plan, Thumb has the right to vote to accept or reject the plan.[113]

This right to vote only matters to Thumb if it forces Development to consider Thumb's interests while Development forms its reorganization plans. Development will only consider Thumb's interest if Thumb can stall the implementation of the reorganization plan until Thumb is satisfied with its terms. Thumb can only stall the implementation of the reorganization plan if this Court requires Development to obtain Thumb's consent to the reorganization plan. This result is only possible under the per debtor approach. This court should reject the per plan interpretation because it would allow Development to alter Thumb's rights without Thumb's consent, full repayment of the debt, or substantive consolidation. If this court adopts the per plan approach, Development can alter Thumb's rights under the plan without paying Thumb the money Development owes and without complying with the rigorous requirements of substantive consolidation.

d. Substantive consolidation destroys each entity's unique corporate existence. This Court should apply the per debtor approach and respect the distinctions recognized by state corporate law.

Substantive consolidation is not in the bankruptcy code, but it is an equitable remedy created by federal common law.[114] Bankruptcy courts are reluctant to impose substantive consolidation because this remedy destroys the distinct corporate identity of multiple debtors and

[112] R. at 7.
[113] 11 U.S.C.S. § 1129(a)(7)(A)(i) (LEXIS through Pub. L. no. 116-91); *see also* 11 U.S.C.S. § 1129(a)(10) (LEXIS through Pub. L. no. 116-91).
[114] *In re Owens Corning*, 419 F.3d 195, 210 (3rd Cir. 2005).

combines them into one bankruptcy estate.[115] The bankruptcy code does not contemplate this action.[116] Instead, bankruptcy law attempts to coexist peacefully with state corporate law whenever possible.[117]

The dispute between federal bankruptcy law and state corporate law is rooted in our nation's history.[118] At the Founding, there was a question whether there should be a federally administered corporate bankruptcy framework since corporations are a creation of state law and state law governs the essential terms of a corporation's existence.[119] Eventually, Congressional power won out, and Congress passed a federal framework for corporate bankruptcy in 1867.[120]

However, just because Congress began to regulate corporations in federal bankruptcy does not mean that Congress disregarded relevant distinctions between corporations governed by state law. Delaware bankruptcy courts have stated that without substantive consolidation, entity distinctness is fundamental.[121] The Supreme Court recognized that state law governs property interests, and this general rule does not change just because the property interests are involved in a bankruptcy proceeding. [122]

Start, TDI, and its subsidiaries are distinct corporate entities under state law. These entities filed ten bankruptcy petitions under Chapter 11: one for each entity. This immediately created ten separate bankruptcy estates. These bankruptcy estates were jointly administered under Bankruptcy Rule 1015, but joint administration does not eliminate each entity's distinct

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[115] *Id.* at 206.
[116] *Id.* at 205.
[117] *Butner v. United States*, 440 U.S. 48, 55 (1979).
[118] David A. Skeel, Jr., *Rethinking the Line Between Corporate Law and Corporate Bankruptcy*, 72 Tex. L. Rev. 471 (1994).
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id., citing Butner v. United States*, 440 U.S. 48, 55 (1979) ("Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.").

corporate identity. Joint administration only allows one judge to administer the bankruptcy estate in one proceeding. The debtors had the option to eliminate their corporate distinctions and take advantage of substantive consolidation, and they specifically chose not to exercise it.[123]

The federal bankruptcy code can respect each entities' distinct corporate existence under state law while still achieving the convenience of joint administration. Bankruptcy courts may achieve this goal using the per debtor approach because it recognizes that each debtor, though affiliated, is still distinct under state corporate law. This process allows state law to function in its historical role and govern property interests while federal law governs the negotiation of the bankruptcy plan.

The dissent argues that substantive consolidation is irrelevant to 1129(a)(10) because substantive consolidation is an equitable doctrine and 1129(a)(10) is a technical requirement.[124] Accordingly, 1129(a)(10) provides no substantive rights to creditors.[125] The dissent reasons that 1129(a)(10) is an obligation that the proponent of a reorganization must satisfy, not a right for creditors to object to a reorganization plan. [126]

This reasoning is flawed. The Arizona bankruptcy court states that 1129(a)(10) is a requirement that the proponent of a reorganization plan must fulfill to get the plan confirmed.[127] To fulfill this obligation, the champion of the reorganization plan still must get the approval of at least one impaired creditor.[128] While 1129(a)(10) orders the proponent of the plan to satisfy this requirement, this effectively gives the impaired creditor the right to halt the reorganization plan.

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[123] R. at 7.
[124] *In re Rhead*, 179 B.R. 169, 177 (Bankr. D. Ariz. 1994).
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*; see also 11 U.S.C.S. § 1129(a)(10) (LEXIS through Pub. L. no. 116-91).

This impaired creditor's "right" is most acute when there is only one impaired creditor, since the code undoubtedly would require that sole impaired creditor's consent before plan confirmation.

This court should hold that section 1129(a)(10) requires the consent of at least one class of impaired creditors to each debtor in a jointly administered bankruptcy case and adopt the per debtor approach. This holding would be most consistent with canons of statutory interpretation and would protect creditors from undesirable plans. Further, the per debtor approach most closely aligns with a recognized policy in bankruptcy courts to respect corporate law where the corporate law does not directly contradict relevant bankruptcy law. Corporate law enshrines a distinct existence for each corporate entity, and bankruptcy law should respect this distinct nature absent substantive consolidation.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court affirm the United States Court of Appeal for the Thirteenth Circuit on the issues of Sections 365(c)(1) and 1129(a)(10).

Respectfully submitted,

/s/ Team 19R

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Counsel for Respondent