IN THE

Supreme Court of The United States

SPRING TERM, 2020

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 Supreme Court of the United States

Brief for the Respondent

Team No. 29
Counsel for Respondent

QUESTIONS PRESENTED

I. Whether 11 U.S.C. § 365(c)(1) permits a debtor in possession to assume an executory contract over the objection of the non-debtor party to such contract when applicable non-bankruptcy law excuses the non-debtor party from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession.

II. Whether, in a case where a class of claims is proposed to be impaired under a joint, multi-debtor plan, 11 U.S.C. § 1129(a)(10) requires 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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STATEMENT OF JURISDICTION

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

STATEMENT OF FACTS

Factual Background

Chapter 11 Bankruptcy proceedings were filed by Tumbling Dice, Inc. ("TDI") and its affiliated debtors on January 11, 2016. Record (R.) at 3. TDI is a holding company formed to own the membership interests of its nine wholly-owned debtor-subsidiaries, eight of which operate a luxury casino and resort. *Id.* at 4. The remaining debtor-subsidiary, Tumbling Dice Development, LLC ("Development"), acts as a licensee under a non-exclusive software license agreement with Under My Thumb. *Id.*

Under My Thumb is a leading software designer that created software for Development's casino loyalty program in 2008, pursuant to a Research and Development agreement. *Id.* The Software cost Under My Thumb $10 million and took nearly a year to create. *Id.* Development agreed to reimburse Under My Thumb for a portion of the costs pursuant to an unsecured $7 million promissory note. *Id.*

At the completion of the software, Under My Thumb and Development entered into a license agreement that allowed Development a non-exclusive license to use Under My Thumb's copyrighted and patented Software in exchange for a monthly fee and broadly prohibited Development from assigning or sublicensing their rights to others without Under My Thumb's express written consent. *Id.* at 5. The agreement did, however, permit Development to "extend the benefits of the Agreement to its affiliated entities." *Id.* The Software provided by Under My Thumb was a huge success for Development and is an essential part of Development's business model. *Id.*

In December 2011, the stock of TDI was acquired by a hedge fund, Start Me Up, Inc., through a leveraged buy-out. *Id.* at 6. As part of the leveraged buy-out, TDI and Debtors gave first priority liens on their assets to a group of lenders in exchange for a loan in the amount of $3 billion which led to the commencement of these chapter 11 cases. *Id.* A joint chapter 11 plan was filed on behalf of all of the Debtors that proposed to assume Under My Thumb's license agreement under sections 365 and 1123(b)(2). *Id.* at 7. Under My Thumb would continue to receive monthly payments for the use of its Software and would be paid the remaining $6 million owed under the R&D Note. *Id.*

The disclosure statement revealed that Sympathy for the Devil ("SFD") would receive 51% of the voting shares of reorganized TDI. *Id.* SFD is a private equity group whose portfolio includes a direct competitor of Under My Thumb that had tried to replicate Under My Thumb's Software. *Id.* at 8.

Each of the Debtors had at least one impaired accepting class of creditors except for Development. *Id.* Under My Thumb, who controlled Development's only class of creditors, voted to reject the plan in order to protect the Software from their competitors. *Id.*

Procedural History

Under My Thumb objected on numerous grounds but pursued only two on appeal. *Id.* First, it relied on the "hypothetical test" and argued that the proposed assumption of the Agreement by the Debtors was not allowed under section 365(c)(1) because applicable non-bankruptcy law excused performance by Under My Thumb in the absence of its consent. *Id.* Second, it argued the Plan was not confirmable under section 1129(a)(10) because no impaired class of Development's creditors had voted on it. *Id.*

The bankruptcy court overruled the objections and confirmed the Plan. The bankruptcy court adopted the "actual test" and concluded that Under my Thumb was being asked only to honor its existing contractual obligation with Development. *Id.* The court further held that section 1129(a)(10) is satisfied where at least one impaired class in a joint, multi-debtor plan accepts the plan. The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court on both issues.

The Court of Appeals for the Thirteenth Circuit reversed the judgment on both issues. The Thirteenth Circuit held that section 365(c)(1) precludes assumption of a non-exclusive license of intellectual property over the objection of the licensor and adopted the "hypothetical test." The Thirteenth Circuit further held that section 1129(a)(10) requires acceptance from an impaired class of claims of each debtor under a joint, multi-debtor plan.

SUMMARY OF ARGUMENT

Development Cannot Assume the Agreement Without Under My Thumb's Consent

Section 365(c)(1) precludes assumption of a non-exclusive intellectual property license over the objection of the licensor. The plain language of section 365(c)(1)clearly provides that Under My Thumb's licenses cannot be assumed *or* assigned. A literal reading of the statute does not create a conflict between sections 365(c)(1) and 365(f) because the former applies only to specific laws that excuse a contracting party from accepting performance to a third party and the latter is a general prohibition on assignment.

The "hypothetical test" should be adopted over the "actual test" because the "actual test" disregards the statute's literal meaning without reason. Section 365(c)(1) uses clear language and does not implicate an exception to the plain meaning rule. Further, Development is materially different than its prepetition entity due to new ownership and directors. Neither the debtor in

possession, nor the new Development has Under My Thumb's consent to assume the agreement, therefore under section 365(c)(1)'s plain meaning Development cannot assume the Agreement.

> The Per Debtor Rule Ensures that Under My Thumb's Substantive Rights are Not Violated.

The per plan rule should not be adopted by this court because it is inconsistent with the fundamental principal of entity separateness. Adoption of this rule would allow a debtor who is unable to confirm its own plan of reorganization to confirm a plan in a jointly administered case by the vote of a stranger-creditor. The per plan rule deprives creditors of what little protection the Code offers them by way of plan confirmation and alters creditors substantive rights in a manner not contemplated by the Code. This Court should reject the Ninth Circuit's per plan rule and adopt Delaware's per debtor rule.

ARGUMENT

I. Development cannot assume the agreement because section 365(c)(1) precludes assumption of a non-exclusive intellectual property license over the objection of the licensor.

11 U.S.C. § 365 authorizes a bankruptcy trustee, or, in a Chapter 11 case, the debtor in possession to assume executory contracts. This great authority is not wholly absolute. Section 365(c)(1) provides that:

> A "trustee may not assume or assign an executory contract" 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. § 365(c)(1).

The circuit courts have disagreed on how to apply and interpret section 365(c)(1). The Third, Ninth, Eleventh, and Fourth Circuits choose to adhere to the plain language of the statute,

thus embracing the "hypothetical test". *See,* e.g., *RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257 (4th Cir. 2004); *Perlman v. Catapult Entm't, Inc. (In re Catapult Entm't, Inc.)*, 165 F.3d 747 (9th Cir. 1999); *In re West Elec., Inc.*, 852 F.2d 79 (3d Cir. 1988); *In re James Cable Partners*, 27 F.3d 534, 537 (11th Cir. 1994) (same); *In re Catron*, 158 B.R. 629, 633-38 (E.D. Va. 1993). The First Circuit is the only circuit in which the "actual test is clear established law". *See*, e.g., *Institut Pasteur v. Cambridge Biotech Corp*., 104 F.3d 489 (1st Cir. 1997).

This Court should adopt the "hypothetical test" and hold that applicable intellectual property law protections combined with Under My Thumb's lack of consent protects Under My Thumb from continuing under the Agreement against their will.

A. Section 365(c)(1) is clear, and the plain reading of the statute provides that Under My Thumb's Licenses cannot be assumed or assigned.

A literal reading of section 365(c)(1) establishes the "hypothetical test" whereby a debtor in possession may not assume or assign an executory contract over the non-debtor's objection if applicable law would bar assignment to a hypothetical third party, even where the debtor in possession has no intention of assigning the contract to any such third party. *See*, e.g., *In re Sunterra Corp.*, 361 F.3d at 257; *In re Catapult Entm't, Inc.*, 165 F.3d at 747; *In re West Elec., Inc.*, 852 F.2d at 79. Under the plain language of section 365(c)(1), if applicable intellectual property law would excuse Under My Thumb from accepting performance from an entity other than the debtor, the debtor may not assume or assign the licenses.

The Third Circuit was the first to adopt this test in *In re West Electronics. Inc*. It found that the "literal meaning of the words chosen by Congress" requires abiding by the "hypothetical test". *Id.* at 83.

As the Thirteenth Circuit rightly noted, the language of section 365(c)(1) notably uses the grammatical "or" as a disjunctive conjunction instead of "and". This indicates that Congress chose "or" to signal that "assumption" or "assignment" are independent from one another. This Court has recognized that the "reading [of a statute] is also mandated by the grammatical structure of the statute". *See United States v. Ron Pair Enterprises*, 489 U.S. 235, 241 (1989).

i. The literal reading of section 365(c)(1) does not create irreconcilable inconstancies within the Bankruptcy Code.

a. Reconciling sections 365(c)(1) and 365(f)

Development will argue that the literal reading of section 365(c)(1) creates constant conflict between subsections 365(c)(1) and 365(f). However, this is not so because section 365(c)(1) is only a narrow exception to the debtor's general assignment power. Section 365(c)(1) will only excuse parties if the applicable anti-assignment law is predicated on the rationale that the identity of the contracting parties is material to the agreement. *In re Sunterra Corp.*, 361 F.3d at 266-67.

The Sixth, Ninth, Eleventh and notably the Fourth Circuit in *Sunterra,* ascribe a different meaning to the phrase "applicable law". *Id.* It interpreted the phrase "applicable law" in section 365(f) as applying to general prohibitions on assignment whereas the same phrase in section 365(c)(1) applies only to specific laws that excuse a contracting party from accepting or rendering performance to a third party. *Id.*; *see In re Magness*, 972 F.2d at 695. Here, the Thirteenth Circuit agreed with these circuit courts. R. 14. The First Circuit, on the other hand, interpreted the phrase "applicable law" in each section as applying to different respective laws. *See In re Pioneer Ford Sales, Inc,* 729 F.2d. 27, 29 (1st Cir. 1984)[1]. Accordingly, section

[1] "…we see no conflict, for (c)(1)(A) refers to state laws that prohibit assignment 'whether or not' the contract is silent, while (f)(1) contains no such limitation. Apparently (f)(1) includes state laws that prohibit assignment only

365(c)(1) overrides 365(f) and applies to the Agreement in this case because the identity of the original contracting parties is material.

b. Debtor in Possession Versus Trustee

Judge Jones, dissenting in the Thirteenth Circuit opinion noted the difference between the use of the words "trustee" and "debtor in possession" to imply that section 365(c)(1) does not restrict the debtor in possession's right to assume executory contracts. R. 23. However, the Ninth Circuit in *Perlman* reiterated the principle that section 365(c)(1)'s "use of the term 'trustee' includes Chapter 11 debtors in possession". *In re Catapult Entm't, Inc.*, 165 F.3d at 750.

ii. The literal reading of section 365(c)(1) does not conflict with the Code's legislative history because no such relevant history exists.

Advocates of the "actual test" argue that the plain reading of section 365(c)(1) is at odds with the Code's legislative history. Because the statute is clear, this Court need not resort to the code's so-called legislative history. *See Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808-09 n.3, 103 L. Ed. 2d 891, 109 S. Ct. 1500 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute."). While looking at legislative history is irrelevant to begin with, we will address this argument here.

Section 365 has no legislative history because it was added to the Bankruptcy code in 1984. *See In re Sunterra Corp.*, 361 F.3d at 270; *In re Cardinal Indus., Inc.*, 116 B.R. 964, 979 (Bankr. S.D. Ohio 1990). Because no relevant history exists, Development would like this Court to consider a different amendment from several years earlier, never enacted, that reflects "at most the thoughts of only one committee in the House". *In re Catapult Entm't, Inc.*, 165 F.3d at 754.

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when the contract is *not* silent about assignment; that is to say, state laws that enforce contract provisions prohibiting assignment".

Even if this Court wishes to consider all three and a half lines of text from the 1980 amendment, this evidence is neither "sufficient to override the Plain Meaning Rule", nor conclusive enough to override contrary language in the statute. *In re Sunterra Corp.*, 361 F.3d at 270; *Sigmon Coal Co., Inc v. Apfel*, 226 F.3d 291, 306 (4th Cir. 2000) (refusing to displace a clear statutory provision with an explanation proffered by a single member of Congress). The suggested approach by Development is of no real consequence and surely not enough to overcome the straightforward language of subsection (c)(1).

iii. The plain language of section 365(c)(1) preserves Under My Thumb's rights with respect to the federal intellectual property system.

Article I, section 8 provides Congress the power to grant protections for inventors, authors, and artists alike in order to foster development and support an innovative environment. Art. 1 § 8, cl. 8. Patents, copyrights, and trademarks are accompanied by a bundle of property rights under which an owner may control the use and license of his or her creations for limited amounts of time. Owners often exercise their rights through exclusive and non-exclusive licenses. Under federal common law, intellectual property license agreements are personal and non-assignable. *Everex Sys. v. Cadtrak Corp. (In re CFLC, Inc.),* 89 F.3d 673 (9th Cir. 1996).

Allowing a patent owner to decide the identity of her licensee is essential to the policy of the intellectual property system. Eliminating the exception for deference to applicable federal law provisions furthers the risk of deteriorating the rights of inventors, like Under My Thumb, to control the use and sale of their technology.

Development may argue that refusing to permit assumption of the licenses undermines general bankruptcy policy. A similar point was made in *In re CFLC, Inc,* where the court held that despite the overall bankruptcy policy requiring maximization of a debtor's assets, "§365(c) recognizes that there are other policies in law as well, and the statute expressly subordinates the

policy of maximization to those other policies." 174 B.R. 119 at 123 (N.D. Cal 1994). Moreover, as this Court has recognized on many occasions, "Congress is the policymaker- not the courts" and "the modification of a statutory provision to achieve a preferable policy outcome is a task reserved for Congress". *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A*., 530 U.S. 1, 13 (2000) (citations omitted); *In re Sunterra Corp.*, 361 F.3d at 269 (citations omitted).

Nothing expressly prevents the new Development entity from renegotiating further details in new agreements with Under My Thumb beyond just assuming the Agreement.

B. The "actual test" disregards the "or" in section 365(c)(1) thereby ignoring the statute's literal meaning without reason.

Courts have adopted the "actual test" as applying only when the debtor actually seeks to assign an executory contract to a third party. This test changes the disjunctive "or" to an "and" thus considering assumption and assignment to be a package deal. Theoretically, a debtor in possession would be permitted to assume any executory contract as long as no 'actual' assignment was contemplated. This test has only been adopted by the First Circuit. *See*, e.g., *Summit Inv. & Dev. Corp*. *v. Leroux*, 69 F.3d 608, 613 (1st Cir. 1995); *Institut Pasteur,*104 F.3d at 489.

i. Section 365(c)(1) does not require statutory interpretation because the language is clear and does not implicate an exception to the plain meaning rule.

Development urges this Court to look beyond the plain language of section 365(c)(1) to determine whether Under My Thumb's consent is required to assume the licenses. This is unnecessary. When interpreting a statute, this Court must defer to the plain meaning, unless the plain meaning is unclear, absurd[2], or would produce results contrary to legislative intent. *Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564, 571 (1982). Even a reading that conflicts with

[2] A literal application of the statutory language is absurd, for example, when it is so gross as to shock the general moral or common sense…" *In re Sunterra Corp.*, 361 F.3d at 265 (citations omitted)

general policy is not considered "absurd" enough to implicate one of the exceptions. *In re Sunterra Corp.*, 361 F.3d at 268 (citations omitted). Courts have recognized that triggering an exception to a statute's plain meaning is "exceptionally rare". *Sigmon Coal Co.* 226 F.3d at 304.

The language of section 365(c)(1) is clear. It provides that absent consent from the licensor, a debtor can neither assume nor assign an executory contract which is non-transferable under applicable nonbankruptcy law. The use of "or" in section 365(c)(1) does not create textual ambiguity so Development must reach the higher burden of demonstrating that a plain reading would create an absurd result or show that it is at odds with Congress' intent; it has not done so. Therefore, this Court should "hold Congress to its words" and find that 365(c)(1) applies to assumption or assignment based on the plain meaning interpretation. *Brooker v. Desert Hosp. Corp.,* 947 F.2d 412, 414 (9th Cir. 1991).

ii. Even if this court were to adopt the "actual test", development still cannot assume the agreement.

Presuming the bankruptcy estate is considered a separate legal entity than that of the debtor, an assumption of Under My Thumb's non-exclusive licenses by a newly reorganized Development would theoretically be equivocal to an assignment of those licenses[3].

C. Development cannot assume the agreement because per 365(c)(1)(a), federal intellectual property law excuses under my thumb from rendering performance to an entity other than the debtor or the debtor in possession.

The delectus personae of the contracting parties is material to the Agreement due to the competitive nature of lucrative software[4]. Development maintains that it is the same exact entity

[3] "This automatic assignment creates an issue for the patent licensor because the licensee is no longer the same legal entity as it was prebankruptcy". Jennifer Ying, *The Plain Meaning of Section 365(c): The Tension Between Bankruptcy and Patent Law in Patent Licensing*, 158 U. Pa. L. Rev. 1225.
[4] Courts have found that intellectual property law constitutes "applicable law" under sections 365(c)(1)(A). R.13; *see In re Catapult Entm't, Inc.*, 165 F.3d at 750.

it was when the Agreement was made despite substantial new ownership by Sympathy for the Devil (SFD). R. 8.

Like in *Institut Pasteur*, where the reorganized entity was different than the prepetition entity because of the change in ownership post-bankruptcy filing, Development's reorganization would change the ownership of the prepetition entity. 104 F.3d at 494. Specifically, SFD would receive 51 percent of the voting shares as well as several seats on the reorganized board of directors. R.8. Development's proposed reorganization plan amounts to a de facto assumption on behalf of SFD, a third party not present in the original Agreement. Under My Thumb would surely not have agreed to license their technology to Development had they known that its future ownership would involve their direct competitors. R. 8.

We recognize that this Court in *NLRB* suggested that a debtor possession is the same entity it was before filing for bankruptcy. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). However, some courts have interpreted this suggestion as being "necessary only for the purposes of that case" and have held that "it does not support in all cases the proposition that no assignment or transfer occurs as a matter of law between prepetition debtor and debtor in possession." *Bonneville Power Admin. v. Mirant Corp. (In re Mirant)*, 440 F.3d 238, 254 n.21 (5th Cir. 2006). Thus, we insist that the reorganized Development is materially different than its prepetition entity, not merely due to its chapter 11 filing but because of its new ownership and directors. R.8.

D. Development cannot assume the agreement because per 365(c)(1)(b), Development does not have Under My Thumb's consent.

Courts regularly consider intellectual property licenses as executory contracts[5] and thus governable by section 365 of the bankruptcy code. *See*, e.g., *In re Kmart Corp.*, 290 B.R. 614, 618 (Bankr. N.D. Ill. 2003). As the Thirteenth Circuit and other circuits agree, nonexclusive licenses in the realm of patent and copyright agreements, are considered "personal and assignable only with the consent of the licensors." *Everex*, 89 F.3d at 680.

Our case is similar to *In re Catapult Entm't, Inc.,* where the Ninth Circuit held that nonexclusive patent licenses could not be assumed in a bankruptcy proceeding without the consent of the licensor. 165 F.3d at 754. The proposed reorganization plan in the above case involved a complicated merger with two other companies who would also be assuming the patent licenses. *Id.* at 748-49. Similarly, reorganized Development, which includes new companies like SFD, is attempting to assume the nonexclusive licenses in the Agreement without Under My Thumb's consent. R. 8.

Like patent licenses, nonexclusive copyright licenses also require the licensor's consent in order for valid assumption to occur. In *In re Sunterra Corp.*, a debtor sought to assume RCI's non-exclusive software license after filing for Chapter 11 bankruptcy. 361 F.3d at 260. Prior to the reorganization plan's confirmation, RCI asserted that Sunterra was precluded from assuming the license under section 365(c)(1) without RCI's consent. *Id.* at 271. The Fourth Circuit agreed and held that Sunterra could not assume the licenses without RCI's consent. *Id.* Because Under

[5] An executory contract is "a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 Minn. L. Rev. 439, 460 (1973)

My Thumb did not consent to Development's assumption of the Agreement, this Court should deem the license rejected and terminate the Agreement.

II. Section 1129(a)(10) requires acceptance from at least one impaired class of claims of each debtor.

Very few courts have addressed the question of whether section 1129(a)(10) requires a per debtor or per plan rule in jointly administered, multi-debtor cases. The Ninth Circuit is the only circuit court to have entered the fray, by simply requiring one impaired class to accept a joint-plan. *See JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (In re Transwest Resort Props., Inc.)*, 881 F.3d 724 (9th Cir. 2018). The District of Delaware, widely considered the most influential bankruptcy court in the country, requires each debtor to have at least one impaired class accept a joint-plan. *In re Tribune*, 464 B.R. 126, 183 (Bankr. D. Del. 2011). The Thirteenth Circuit adopted the per debtor rule. R. 21.

Petitioner advocates that this Court should adopt the Ninth Circuit's per plan rule found in *Transwest*, which decision primarily focuses on the plain reading of section 1129(a)(10). However, the per plan rule is inconsistent with the fundamental principal of entity separateness. Adopting the per plan rule allows a debtor who is unable to confirm its own plan of reorganization to nevertheless confirm a plan in a jointly administered case by the vote of a stranger-creditor. In essence, the per plan rule operates as a de-facto substantive consolidation of jointly administered debtors for purposes of confirmation without satisfying the consolidation requirements. Under a per plan rule, creditors are deprived of what little protection the Code offers them by way of plan confirmation. As a result, their substantive rights are inexcusably altered. It also is inconsistent with the meaning of section 1129(a)(10) when read in conjunction with the other provisions of the Bankruptcy Code. As such, this Court should reject the Ninth Circuit's per plan rule and adopt Delaware's per debtor rule.

A. The per plan rule is inconsistent with the fundamental principal of entity separateness.

As with all cases of statutory interpretation, this Court must start with the text. Section 1129(a)(10) reads as follows, "at least one class of claims that is impaired under the plan has accepted the plan". 11 U.S.C. § 1129(a)(10). The Ninth Circuit held that a plain reading of section 1129(a)(10) unambiguously applies a per plan rule. *Transwest*, 881 F.3d at 729. That court found that the statute made no distinction between single and jointly administered multi-debtor plans. *Id.* Although semantically correct, this reasoning is unpersuasive because it ignores fundamental principles of entity separateness. *In re Tribune*, 464 B.R. at 182, 183.

For example, in *Tribune* the court jointly administered 111 petitions for reorganization filed by the Tribune Company and its affiliates. *Id.* at 135. Two plan proponents presented competing plans, neither of which complied with section 1129(a)(10). *Id.* at 201, 207. Both plans contained express language that the debtors' estates were not being substantively consolidated. *Id.* at 182. For example, that a "claim against multiple Debtors would be treated as a separate claim against each". *Id.* The court found that the practical effect of these provisions was that "each joint plan actually consists of a separate plan for each Debtor." *Id.* Thus, the court held that each of the 111 Debtors had to individually comply with, among other things, section 1129. *Id.* at 183.

i. Joint administration does not affect the substantive rights of debtors or creditors.

Joint administration is simply a tool of convenience for the court and the parties to streamline the administrative process. *Reider v. FDIC, (In re Reider)*, 31 F.3d 1102, 1109 (11th Cir. 1994); R.3. It does not affect the substantive rights of either the individual debtors nor their creditors. *Bunker v. Peyton (In re Bunker)*, 312 F.3d 145, 153 (4th Cir. 2002) "Joint

administration is thus a procedural tool permitting use of a single docket for administrative matters, including the listing of filed claims, the combining of notices to creditors of the different estates, and the joint handling of other ministerial matters that may aid in expediting the cases." *Id.* at 1109 (citing Rule 1015, Advisory Committee Note (1983)). It also ensures that one judge is hearing and adjudicating the disputes, as well as provides for all motions to be heard together. It also eases the burden of the debtors by allowing for one round of disclosure statements.

Because joint administration does not affect substantive rights, it follows that the administrative shortcuts it provides cannot directly affect substantive rights of any parties. Accordingly, when multiple debtors propose a joint plan, each individual debtor must comply with section 1129(a)(10) to obtain plan confirmation. *See In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. at 302 (Bankr. D. Del. 2011); *In re Tribune*, 464 B.R. at 183; *see also In re Woodbridge Grp. Of Cos., LLC*, 592 B.R. 761, 778 (Bankr. D. Del. 2018) (finding alternatively that substantive consolidation adopts the per plan rule). A few courts have found section 1129(a)(10) to be a technical requirement, and thus not a substantive right of impaired creditors. *In re 7th St. & Beardsley Partnership*, 181 B.R. 426, 431 (Bankr. D. Ariz. 1994). Even if true, a right to payment is a substantive right. *Substantive Law*, Black's Law Dictionary (10th ed. 2014). Section 1129 is a mechanism to protect that right. Joint administration does not allow for the vote of an impaired class to be ignored, yet, that is what occurred here.

ii. The per plan rule operates as a de-facto substantive consolidation of jointly administered debtors without satisfying the consolidation requirements.

Substantive consolidation treats multiple debtors as one, which directly affects the substantive rights of the parties involved. *In re Owens Corning*, 419 F.3d 195, 199 (3rd Cir. 2005) (substantive consolidation "may affect profoundly creditors' rights and recoveries"). In *In*

re Owens Corning, the Third Circuit considered when bankruptcy courts could substantively consolidate affiliated cases. *Id.* The court declined to list hard-fast factors, rather it adhered to five principles that every court should consider. *Id.* at 211. First, the fundamental principle that, absent consolidation, courts must respect entity separateness. *Id.* Second, the harms that arise form disregarding entity separateness, and, whether the debtor or creditors seek it. *Id.* Third, simplicity to the administrative process is insufficient, alone, to grant substantive consolidation. *Id.* Fourth, substantive consolidation is an "extreme" and "imprecise" remedy that should be used rarely. *Id.* Fifth, it is one that debtors cannot use solely to "disadvantage tactically a group of creditors in the plan process or to alter creditor rights." *Id.*

UMT does not suggest that the Debtors substantively consolidated their estates. That issue has never been briefed before the bankruptcy court, bankruptcy appellate panel, or the Thirteenth Circuit. R. 7. In fact, the plan included "non-substantive consolidation" provisions similar to the competing plans in *In re Tribune*, including that "no Debtor is to become liable for the obligations of another." *Id.* However, a per plan rule treats a jointly administered case as a de-facto substantive consolidation for confirmation purposes. *In re Tribune*, 464 B.R. at 183; R. 18. If Debtors' obligations do not change, then the joint plan is actually ten separate plans. *In re Tribune*, 464 B.R. at 183. As such, only Development's creditor, UMT, may vote for its proposed plan.

B. A per debtor rule will ensure that Under My Thumb's substantive rights are not altered.

When a debtor files a Chapter 11 petition, there is no guarantee that it will confirm a proposed plan and receive a discharge. In fact, the success rate for corporate reorganization ranges in empirical studies between ten and twenty seven percent. Michelle M. Arnopol, *Why Have Chapter 11 Bankruptcies Failed So Miserably: A Reappraisal of Congressional Attempts*

to Protect a Corporation's Net Operating Losses after Bankruptcy, 68 Notre Dame L. Rev. 133, 134 (1992). Part of the difficulty in effective reorganizations is that the debtor must comply with the provisions in the Code. On top of that, creditors may bring to the attention of the court any instances of non-compliance.

Notwithstanding the benefit that joint administration provides for multi-debtor cases, the court in *Reider* unequivocally stated that the individual bankruptcy estates must remain separate unless and until they are substantively consolidated. *(In re Reider)*, 31 F.3d at 1111. However, entity separateness is compromised if a creditor for debtor A can approve a plan for Debtor B. R. 19. Voting for or against a plan is a right that belongs only to a holder of an impaired claim or interest. 11 U.S.C. § 1126(a). Its purpose is to protect those creditors' substantive rights. Under a per plan rule, there is little stopping corporate debtors from manipulating the claims process. For example, a debtor could have at least one affiliate file a petition to ensure that an impaired class of claims accepts the joint plan. Or, as is the case here, a debtor who is unable to confirm a plan on its own may jointly administer its petition with other debtors. Both types of manipulation are contrary to the purpose of the Code. *Windsor on the River Assocs*, 7 F.3d at 131 (stating that 1129(a)(10) was created to protect lenders from inequity in cramdowns).

Contrary to the Debtors' claims, the plan proponents are not left without any recourse. They can drop Development from the proposed joint plan because it fails to meet the requirements under section 1129(a)(10). See *In re Tribune*, 464 B.R. at 184. The Debtors acknowledged that restructuring or refinancing their debt load from the leveraged buyout "was a primary goal in these bankruptcy cases." R. 6. But Development is neither a borrower nor a guarantor under the buyout agreement. *Id.* As such, it is not a necessary party to the reorganization of the other Debtors who are saddled with secured debts of nearly $3 billion and

$114 million in unsecured debts. *Id.* Further evidenced by the undisputed fact that Development "serves a more limited purpose in the overall corporate structure." R. 4. This would allow the court to confirm the plans of those debtors who complied with section 1129, while protecting UMT from a cramdown that has zero support from its affected impaired creditors. R. 8.

The plan proponents are also entitled to cure any impairment under the plan to make UMT a non-impaired claimholder. 11 U.S.C. § 1124(2)(A). Since only holders of impaired claims or interests have the right to vote, Development has the statutory power to remove UMT's voting rights. 11 U.S.C. § 1126(a).

C. This court's cardinal rule of statutory interpretation requires section 1129(a)(10) to be read in conjunction with the other provisions of the Bankruptcy Code.

Even if this Court finds that the per plan rule is not a de-facto substantive consolidation for purposes of 1129(a)(10), the Debtors argument is still found wanting. The Thirteenth Circuit's interpretation of section 1129(a)(10) is consistent with this Court's guidance on statutory interpretation that "a statute is to be read as a whole… since the meaning of statutory language, plain or not, depends on context." *See King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) (citations omitted).

Context is derived from the other provisions of the Code. For example, its rules of construction provide in part that "the singular includes the plural." 11 U.S.C. § 102(7). Section 1129 governs confirmation of a plan. It provides in part that "[t]he court shall confirm a plan only… 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…." 11 U.S.C. § 1129(a)(10). In *Transwest*, the Ninth Circuit applied the per plan rule and held that a plain reading of section 1129(a)(10) only required that "one impaired class 'under the plan' approve 'the plan'." *In re Transwest Resort Props., Inc.*, 881 F.3d at 729. However, as the court in *Tribune* found, reference to "plans" is

consistent with the principle of entity separateness and is not sufficient reason, on its own, to apply a per plan rule. *In re Tribune*, 464 B.R. at 182. This Court should read section 1129(a)(10) in conjunction with the other subsections of section 1129, especially section 1129(a)(7). By doing so, this Court will find that section 1129(a)(10) must be interpreted to apply a per debtor rule.

i. Development's plan may not be confirmed because it does not satisfy all the requirements of section 1129.

In Chapter 11 cases, the court does not play an active role in accepting or rejecting a plan. In fact, the court does not vote at all. However, it plays an important role at both the disclosure statement stage, *see* 11 U.S.C. § 1125(a)(1)[6], as well as the confirmation stage by ensuring that the plan complies with the provisions of the Code. 11 U.S.C. § 1129(a)(1). Meanwhile, the right to vote on a plan belongs exclusively to each debtors' impaired creditors. 11 U.S.C. § 1126(a). This right is protected by requiring at least one impaired class of claims accept the plan. 11 U.S.C. § 1129(a)(10). The purpose of section 1129(a)(10) is to deter cramdowns and "provide some indicia of support by affected creditors and prevent confirmation where such support is lacking." *Windsor on the River Assocs. v. Balcor Real Estate Fin. (In re Windsor on the River Assocs.)*, 7 F.3d 127, 131 (8th Cir. 1993) (citation omitted). Unfortunately, the per plan rule undermines this purpose. It does not prevent confirmation where a debtor does not have support from its only impaired creditor.

In *Tribune*, the court found section 1129(a)(7) was an "entitlement to the prescribed treatment for every impaired class of creditors for each debtor which is part of a joint plan." *In re Tribune*, 464 B.R. at 183. In other words, a plan must provide that every creditor receives at least

[6] Adequate information means that a "hypothetical investor", who is similarly situated to the creditors, would be able to "make an informed judgment about the plan."

as much as it would in a liquidation of their specific creditor. Since section 1129(a)(7) applies to each debtor, this Court should find that section 1129(a)(10) does as well. Even under the per plan rule, UMT would succeed in challenging any plan that failed to comply with section 1129(a)(7). The court in *Tribune* could not confirm a joint plan where the debtor did not meet the confirmation standards pursuant to section 1129. *Id.* Similarly, this Court should hold that because Development failed to comply with section 1129(a)(10), it is ineligible to have its plan confirmed.

No party disputes that the bankruptcy court would not have confirmed Development's plan if their petition was not jointly administered. The only affected creditor of Development's plan of reorganization is UMT, who has an allowed claim for $6 million. R. 6. It is set to receive a distribution of fifty-five percent of that total under the plan. R. 7. The per plan rule disenfranchised UMT and removed its right as the sole holder of an impaired claim to reject Development's plan. As a result, Development was able to cramdown its plan without any support from UMT in direct contravention of section 1129(a)(10). Development needs UMT to approve its plan. 11 U.S.C. § 1129(a)(10). This holding should not change simply because the petition is being jointly administered.

CONCLUSION

For the reasons stated above, the judgement of the court of appeals should be affirmed.

CERTIFICATE OF COMPLIANCE

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This document further certifies that the authors of this brief have complied with all applicable competition requirements.

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