No. 19-1004

IN THE

SUPREME COURT OF THE UNITED STATES

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

BRIEF FOR RESPONDENT

Team 21R

Counsel for Respondent

QUESTIONS PRESENTED

1. Is a debtor in possession prohibited from assuming an executory contract under 11 U.S.C. § 365(c)(1) when the non-debtor party to such contract objects to such assumption, when applicable non-bankruptcy law excuses the non-debtor party from accepting such performance from or rendering performance to an entity other than the debtor or the debtor in possession?

2. 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?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUES

OPINIONS BELOW

The Opinion of the U.S. Court of Appeals for the Thirteenth Circuit is contained on page 2 of the Record.

STATEMENT OF JURISDICTION

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

STATUTE PROVISIONS

11 U.S.C. § 365(c)(1) provides the following:

> (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;

11 U.S.C. § 1129(a)(10) provides the following:

> (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.

STATEMENT OF THE CASE

Tumbling Dice, Inc. ("TDI"), and its affiliated debtors (collectively, the "Debtors" or the "Petitioners"), voluntarily filed for Chapter 11 bankruptcy reorganization on January 11, 2016. R. at 3. The lead bankruptcy case was filed by TDI, a holding company that holds the membership interest in nine wholly owned subsidiaries. R. at 4. These nine subsidiaries are also parties in this bankruptcy case. R. at 4. Eight of TDI's subsidiaries—the Operating Debtors—"each operate a luxury casino and resort." R. at 4. The ninth subsidiary, Tumbling Dice Development, LLC ("Development") acts "as the licensee under a non-exclusive software license agreement with Under My Thumb, Inc. [("Under My Thumb" or the "Respondent")]," one of the Debtors creditors. R. at 4. The Debtors' bankruptcies were jointly administered by the bankruptcy court pursuant to Rule 1015(b). R. at 4.

In 2008, Under My Thumb and Development entered into an agreement where Under My Thumb would create a comprehensive software system to update the loyalty program for the casinos. R. at 4. Under My Thumb and Development agreed to a Research and Development Agreement with the understanding that it would cost Under My Thumb $10 million dollars to create and develop the Software, and that Development agreed to reimburse Under My Thumb for $7 million dollars for the incurred cost pursuant to a $7 million dollar promissory note, ("R&D Note"). R. at 4. Additionally, under the Research and Development Agreement, the parties agreed to a License Agreement, whereby Under My Thumb granted Development a non-exclusive license to use software created by Under My Thumb and to "extend the benefits of the Agreement to its affiliated entities only." R. at 5. The License Agreement explicitly included a broad anti-assignment provision, which requires Under My Thumb's consent for any assignment or sublet of the license. R. at 5. Additionally, Development agreed to pay Under My Thumb a

monthly fee under the License Agreement. R. at 5. Development, however, stopped making the payments in June 2015. R. at 6.

In December 2016, Start Me Up Inc, acquired TDI in a leveraged buyout where "a syndicated group of lenders (the "Lenders") funded with a $3 billion dollar loan. R. at 6. In exchange, TDI and the Operating Debtors granted the Lenders a first priority lien on their assets. R. at 6. Development, however, was not involved in this loan with the Lenders. R. at 6.

Under My Thumb was not involved in the non-binding court ordered mediation that resulted in the proposed Plan Support Agreement (the "Plan"). R. at 7. Some material terms of the Plan included the following: (1) that the Debtor would "restructure substantially all of the secured indebtedness owed to the Lenders at a lower interest rate and extend the payments to be over a twenty year period," (2) "Start Me Up would inject new capital to fund a 55% distribution to unsecured creditors," (3) "Start Me Up would be entitled to retain its equity interest in the Debtors," (4) "the Debtor in Possession would assume Development's License Agreement with Under My Thumb," and (5) that there would be no change to TDI's overall corporate structure. R. at 7. Though the Plan was filed on behalf of all the Debtors in this Bankruptcy, it explicitly stated that "the Debtors estates are not being substantially consolidated and no Debtor is to become liable for the obligations of another." R. at 7.

Under My Thumb opposed the Plan upon learning that Start Me Up would be directly funding only $3.1 million and Sympathy for the Devil, LP ("SFD") would be funding the remaining $35 million. R. at 8. Under My Thumb opposed the Plan, in part, because it included provisions where SFD would receive 5% of the voting shares of the reorganized TDI and seats on the restructured TDI Board of Directors. R. at 8. SFD's involvement in the restructured TDI was particularly concerning for Under My Thumb because SFD is a well-known competitor of

Under My Thumb's customized software industry and has specifically tried to duplicate the Software at issue. R. at 8.

Under My Thumb, controlling Development's only class of creditors, voted to reject the Plan and objected to Plan because the courts that it did not consent to the assumption of the License Agreement and that Plan was not confirmable under §1129(a)(10) no impaired class of creditors had voted to accept it. R. at 8. However, the Bankruptcy Court overruled Under My Thumb's objections and confirmed the Plan. R. at 8.

Under My Thumb appealed and the Thirteenth Circuit Bankruptcy Panel affirmed the Bankruptcy Court's Order. The Thirteenth Circuit, however, reversed the Bankruptcy Court's Order and adopted Under My Thumb's arguments against confirmation of the Plan. R. at 4. The United States Supreme Court granted cert to review this case and resolve a split in the circuits on these unresolved bankruptcy issues.

SUMMARY OF THE ARGUMENT

This Court should affirm the U.S. Court of Appeals for the Thirteenth Circuit's judgement for two main reasons. First, because the Bankruptcy Court improperly confirmed the Plan for reorganization over Under My Thumb's objection. Second, because the Bankruptcy Court improperly confirmed the Joint Plan of Reorganization without obtaining acceptance from at least one impaired class of creditors of each debtor.

The Bankruptcy Court improperly confirmed the Plan because Under My Thumb did not consent to the assumption of the License Agreement as required under § 365(c)(1). Under My Thumb's consent is required under for debtor in possession to assume the License Agreement under § 365(c)(1) because federal intellectual property law precludes a licensee from assigning a software license without the licensor's consent. This is known as the hypothetical test, which

requires the debtor in possession to have the hypothetical ability to assign a contract as a prerequisite to assuming the contract.

The Bankruptcy Court also improperly confirmed the Plan because the Plan was confirmed without an affirmative vote from an impaired class of claims for Development. Under My Thumb's support of the Plan was required under § 1129(a)(10) because the statute requires affirmative votes from an impaired class of claims from each debtor under a joint, multi-debtor plan. Under My Thumb is an impaired class because its rights under the License Agreement would change under the Plan. Under My Thumb is Development's only impaired class and as such, its acceptance of the Plan was required in order to confirm the Plan.

Both of these issues demonstrate that the Bankruptcy Court improperly confirmed the Plan. Consequently, this Court should affirm the Thirteenth Circuit's judgement.

ARGUMENT

The purpose of Chapter 11 Bankruptcy is to reorganize the debtor to rehabilitate the debtor to allow it to continue to contribute to the commercial community while also structuring a plan to maximize creditor repayment. The Chapter 11 provisions work towards maximizing those goals. In particular, the Bankruptcy Code provides an avenue for debtors to construct a plan that specifies how its debtors will be repaid over time. *See, e.g.*, 11 U.S.C. § 1123 (demonstrating that the Code includes a number of requirements that reorganization plans must contain). Consequently, the Bankruptcy Code contains protections to assure that creditors are treated fairly in the contemplated plan of repayment. The Bankruptcy Code provisions at issue in this case, § 365(c)(1) and § 1129(a)(10), both work to provide creditors protection when their rights over a claim are affected. Consequently, this Court should adopt the hypothetical test for § 365(c)(1) and the per debtor approach in § 1129(a)(10) to preserve these creditor protections.

I. The Bankruptcy Court Improperly Confirmed the Plan Because Under My Thumb Did Not Consent to the Assumption of the License Agreement as Required Under § 365(c)(1)

The Bankruptcy Court improperly confirmed the Plan for reorganization because Under My Thumb did not consent to the assumption of the License Agreement under the Plan. Under § 365(a), debtors in possession can assume executory contracts held by the debtors prior to entering bankruptcy. Section 365(a) reads the following: "[e]xcept as provided 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." It is undisputed that the License Agreement is an executory contract. R. at 9; *see In re Access Beyond Tech. Inc.*, 237 B.R. 32, 42–43 (Bankr. D. Del. 1999) (noting that typically, licenses of intellectual property will be considered executory contracts for the purposes of § 365).

The Statute, however, limits this assumption power in the interest of protecting creditors' choice to continue the contract when certain relevant non-bankruptcy law would provide that creditor the option. *See In re Alltech Plastics Inc.*, 71 B.R. 686, 688 (Bankr. W.D. Tenn. 1987) (discussing how § 365(c) applies beyond personal service contracts, including "federally subsidized electric power," "regulated airport landing slots," "automobile dealer franchise"). The Statute states that the debtor in possession may not assume an 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, whether or not such contract…prohibits or restricts assignment of rights or delegation of duties; and such party does not consent to such assumption or assignment.

§ 365(c)(1)(A)–(B)

Courts have generally agreed that federal intellectual property common law is the proper "applicable law" under § 365(c)(1)(A). *See In re Alltech Plastics Inc.*, 71 B.R. at 688 (explaining

that patent law originates under Article 1, Clause, Section 8 of the U.S. Constitution and Congress has enacted multiple laws concerning patents). Generally, U.S. Federal Intellectual Property Law prohibits assignment of an intellectual property license without the licensor's consent. *See Unarco Indus., Inc. v. Kelley Co., Inc.*, 465 F.2d 1303, 1306 (7th Cir. 1972) (noting that intellectual property licenses are "personal to the licensee" and not assignable unless expressly made so in the agreement").

Courts have held that when required, consent to assignment must be affirmative or explicitly provided for in the agreement. *See, e.g.*, *Unarco Indsu. v. Kelley Co.*, 465 F.2d 1303, 1306–07 (7th Cir. 1972) (holding that a patent license is personal to the assignee and, thus, affirmative consent is required to assign a patent license); *In re Access Beyond Techs., Inc.*, 237 B.R. at 42 (concluding that failure to include a consent clause in the contract did not absolve the license of the consent requirement under federal patent law). Silence is not an "express consent to assignment, particularly where federal law holds the opposite: that silence, i.e., lack of express agreement, means the agreement is *not* assignable." *In re Access Beyond Techs., Inc.*, 237 B.R. at 46 (applying the hypothetical test and holding that the debtors' license agreement was an executory contract that was not assignable without the owner's consent, which prevented assumption or assignment of the license agreement). Here, the License Agreement explicitly contains a broad anti-assignment clause. R. at 5. Consequently, Under My Thumb's consent was required for the Debtor in Possession to assume the License Agreement.

A. The Owner of Intellectual Property Must Consent to Allow the Assumption of an Intellectual Property License Agreement

Courts have utilized two different approaches when applying § 365(c)(1): (1) the hypothetical test and (2) the actual test. The hypothetical approach has been adopted by the

Third, Fourth, Ninth, and Elevenths Circuits. *See, e.g.*, *RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257, 265 (4th Cir. 2004) (characterizing § 365(c)(1) as establishing the hypothetical test); *Perlman v. Catapult Entm't (In re Catapult Entm't)*, 165 F.3d 747, 754 (9th Cir. 1999) (same); *City of Jamestown v. James Cable Partners, L.P. (In re James Cable Partners)*, 27 F.3d 534, 537 (11th Cir. 1994); *In re West Electronics, Inc.*, 852 F.2d 79, 83 (3d Cir. 1988) (same). The hypothetical test "implies that it does not matter if the licensee does not have an intention of assigning the agreement to a third party." R. at 12. Instead, under the hypothetical test, "a debtor in possession may not assume an executory contract over the non-debtor's objection if the applicable law would bar assignment to a hypothetical third party, even where the debtor in possession has no intention of assigning the contract in question to such third party." *Perlman*, 165 F.3d at 750. Therefore, under the hypothetical test, hypothetical assignment to a third party must be possible under the relevant non-bankruptcy law to permit the debtor in possession to assume the executory contract. *See id.* The actual test, however, only prohibits assumption over the creditor's objection when the debtor actually intends to assign the executory contract to a third party. *See RCI Tech. Corp.*, 361 F.3d at 262 n. 9. In other words, under the actual test, the debtor in possession may assume the executory contract regardless of whether the relevant non-bankruptcy law prohibits assignment without the non-debtor party consent. *See id.*

This Court should adopt the hypothetical test and require Under My Thumb's consent to the assumption of the License Agreement under §365(c)(1) for three main reasons.

First, because IP law discourages the free assignability of non-exclusive licenses of intellectual property without the owner's consent. *See In re Access Beyond Techs., Inc.*, 237 B.R. at 44. Federal IP law promotes a policy of patent monopoly and supports protection of ownership rights over the property. *See In re Alltech Plastics, Inc.*, 71 B.R. at 688 ("[Patent] laws promote

the stated objective of the Constitution by 'offering a right of exclusion for a limited period as an incentive to investors to risk the often enormous costs in terms of time, research, and development."). "The rights of the patent owner to license the use of his invention is a creature of federal common law as is the right of the licensee to have the license construed." *Id.* at 689. Courts have recognized that "patent licenses are personal and not assignable unless expressly made so." *Id.* (noting that though the nonassignment of patent licenses is not "statutorily mandated," federal common law has recognized "patent licenses as personal in nature and not assignable unless expressly made so.").

Second, under federal IP law, the identity of the licensor is important to the licensee. *See Perlman* 165 F.3d at 754 ("[W]here applicable non-bankruptcy law makes an executory contract nonassignable because the identity of the non-debtor party is material, a debtor in possession may not assume the contract absent consent of the non-debtor party."). Once purpose of federal IP law is to promote creation and innovation of new technologies. *See In re Alltech Plastics, Inc.*, 71 B.R. at 688 (explaining that the U.S. Constitution mandates Congress to promote the development of science and the granting of patents). An aspect of this is to allow for control over who has access to the copyrighted or patented material. Therefore, the hypothetical test encourages the federal policy of protecting ownership's control over intellectual property by providing a licensor maximum choice as to whether to consent to assumption of a license when the identity of the entity is changing in the bankruptcy reorganization process.

Third, because the explicit plain language of § 365(c)(1) supports the hypothetical test. When conducting statutory interpretation, the analysis must first start with the statutes actual language. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). As stated in *Perlman*, "[t]he plain language of §365(c)(1) 'links nonassignability under 'applicable law' together with a

prohibition on assumption in bankruptcy.'" *Perlman*, 165 F.3d at 750. The language in § 365(c)(1) states that assumption of executory contracts is prohibited when the applicable law precludes assignment of the contract to a third party. *Id.*

There are two exceptions to the plain meaning rule: (1) absurdity and (2) legislative intent. *See RCI Tech. Corp.,* 361 F.3d at 265 (holding that the debtor in possession was precluded from assuming a non-exclusive license to copyrighted software). Both of these exceptions should apply only in the most exceptional circumstances and, thus, divergence from the plain meaning rule is rare and is not appropriate in this case. *See id.*

Absurdity exists when "literal application of the statutory language at issue results in an outcome that can truly be characterized as absurd, i.e. that is so gross as to shock the general moral or common sense." *Id.* This exception to the plain language rule does not apply because despite the Debtors' arguments that "the plain meaning of section 365(c)(1)…renders inoperative and superfluous section 365(f)(1)." R. at 13; *see also Perlman*, 165 F.3d at 753. Courts should interpret statutes "so as to minimize discord among related provisions" and assure that "effect is given to all provisions, so that no part will be inoperative or superfluous, void or insignificant…" *Perlman,* 165 F.3d at 751. Sections 365(c)(1) and 365(f)(1), however, are not in conflict, but rather address applicable law in different circumstances and scopes. *See City of Jamestown*, 27 F.3d at 538.

Section 365(f)(1) provides that debtors in possession may assign an executory contract, once assumed, regardless if the specific contract or applicable law contains anti-assignment language. "The potential conflict between subsections (c)(1) and (f)(1) arises from their respective treatments of 'applicable law'" because subsection (f)(1) permits assignment of an assumed executory contract despite "contrary provisions in applicable law." *Perlman*, 165 F.3d

at 751–52. Numerous circuits, however, have held that this provisions are not actually in conflict. *See, e.g.*, *RCI Tech. Corp.*, 361 F.3d at 266 (explaining that § 365(f)(1) creates the general rule and §365(c)(1) establishes a specific narrow exception to that rule); *In re Magness,* 972 F.2d 689, 694 (6th Cir. 1992) (holding that subsections (c)(1) and (f)(1) are not in conflict but must be read together).

The court in *Perlman*, the leading case on the hypothetical test, reconciles these provisions by explaining that § 365(f)(1) creates a broad rule while § 365(c)(1) contains a limited exception to this 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 § 365(f)(1)." *Perlman*, 165 F.3d at 752. The referenced applicable law § 365(c)(1) refers to "applicable law other than general prohibitions barring assignment." *City of Jamestown*, 27 F.3d at 538 (looking at if Tennessee law excuses a city from "accepting performance under [a] franchise agreement from a third party"). For example, in *City of Jamestown v. Jamestown Cable Partners, L.P. (In re James Cable Partners)*, the Eleventh Circuit held that § 365(c)(1) did not apply when a debtor in possession sought to assume a cable franchise agreement because the relevant non-bankruptcy law did not excuse the non-debtor party from accepting performance under the contract from a third party. *See id.* (demonstrating that pointing to general prohibitions against assignment in the law would be insufficient to apply § 365(c)(1)). The Eleventh Circuit, however, reasoned that if the non-debtor party could show that the applicable law "render[ed] performance under the cable franchise agreement nondelegable," then § 365(c)(1) would apply. *Id.* (explaining that an example where "performance is nondelegable is a personal service contract").

To determine whether the applicable law non-bankruptcy law excuses the non-debtor's performance under § 365(c)(1), a court should consider "why the applicable law prohibits assignment." *Perlman*, 165 F.3d at 752. If the "law prohibits assignment on the rationale that the identity of the contracting party is material to the agreement will subsection (c)(1) rescue it." *Id.* (noting that the Sixth and Eleventh Circuits also adopt this logic). As discussed above, the federal intellectual property law is the applicable law in this case. Federal intellectual property law prohibits assignment without the licensor's consent because of the federal policy of protecting patents and the importance of identity in license agreements.

This case demonstrates why identity is material in the context of intellectual property licenses. The identity of the reconstructed TDI is important and material to Under My Thumb's interests because SFD, a major competitor of Under My Thumb, would have 51% of the voting shares of TDI and several seats on TDI's Board of Directors. R. at 8. Therefore, permitting the debtor in possession to assume the License Agreement between Under My Thumb and Development over Under My Thumb's objection undermines and directly contradicts the federal patent monopoly policy. *See* R. at 8; *In re Alltech Plastics*, 71 B.R. at 688–89.

Courts do not consider legislative intent when the plain language of the statute is unambiguous. *See RCI Tech. Corp.*, 361 F.3d at 261. However, courts can look at legislative history when it "clearly indicates that Congress meant something other than what is said." *See Perlman*, 165 F.3d at 754. Legislative intent need not be considered by this Court because "there exists no contemporaneous legislative history regarding the current formulation of subsection (c)(1)." *Perlman*, 165 F.3d at 754. Since neither of the above exceptions apply, the plain meaning rule supports adopting the hypothetical test to analyze § 365(c)(1).

B. The Actual Test is Inconsistent with the Plain Meaning of § 365(c)(1)

Another reason that this Court should adopt the hypothetical test is because the actual test is inconsistent with the plain meaning of § 365(c)(1) and undermines the creditor protection that the provision provides. Courts that adopt the actual test hold that § 365(c)(1) contemplates "a case-by-case inquiry into whether the non-debtor party…actually was being 'forced to accept performance under its executory contract from someone other than the debtor party with whom it originally contracted." *Inst. Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997).

Adopting the actual test would require this Court to "abandon the literal language of §365(c)(1) in favor of an alternative approach." *Perlman,* 165 F.3d at 751. One common justification for departure from the plain language of the statute and adoption of the actual test is that the hypothetical test promotes "bad policy." *See id.* However, courts have consistently held that "[p]olicy arguments cannot displace the plain language of the statute; that the plain language of §365(c)(1) may be bad policy does not justify a judicial rewrite. And a rewrite is precisely what the actual test requires." *Id.* at 754. Additionally, as previously discussed above there is no legislative history to suggest that Congress did not intend the statutory language to depart from the clear language of the statute. *See id.*

Additionally, the literal reading of the statue promotes the protection of creditors in the context where their rights to an agreement are being altered. Judicially rewriting the statute to apply the actual test would eliminate the carefully balanced protections of the creditors. A common theme throughout the Bankruptcy Code is the need to balance the rights of all interested stakeholders in the Bankruptcy. Adopting the actual test would write the creditor protection out of the statute and unbalance the carefully weighed scales of equity in Chapter 11 of the Bankruptcy Code.

Under My Thumb, did not consent to the Debtor in Possession's assumption of the non-exclusive license to the Software. Consequently, the Court should affirm the 13th Circuit's holding that the bankruptcy court improperly confirmed the Plan without Under My Thumb's consent to the assumption of the License Agreement.

II. Acceptance From an Impaired Class of Claims of Each Debtor is Required by § 1129 (a)(10) When Effectuating a Joint, Multi-Debtor Plan

Chapter 11 is governed by a statute setting out relatively few requirements, ensuring flexibility in the creation and acceptance of a plan. This flexibility, as contemplated by Congress, is essential to the process. It ensures the creation of a unique strategy that benefits all parties. Because the goal of Chapter 11 is not dissolution but reemergence the negotiation of the plan and agreement to the plan, especially by an impaired class of each debtor, is crucial.

Impaired classes in Chapter 11 are those that include creditors whose pre-bankruptcy legal, equitable, or contractual rights are to be altered under the plan. 11 U.S.C. § 1124. As such, under the statute impairment triggers the right to vote on the plan. 11 U.S.C. § 1126(a), (f). This right to vote is one of the most powerful tools available to an impaired creditor and is key to ensuring fairness in the process. It gives impaired classes of creditors stake in the negotiation of the plan.

Section 1129(a)(10) requires acceptance from at least one impaired class of creditors per debtor in a multi-debtor plan. As noted by the lower court, the purpose of inclusion of § 1129(a)(10) in the Bankruptcy Code is in part to ensure a minimum of support from the creditors whose financial interests are being affected by the plan. R. at 16 (citing *In re Combustion Eng'g Inc.*, 391 F.3d 190, 243–44 (3d Cir. 2004) ("The purpose of [§ 1129(a)(10)] is 'to provide some indicia of support [for a plan of reorganization] by affected creditors and prevent confirmation where such support is lacking'")). Here, because no impaired class of

creditors of Development has voted in favor of the reorganization plan, the plan does not comport with the requirements of § 1129(a)(10) and should not have been confirmed. Finding otherwise would undermine the purpose of this requirement in the Bankruptcy Code.

As established in *In re Marston Enters., Inc.*, 13 B.R. 514, 520 (Bankr. E.D.N.Y. 1981) a plan requires the active approval of at least one non-insider impaired class. In *In re Marston Enterprise, Inc.,* bankruptcy proceedings were started after the bank began foreclosure on a property. The bank argued that the plan was per se unacceptable in part because no impaired class was able to accept the plan. The court looked to § 1129(a)(10) providing:

> (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). The court also directs us to the intent of Congress in passing this law – something that is of particular importance as we interpret the statute. In relevant part, the Senate Report commenting on § 1126 that only an impaired claim or interest under the plan must confirm the plan. Senate Report No. 95-989, 95th Cong. 2d Sess. (1978) 123, U.S. Code Cong. & Admin. News 1978, p. 5909 (commenting on § 1126(f)).

Though accepted by all circuits that an impaired class must confirm the plan, disagreement exists as to whether the standard established in 1129 (a)(10) applies per debtor or per plan. This court should adopt the opinions from the District of Delaware, the country's most influential business bankruptcy court, holding that each debtor must be able to meet the requirements of § 1129 (a) in its entirety – including that there must be an accepting non-insider impaired creditor. *See, e.g., In re Tribune Co.*, 464 B.R. 126 (Bankr. D. Del. 2011) ("[T]o consider the plain meaning of § 1129(a)(10), one must start at the beginning: the Bankruptcy

Code's rules of construction provide that "the singular includes the plural." § 102(7). Therefore, the fact that § 1129(a)(10) refers to "plan" in the singular is not a basis, alone, upon which to conclude that, in a multiple debtor case, only one debtor—or any number fewer than all debtors—must satisfy this standard."); *see also In re Woodbridge Grp. of Cos., LLC*, 592 B.R. 761 (Bankr. D. Del. 2018) (reiterating that "'[i]n the absence of substantive consolidation, entity separateness is fundamental' and the requirement of § 1129(a)(10) must be satisfied by each debtor in a joint plan."); *In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293 (Bankr. D. Del. 2011). This includes § 1129(a)(8) that requires each class of claims be either unimpaired or accept the plan. In these cases, the Delaware court applied the plain meaning of the statute and adopted a per debtor standard. In the instant case, broader creditor support is irrelevant. No impaired creditor has confirmed the plan for Debtor. Notably, courts that have held to the contrary and that have supported a per plan approach have done so because the interpretation of § 1129(a) was not outcome determinative. *See, e.g., In re SGPA, Inc.,* 2001 Bankr. LEXIS 2291 (Bankr. M.D. Pa. Sept. 28, 2001) (holding that the creditors did not suffer adverse effect of the joint plan, and consolidation would not have changed that fact).

Further, the Debtors in this case did not seek substantive consolidation of the estates and each debtor should thus have individual requirements for confirmation of the plan. True that substantive consolidation is not favored by the courts, and indeed the 9th Circuit has noted it should be used sparingly, but this disfavor only lends support to the fact that each debtor should be treated as having its own plan. *See Alexander v. Compton (In re Bonham)*, 229 F.3d 750, 767 (9th Cir. 2000). Each debtor in this case reorganized their individual bankruptcy estate separately under the joint plan. So, in the absence of affirmative consolidation, the Debtor in this case must have confirmation from an impaired class and broader acceptance of the plan is not enough. To

allow joint administration of Chapter 11 reorganization would necessarily create a work-around the rigorous rules for substantive consolidation. *See Reider v. Fed. Deposit Ins. Corp (In re Reider)*, 31 F.3d 1102, 1109 (11th Cir. 1994). Allowing for a per plan approach would not only create a loophole, but would undermine the rights of certain impaired classes. It would allow the impaired class of one debtor to speak for that of another.

This Court should not adopt a per plan approach to confirmation of Chapter 11 reorganization, favoring expediency over fairness. Indeed, doing so is inconsistent not only with the foundational principles of corporate law and corporate separateness but also is contrary to the statute. Section 1129 (a)(10) states that an impaired class must accept the plan and the purpose for this provision is to ensure fairness and support from creditors. Consequently, a per debtor application of § 1129 (a)(10) is necessary.

CONCLUSION

This Court should affirm the judgement of the U.S. Court of Appeals for the Thirteen Circuit and adopt the hypothetical test for § 365(c)(1) and the per debtor approach for confirmation of a plan under § 1129(a)(10).