No. 19-1004

IN THE

Supreme Court of the United States

OCTOBER TERM, 2019

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

TUMBLING DICE, INC. *ET AL.*, PETITIONER

V.

UNDER MY THUMB, INC., RESPONDENT.

BRIEF OF PETITIONER, TUMBLING DICE, INC.

Team # 32 P
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QUESTIONS PRESENTED FOR REVIEW

1. Where the debtor in possession does not plan to assign an executory contract, but only assume the contract, does 11 U.S.C. § 365(c)(1) allow the debtor in possession to still assume the executory contract despite the objection of the non-debtor party to such contract?

2. In a joint, multi-debtor plan, where a class of claims is proposed to be impaired, does 11 U.S.C. § 1129(a)(10) only require the acceptance from an impaired class of claims of any debtor under the joint plan?

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STATEMENT OF JURISDICTION

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

STATEMENT OF THE CASE

This appeal arises from two objections made by Under My Thumb, Inc. ("Respondent"), in response to the Bankruptcy Court's confirmation of the Joint Plan of Reorganization ("Plan") proposed by Tumbling Dice, Inc., ("Petitioner"), and by its affiliated debtors ("Debtors"). The facts giving rise to the two questions presented for review in this case are as follows:

I. FACTUAL HISTORY

On January 11, 2016, the Debtors voluntarily commenced a Chapter 11 proceeding in accordance with the Bankruptcy Code. R. at 3. Out of convenience for the parties and in accordance with Bankruptcy Rule 1015(b), the Debtors' cases were jointly administered. *Id*.

As a holding company "formed to own the membership interests of its nine wholly-owned debtor-subsidiaries," Petitioner, Tumbling Dice, Inc., filed the lead bankruptcy case. R. at 4. Eight of its wholly owned debtor-subsidiaries operate luxury casinos and resorts ("Operating Debtors"). *Id*. The ninth debtor-subsidiary is Tumbling Dice Development, LLC ("Development"), which administers certain operations and functions for all the other Operating Debtors. *Id*.

In 2008, Development entered a contract with Respondent, an established software designer, to create a software system that would modernize Debtors' casino loyalty program. *Id*. In nearly a year, Respondent incurred approximately $10 million in costs associated with creating the customer loyalty program software pursuant to a Research and Development Agreement entered into by the parties. *Id*. In return, Development agreed to reimburse Respondent for a portion of these costs through an unsecured $7 million promissory note ("Note"). *Id*.

Upon completion of the software system, Development and Respondent entered into a license agreement (the "Agreement") granting Development a non-exclusive license to use

Respondent's copyrighted and patented software program. R. at 5. In exchange for the license, Development agreed to pay a monthly fee to Respondent contingent on the amount of spending activity by the club loyalty members. *Id*.

Specifically, the Agreement allowed Development to "extend the benefits of the Agreement to its affiliated entities only" despite such affiliated entities not technically being parties to the agreement. *Id*. However, the Agreement disallowed the Debtors from assigning or sublicensing their rights to other parties absent Respondent's written consent. *Id*.

Through the software program, the Debtors could better ascertain the habits and interests of their customers and used this information to revamp their loyalty program, resulting in the tripling of membership. *Id*. The Debtors acknowledged that the software program is an integral part of the Debtors' ongoing business model. *Id*.

The Debtors were not the only party to profit from the Agreement, as the relationship between the parties benefitted Respondent as well. *Id*. Not only was Under My Thumb, Inc. allowed to license similar software to third parties, which it did, but Respondent also received higher than anticipated payments under the Agreement due to the popularity of the Debtors' loyalty program. R. at 5-6. In fact, until June 2015, the Debtors remained current under the terms of the promissory note while maintaining monthly percentage payments from the membership revenues. R. at 6.

In December 2011, a hedge fund, Start Me Up, Inc., acquired Petitioner's stock. *Id*. As part of the leveraged buy-out, and in exchange for a $3 billion loan, Tumbling Dice, Inc. and the Operating Debtors entered into a loan agreement with a syndicated group of lenders ("Lenders") by granting the Lenders first priority liens on Operating Debtors' assets. *Id*.

In January 2016, the Debtors commenced these Chapter 11 proceedings due to the large debt load resulting from the leveraged buy-out. *Id*. Per the petition date, Tumbling Dice, Inc. and the Operating Debtors jointly and severally owed approximately $2.8 billion to the Lenders. *Id*. The Debtors acknowledged their primary goal in these bankruptcy proceedings was to negotiate a deal with the Lenders so as to restructure and refinance Petitioner's debt. *Id*. And, although the Debtors owed approximately $120 million to its unsecured creditors, including Respondent who was owed more than $6 million under the unsecured promissory note, the Debtors nevertheless remained current in their payments to Under My Thumb, Inc., even despite such a vast debt load. *Id*.

Following negotiations and court-ordered non-binding mediation, a deal was reached, and the terms were incorporated into a plan support agreement. R. at 6-7. Per the plan support agreement, and in an effort to substantially restructure the secured indebtedness owed to the Lenders, the Debtors agreed to extend payments over a period of twenty years in exchange for a lower interest rate. *Id*. In return, Start Me Up, Inc. would inject new capital to fund a 55% distribution to unsecured debtors while retaining its equity interests in the Debtors. *Id*.

In August 2016, the Debtors filed a joint plan consistent with the plan support agreement. *Id*. The plan explicitly stated that the Debtors estates were not being substantively consolidated. *Id*. The plan also proposed to assume the Agreement with Respondent pursuant to Sections 365 and 1123(b)(2). *Id*. Therefore, Respondent would continue to receive monthly payments for use of its software program. *Id*.

The plan further provided additional protections for Respondent; the plan included a $66 million (or 55%) pro rata distribution to the Debtors' unsecured creditors thereby resulting in a distribution of approximately $6 million to Respondent that was owed by Development per the

promissory note. *Id*. Respondent initially viewed this plan favorably as it not only allowed for the Agreement to continue to be assumed, but it also provided a distribution to Respondent that significantly exceeded the value of Development's assets. *Id*.

However, Under My Thumb, Inc. began to disfavor the plan once Respondent realized that the unsecured distribution was to be partly funded by a private equity group, Sympathy for the Devil. R. at 7-8. In exchange for its funding of $35 million of the capital used to fulfill the distribution of approximately $66 million to the unsecured creditors (about 53% of the unsecured creditor's distribution), Sympathy for the Devil would receive just 51% of the voting shares of Tumbling Dice, Inc. as well as some seats on the reconstituted board of directors. R. at 8. Sympathy for the Devil's portfolio of companies included a competitor of Respondent. *Id*.

Notably, the plan received nearly unanimous support from all creditor groups. *Id*. Both Tumbling Dice, Inc. and the eight Operating Debtors received acceptance from at least one impaired class of creditors. *Id*. However, Respondent prevented Development from benefitting the same result. *Id*. By controlling Development's only class of creditors, Respondent voted to deny the plan, despite the extremely favorable financial distribution under the Plan that otherwise would not have been possible for Respondent. *Id*. As a result, Development lacked an impaired accepting class of creditors. *Id*.

II. PROCEDURAL HISTORY

Respondent objected to the plan on various grounds, but ultimately only two objections were pursued on appeal to the Thirteenth Circuit Court of Appeals. *Id*. First, Respondent argued, in reliance on the "hypothetical test," that Section 365(c)(1) disallowed the proposed assumption of the Agreement by the Debtors because applicable non-bankruptcy law excused Under My Thumb, Inc. from performance in the absence of its consent, which it refused to provide. *Id*.

Secondly, Respondent argued the Plan is disallowed under Section 1129(a)(10) since Development lacked an impaired accepting class of creditors, arguing that a "per-debtor" approach was proper. *Id*.

The bankruptcy court ruled in favor of Petitioner and its Debtors due to the overwhelming creditor support in favor of the plan (of which only Respondent's acceptance was absent). R. at 3, 8. In response to Respondent's first objection, the bankruptcy court relied on the "actual test" and held that Section 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 party with whom it originally contracted." R. at 8-9. Ultimately, the bankruptcy court ruled that Development could assume the Agreement as Respondent was only being asked to simply honor its existing contractual obligation to Development. R. at 9.

Next, in response to Respondent's second objection, the bankruptcy court found that "Section 1129(a)(10) is satisfied where at least one impaired class in a joint, multi-debtor plan accepts the plan." *Id*. The court emphasized the fact that all of Debtors' impaired classes voted in favor of the Plan except solely for Respondent. *Id*. Further, the court rejected Respondent's contention that the Plan should not be confirmed simply because it refused to vote in favor of the Plan, leaving Development without an accepting impaired class. *Id*.

The Bankruptcy Appellate Panel for the Thirteenth Circuit upheld the bankruptcy court's ruling in favor of the Debtors. R. at 3. On appeal, the United States Court of Appeals for the Thirteenth Circuit reversed the bankruptcy court's decision in its opinion dated March 4, 2019. R. at 2, 21. The Supreme Court of the United States granted the petition for a writ of certiorari limited to the two questions presented for review in this case. R. at 1.

SUMMARY OF THE ARGUMENT

As to the first issue, this court should reverse the decision of the U.S. Thirteenth Court of Appeals' decision that Tumbling Dice, Inc. is precluded from assuming the Agreement. First, the court reached their decision based on the incorrect standard and should have applied the 'actual test' approach. Second, the hypothetical test should be abandoned because it creates erroneous and absurd results contrary to the goals and purpose of the Bankruptcy Code. This case presents an opportunity to quell an issue which has troubled courts and business for far too long. To not seize this opportunity to correct this long-standing problem would be a large failure on the part of judicial system.

Regarding the second issue, this Court has the opportunity to adopt the per-plan approach to 11 U.S.C. § 1129(a)(10), which would follow what a majority of courts and jurisdictions (including the Ninth Circuit Court of Appeals, the only Circuit Court to have addressed this issue) have followed. The plain meaning of 11 U.S.C. § 1129 (a)(10) requires only one class of proposed impaired creditors to vote in approval of a joint, multi-debtor reorganization plan. Furthermore, the per-plan approach aligns with the overall arching policy of Chapter 11 of the Bankruptcy Code by facilitating the reorganization of a business enterprise while protecting the business, the business's employees, and the business's creditors.

STANDARD OF REVIEW

Well established law holds that findings of fact are reviewed for clear error and that conclusions of law are reviewed *de novo*. Here, the Circuit Court's interpretation of 11 U.S.C. § 365(c) involved the determination of whether a debtor in possession could assume an executory contract over a non-debtor part's objection to the contract in light of certain non-bankruptcy law, and therefore is reviewed *de novo. Mitchell v. United States (In re Mitchell)*, 977 F.2d 1318, 1320 (9th Cir. 1992).

The second issue also involves the Circuit Court's plain language analysis of whether 11 U.S.C. 1129(a)(10) applied to the case at hand on a "per-plan" or "per-debtor" basis. Given the interpretation of how the statute applies, it is also reviewed *de novo*. *Am. Law Ctr. PC v. Stanley (In re Jastrem)*, 253 F.3d 438, 441 (9th Cir. 2001).

ARGUMENT

I. 11 U.S.C. § 365(c)(1) DOES NOT PRECLUDE TUMBLING DICE, INC. FROM ASSUMING THE EXECUTORY CONTRACT WITH UNDER MY THUMB, INC. BECAUSE IT SATISFIES THE 'ACTUAL TEST;' MOREOVER, THE COURT SHOULD ABANDON THE 'HYPOTHETICAL TEST' IN FAVOR OF THE 'ACTUAL TEST' BECAUSE THE 'HYPOTHETICAL TEST' CREATES ERRONEOUS AND ABSURD RESULTS, WHICH ARE CONTRARY TO THE UNDERLYING PRINCIPLES OF SECTION 365(c)(1) AND WITH THE FOUNDATIONAL VALUES OF THE BANKRUPTCY CODE AS A WHOLE.

Both the majority and the dissenting opinion of the U.S. Court of Appeals for the Thirteenth Circuit agree that an analysis of this issue requires an identification of the plain meaning of Section 356(c)(1). R. at 12, 22. And, while the majority begins its argument by asserting that "[t]he terms 'trustee' and 'debtor in possession,' as used in the Bankruptcy Code, are…essentially interchangeable," the dissent adeptly argues this is simply not the case. R. at 10, 22. The dissent points out that although, initially, the majority's argument may seem compelling when considered in isolation, the argument nevertheless "offends a central tenet of statutory construction by producing an absurd result." *Id*.

The introductory language to Section 365(c)(1) states, "the trustee may not assume or assign." 11 U.S.C. § 365(c)(1). According to the majority, due to the use of "the disjunctive term 'or,' a debtor in possession can neither assume nor assign an executory contract under applicable law absent consent from the non-debtor party." R. at 22. However, the majority's analysis fails to consider a fundamental concept imbedded within the statutory interpretation framework- "that courts must presume that a legislature says in a statue what it means and means in a statute what is says there." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). Additionally, "courts should… refrain from rendering statutory language 'insignificant, if not wholly superfluous.'" R. at 24; *See TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

Here, the legislature purposefully distinguished between the limitations of a trustee and the debtor in possession throughout Section 365 by intentionally using both terms rather than simply relying on the term "trustee." R. at 22. And, such a distinction is quite telling because, as the dissent observes, "when the Bankruptcy Code refers to the trustee and the debtor in possession in the same statutory provision, as it does in Sections 365(c), (e), and (f), the two terms are ascribed different meanings." R. at 23. If, as the majority argues, the two terms are interchangeable, the legislature's intentional distinction between "debtors in possession" and "trustee" throughout Section 365 would prove superfluous. *Id*. Thus, "Section 365(c)(1) instead recognizes a distinction between the trustee and the debtor in possession by proscribing assumption by the former, but not the latter." *Id*.

There is instructive case law on this point; For example, in the case *In re Footstar*, the central issue involved statutory interpretation of Section 365(c)(1). *In re Footstar, Inc.*, 323 B.R. 566, 570-71 (Bankr. S.D.N.Y. 2005). More specifically, the court addressed whether there is a distinction between the terms "trustee" and "debtor in possession." *Id*. at 571. The court reasoned that Section 365(c)(1) does not "say that the debtor or debtor in possession may not assume or assign- the prohibition applies on its face to the 'trustee.' In this case there is no trustee [similar to the instant case]. Here, it is the debtors who seek to assume the Agreements. Nothing in the Bankruptcy Code prohibits the debtors from assuming the Agreements." *Id*. The court further reasons, "To construe 'trustee' in Section 365(c)(1) to mean 'debtors' or 'debtors in possession' would defy the 'plain meaning' of the statute as written by Congress." *Id*. Ultimately, the court held that while a trustee's powers to assume or assign are limited by Section 365(c)(1), "the debtor in possession *can* assume because by the limitation's express terms it can have no consequence or effect as to a debtor in possession, which is *not* an 'entity other than' itself." *Id*. at 575.

This principal is echoed not only in the decisions of the bankruptcy court and the Bankruptcy Appellate Panel for the Thirteenth Circuit, but also in the Judge Jones' dissenting opinion as well. R. at 9, 23. As the dissent argues, even if the terms "trustee" and "debtor in possession" are construed interchangeably, the majority's holding remains inconsistent with the remaining language in Section 365. *See* R. at 23. The dissent argues, "The dispositive terms in Section 365(c)(1) are 'applicable law' and 'an entity other than the debtor or debtor in possession.' Where the debtor in possession seeks to assume, but not assign, an executory contract, the applicable law referenced in Section 365(c)(1) is not triggered." R. at 23; *Summit Inv. & Dev. Corp. v. Leroux,* 69 F.3d 608, 613 (1st Cir. 1995). Therefore, the dissent argues the anti-assignment exception found under the federal law is not applicable in this case because there is no "entity other than the debtor or debtor in possession" in this case. 11 U.S.C. § 365(c)(1). In fact, as both the dissent and the bankruptcy court observed, "Under My Thumb was being asked to do nothing more than honor its existing contractual obligation with Development," who is the debtor in possession in this case. R. at 9. "Under My Thumb, would not be required to render performance under the Agreement to an entity other than Development, the same entity with whom it contracted prepetition." R. at 24.

A. Tumbling Dice, Inc. is not precluded from assuming its executory contract because it satisfies the 'Actual Test,' which this court should adopt.

Although the first objection posed by Under My Thumb, Inc. involves a rather complicated issue, the majority nevertheless condenses the question into a far simpler matter. *See* R. at 11. In the majority opinion of the United States Court of Appeals for the Thirteenth Circuit, the court states, "Resolution of this issue turns squarely on whether the 'hypothetical test' or the 'actual test' applies." *Id*. And although the majority correctly identifies the crux of this first objection, it nevertheless fails to properly identify the correct test to apply in such circumstances.

In fact, this issue highlights a split among the circuits over the proper interpretation of a debtor in possession's limitations within Section 365(c)(1). *See* R. at 11. The 'hypothetical test', which is the test the U.S. Court of Appeals for the Thirteenth Circuit's majority opinion adopts, precludes a debtor in possession "from assuming its contract for the benefit of its estate, despite the absence of an intent to assign that contract…Under this approach, [Section] 365(c)(1)(A) prohibits the assumption of an executory contract…by a trustee or [debtor in possession] if applicable law would prohibit the assignment of the particular contract…even if no assignment is actually contemplated." Jay R. Indyke, Richard S. Kanowitz & Brent Weisenberg, *Ending the "Hypothetical" vs. "Actual" Test Debate: A New Way to Read Section 365(c)(1)*, 16 Norton J. Bankr. L. & Prac. 2 Art. 3 (2007). Such an approach could create potentially negative repercussions for the debtor because if a contract "falls within the [Section] 365(c)(1)(A) exception, a [debtor in possession] will be unable to assume its valuable but unassignable contract solely by reason of having sought bankruptcy protection, even though it did not intend to assign it and would thereby lose a valuable asset." *Id*.

The bankruptcy court, the Bankruptcy Appellate Panel for the Thirteenth Circuit, and the dissent prefer application of the 'actual test.' R. at 9, 24. The 'actual test' was formulated in response to the "anomalous result" created by the 'hypothetical.'" *Id*. Courts that apply the 'actual test' have found that Section 365(c)(1) "should be interpreted to permit assumption if the [debtor in possession] does not actually intend to assign the contract…[Thus,] a [debtor in possession] can assume its executory contract…even if applicable bankruptcy law would preclude an assignment of the particular contract…to a third party." *Id*.

And, while there is a clear division among circuits on this issue, this Court should nevertheless resolve this conflict by setting a clear precedence through the adoption of the 'actual

test.' In fact, the importance of resolving this circuit split "over the meaning of [Section] 365(c)(1) is an important one to resolve for bankruptcy courts and for businesses that seek reorganization." *N.C.P. Marketing Grp., Inc. v. BG Star Prods., Inc.*, 129 S. Ct. 1577 (2009). As Judge Jones shrewdly observes, "By considering the facts and circumstances of each case to determine whether a debtor in possession intends to actually assign an executory contract, the 'actual test' balances the goal of reorganization with the rights of a non-debtor party under a contract." R. at 26. This Court should adopt the 'actual test' not only to resolve this clear division between the courts, but also because the 'actual test' more closely aligns with the well-established principles of statutory interpretation and thereby better honors Congress' intent when drafting Section 365(c)(1). *See* R. at 22. Additionally, the 'actual test' provides a more flexible model which more closely embodies the core fundamental principles of Chapter 11 of the Bankruptcy Code.

B. Courts should abandon the 'Hypothetical Test' because it creates erroneous and absurd results contrary to public policy.

As the leading treatise on bankruptcy law acknowledges, "Chapter 11 [of the Bankruptcy Code] embodies a policy that is generally preferable to enable a debtor to continue to operate to reorganize… [C]ontinued operation can save the jobs of employees and the tax base of communities, and generally reduce the upheaval that can result from termination of a business." 7 Collier on Bankruptcy ¶ 1100.01(16th ed. 2019). The treatise identifies certain presumptions found throughout Chapter 11 as well as various powers afforded to the debtor. For instance, "The Code contains a presumption that the debtor's business will continue to operate and that the debtor will remain in possession after the entry of an order for relief…this assures the debtor considerable control over operations as debtor in possession." *Id*. Moreover, Chapter 11 also provides the debtor with "considerable control over plan negotiations." *Id*. Chapter 11 not only affords the

debtor control in much of the bankruptcy proceeding but it also offers protections to creditors as well. *Id*.

Most notably, the treatise identifies the very crux of Chapter 11 bankruptcy proceedings by stating, "The hallmark of Chapter 11 is flexibility. The debtor in possession is offered considerable discretion in the operation of the business…the plan negotiation process ideally leads to consensual plan under which the debtor and a majority of creditors have agreed to both business and financial plans that offer some realistic chance of success." *Id*.

It is the 'actual test' and not the 'hypothetical test' that provides this type of flexibility as envisioned by Congress and encapsulated in the underlying principles of Chapter 11. *See* R. at 25-26. Alternatively, the majority's application of the 'hypothetical test' creates a slippery slope that provides little flexibility for the debtor and instead impedes upon the debtor's ability to restructure its business. *See* R. at 26. As Judge Jones asserts in his dissent, "the majority gives Under My Thumb a right not contemplated anywhere in the Bankruptcy Code- the right to rescind the Agreement for no reason other than Development's bankruptcy filing." *Id*. Furthermore, Judge Jones states that as a result, the majority's holding seems to prioritize the interests of one of the creditors, Respondent, "to the detriment of the Debtors, its employees and its other stakeholders." *Id.*

Such a result seems especially unreasonable when one considers the nearly universal support from all of Petitioner's creditor groups with the only exception being Respondent. *See* R. at 8. Such a result is also contrary to the fundamental principles of the Bankruptcy Code, which focuses on the "equality of distribution among creditors of equal priority." 7 Collier on Bankruptcy ¶ 1100.01(16th ed. 2019). Additionally, as the dissent warns, the majority's holding could create a dangerous precedent; Judge Jones argued that the majority's holding "will undoubtedly have wide

ranging consequences in future Chapter 11 cases, as the majority invites a non-debtor party like Under My Thumb to extort concessions in exchange for its consent to assumption." R. at 27.

Not only does the 'actual test' better embody the underlying principles of Chapter 11 as well as the Bankruptcy Code at large, but also one must consider the limitations of the 'hypothetical test.' To begin, there is a distinction between assuming and assigning contracts that Congress recognized when it drafted Section 365. Most notably, there is a substantially different legal weight to assigning and assuming a contract that fails to be recognized by the 'hypothetical test.' The definition of assigning is to "convey in full." *Black's Law Dictionary*, p.146 (11th edition 2019). To assume, on the other hand, "generally includes contracts or leases under which both parties to the agreement have duties remaining to be performed." United States Bankruptcy Court District of New Jersey, Glossary of Bankruptcy Terms, http://www.njb.uscourts.gov/content/glossary-bankruptcy-terms (last visited January 21, 2019). These two concepts result in entirely different outcomes for businesses and should therefore not be treated equally as they are under 'hypothetical test.' By using the 'hypothetical test' courts preemptively consider actions that a debtor may take, and as a result, infringe upon the plans of businesses whose only goal is to assume a contract. Notably, the goal of Chapter 11 in the Bankruptcy Code is to facilitate restructuring, not impede upon the rights of debtors to do so. *See* 7 Collier on Bankruptcy ¶ 1100.01(16th ed. 2019).

Yet another reason to abandon the 'hypothetical test' is because businesses already have an option for legal recourse should a party fail to perform as intended after satisfying the 'actual test' — breach of contract. With this available legal recourse in place already, the 'hypothetical test' appears superfluous and unnecessary. Arguably, the 'hypothetical test' allows courts to become involved in a fashion that oversteps their authority. And, based on the foregoing reasons, this

Court should adopt the 'actual test' as it is epitomizes the underlying values and principles of Chapter 11 and of the Bankruptcy Code as a whole; The 'hypothetical test' however creates an overly rigid model, contrary to the Code's fundamental ideals, and has the potential to create a dangerous precedent as evidence by the potential ramifications of the majority's holding.

Accordingly, this Court should abandon the 'hypothetical test' in favor of the 'actual test' and by doing so resolve the present circuit split on this matter.

II. IN A JOINT, MULTI-DEBTOR PLAN, WHERE A CLASS OF CLAIMS IS PROPOSED TO BE IMPAIRED, 11 U.S.C. § 1129(a)(10) ONLY REQUIRES THE ACCEPTANCE FROM AT LEAST ONE IMPAIRED CLASS IN ACCORDANCE WITH THE PER PLAN APPROACH.

11 U.S.C. § 1129(a)(10) states that a court shall only confirm a plan if the following requirement (among many other requirements) is 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. . ." 11 U.S.C. § 1129(a)(10). Specifically, the language "at least one class of claims" is the subject of Respondent's second objection. R. at 3. Admittedly, the U.S. Court of Appeals for the Thirteenth Circuit's majority opinion summarized the second issue of this case quite well. *Id*. The court wrote, "The second objection requires us to determine whether Section 1129(a)(10) requires the proponent of a joint, multi-debtor plan that impairs a class of creditors, such as the Plan in this case, to obtain acceptance from at least one impaired class of creditors of *each* debtor (*i.e.*, *per debtor* approach) or, alternatively, whether acceptance of a single impaired class of creditors under the plain (*i.e., per plan* approach) is sufficient." *Id*. And, although the majority correctly identified yet another circuit split (this time pertaining to the second issue in this case), it nevertheless failed to reach the correct holding. *See id*. In fact, as the dissent eloquently identified, the majority's adherence to the per debtor rather than the per plan approach is not only contrary to the plain

language of Section 1129(a)(10), but such a holding contravenes the foundational purpose and policy of the Bankruptcy Code. R. at 27.

A. The plain language of the statute requires only one impaired creditor to accept the multi-debtor plan.

Statutory interpretation is the first step in the analysis and resolution of this issue. In general, statutory interpretation requires the court to "first analyze [the statutory] language to determine whether the meaning is plan." *In re HP Inkjet Printer Litig.*, 716 F.3d at 1180 (internal quotes omitted). In fact, "the preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what [it] says there. Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *Id*.

Section 1129(a)(10) is not ambiguous on its face, and therefore there is no need to go beyond the well-established statutory interpretation framework often utilized by the courts. In fact, this issue can be resolved by employing a simple plain meaning approach. Section 1129(a)(10) sets forth one of many requirements in a "cramdown plan" and is satisfied when "*at least one class* of claims that is impaired under the plan" accepts the proposed plan. 11 U.S.C. § 1129(a)(10) (emphasis added). Noticeably, and in accordance with Judge Jones' dissenting opinion, Section 1129(a)(10) fails to include any language that would support a per debtor approach. *See* R. at 27. Instead, the plain meaning of Section 1129(a)(10) makes it clear that the courts should employ a per plan approach as the statute applies to "one class of claims that is impaired" and not "one class of claims [per each debtor.]" *See* 11 U.S.C. § 1129(a)(10).

Additionally, it is well-established "that courts must presume that a legislature says in a statue what it means and means in a statute what is says there." *Hartford Underwriters Ins. Cov. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6; *See* R. at 27. Congress had the ability to require acceptance from an impaired class for each debtor involved in a plan, but it tellingly did not include

such language in Section 1129(a)(10). Therefore, one should conclude that if Congress had intended for courts to adhere to the per debtor approach, Congress would have explicitly included language referencing the debtors rather than language plainly referencing the per plan approach.

As Judge Jones astutely observes in his dissenting opinion, "the majority strains to modify Section 1129(a)(10) so that it reads 'at least one class of claims *of each debtor* that is impaired under the plan has accepted the plan." R. at 27. The majority essentially expands Section 1129(a)(10) by inserting a phrase not found anywhere in the text that distorts the plain meaning of the text. *Id*. Furthermore, it is not the court's role to modify the plain language of a statute through interpretation. *See King v. Burwell*, 135 S. Ct. 2480 (2015) ("If the statutory language is plain, we must enforce it according to its terms). Ironically, in its opinion the majority made a separation of power argument when it states that no matter how enticing a certain policy may be, the court "cannot adopt [such interpretation] as our own without trespassing on a function reserved for the legislative branch…" R. at 15. The majority elaborates upon this point by asserting that the court's "job is to interpret the statute as it *is* written, not as it perhaps *should* be written." *Id*. And, while the majority makes light observations regarding the importance of separation of power among the different branches of the government, it nevertheless infringes upon the legislature's power by essentially rewriting Section 1129(a)(10). *See* R. at 27.

Next, the majority from the court below improperly construed the meaning of Section 1129(a)(10) when it applied Section 102(7) to the language of the statute. Section 102(7) is a statute of construction, providing that when the singular is used throughout the code that the plural applies, and vice versa. Here, even if the language of the statute were changed from "at least one class of claims that is impaired under the plan has accepted the plan" to "at least one class of claims that is impaired under the *plan[s]* has accepted the *plan[s]*." R. at 27; 11 U.S.C. 1129(a)(10)

emphasis added. Under either of these forms, the plain meaning is still clear: the requirement requires just one impaired creditor must confirm to either the plan, or the plans.

Although *In re Tribune*, 464 B.R. 126 (Bankr. D. Del. 2011) held that 102(7) rendered Section 1129(a)(10) to apply on a per debtor basis, it is just one of a few decisions that support the per debtor approach. The majority of courts, and the only circuit court to have addressed this issue all are in agreeance that courts should apply Section 1129(a)(10) on a per plan basis. *See In re SGPA, Inc*, No. 1-01-026092; *In re Enron Corp*., 2004 Bankr. LEXIS 2549, 2004 WL 6075307 (Bankr. S.D.N.Y. July 15, 2004); *JPMorgan Chase Bank, N.A. v. Charter Commc'ns Operating, LLC (In re Charter Commc'ns)*, 419 B.R. 221, 266 (Bankr. S.D.N.Y. 2009); *Matter of Transwest Resort Properties, Inc.*, 881 F.3d 724, 726 (9th Cir. 2018).

In *Matter of Transwest*, a holding company wholly owned two individual businesses (Mezzanine Debtors) which in turn each owned an operating business that had each purchased a luxury resort. *Matter of Transwest*, 881 F.3d at 726. While financing the acquisition of the resorts, the five businesses had to file for Chapter 11 reorganization. *Id.* at 727. The debtors submitted a joint reorganization plan, similar to the case at hand, and the Lender, the only creditor class member for the Mezzanine Debtors, objected to the plan and argued that Section 1129(a)(10) applied on a "per debtor" basis, requiring each debtor to have acceptance from at least one impaired creditor. *Id.* at 729. The Ninth Circuit Appellate Court held that Section 1129(a)(10), as a matter of first impression among the Circuit Courts, applied on a "per plan" basis, requiring the acceptance of only one impaired creditor in a joint, multi-debtor reorganization plan. *Id.* Further, the Ninth Circuit held that the statutory text of the bankruptcy code as a whole, does not indicate support for a per-debtor interpretation. Section 102(7), which provides that "the singular includes the plural," would only alter the language of 1129(a)(10) to say at least one impaired class of

claims under the "plans has accepted the plans." This reading of the statute, in the plural, still would require *only one impaired class* under the plan or plans to accept the plan or plans.

The Court here today should thus adopt the holding and application of the Ninth Circuit by concluding that Section 1129(a)(10), as a matter of statutory interpretation applies on a per plan basis.

B. The overall purpose and policy behind Chapter 11 bankruptcy proceedings supports a per-plan approach to joint, multi-debtor reorganization plans.

Chapter 11 reorganizations allow for businesses to adjust their assets and liabilities in order to promote the continued operation of the business; its purpose revolving around the life and success of a struggling business and permitting the enterprise to survive, resulting in the continued employment of the company's people. Unlike a Chapter 7 case, Chapter 11 reorganizations serve to restructure the assets and liabilities of the enterprise so that it may continue operations, employment, and payment to its creditors. *See* R. at 31; *See also* Toibb v. Radloff 501 U.S. 157, 163-64 (1991).

Even the Supreme Court has ruled that even though the protection of creditors interests are one of the purposes of a Chapter 11 reorganization, the primary purposes of Chapter 11 are a successful business reorganization and maximizing the bankruptcy estate's value. Paek, 28 No. 1 J. Bankr. L. & Prac. NL Art. 2. citing *In re Sunnyslope Housing Limited Partnership*, 859 F.3d 637, 646, 64 Bankr. Ct. Dec. (CRR) 51, 77 Collier Bankr. Cas. 2d (MB) 1338, 77 Collier Bankr. Cas. 2d (MB) 1670, Bankr. L. Rep. (CCH) P 83115 (9th Cir. 2017), as amended, (June 23, 2017) and cert. denied, 138 S. Ct. 648, 199 L. Ed. 2d 530 (2018).

Here, the per-plan approach applied to Section 1129(a)(10) in relation to a joint, multi-debtor reorganization, "affords flexibility to achieve a reorganization of an enterprise." Anupama Yerramalli (FN1) & Alexander Nicas (FN1), "*Per Plan" or "Per Debtor"? Transwest Reignites*

the S 1129(a)(10) Debate, Am. Bankr. Inst. J., April 2018, at 30, 85. The corporate form in a joint, multi-debtor reorganization remains intact and undisturbed by the administration of a single, joint plan on behalf of multiple debtors of an enterprise and does not create a "de facto" consolidation. Furthermore, the joint, multi-debtor plan does not prejudice Respondent by moving forward even when Respondent votes in disfavor of the reorganization.

(i) Corporate form is preserved through a joint, multi-debtor plan that is not substantively consolidated, serving the overall purpose of reorganization through Chapter 11 proceedings.

Business enterprises often conduct their operations through a corporate structure consisting of a holding company, affiliates, and subsidiaries. The purpose of operating in this fashion is oftentimes for "operational, regulatory, tax, and/or liability purposes." Paek. The affiliated entities[1] engage integrated financing, ownership and operation of subsidiaries by a parent company, intercompany borrowing arrangements or leases, and share common officers, directors, or assets. When creating, negotiating, and administering the joint plan, although it is not always the case, the joint plan will derive the distributable assets from the combined assets of the debtors. Paek.

In 2001 multiple debtors involved in the Enron enterprise ("Debtors") each filed an individual voluntary petition for relief pursuant to Chapter 11, and the bankruptcy court consolidated their cases for joint administration. *In re Enron Corp*., 2004 Bankr. LEXIS 2549, 2004 WL 6075307 at 13. Throughout the case, Debtor's met with the Creditors' Committee to endeavor to maximize recovery including sale of portfolio assets, which in turn generated billions of dollars to distribute to creditors. *Enron* at 16. Although Debtors had to reduce their workforce

[1] 11 U.S.C. 101(2)(A) defines an "affiliate" in part as an "entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities (i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or (ii) solely to secure a debt, if such entity has not in fact exercised such power to vote[.]"

to create cash flow for distribution to creditors, they were able to save around 24,000 employee's jobs. Id. In 2002, the Debtors' filed a joint reorganization plan with the Creditors' Committee, which was amended throughout the course of a couple years. *Enron* at 24-25. Even with the expansive (over 2,400 entities involved) and global nature of the Enron enterprise, the Debtors cohesively negotiated the plan to maximize creditor recovery. *Id*. at 66. The court noted that even though the substantive consolidation component of Debtor's global agreement may have contributed to its holding that a per-plan approach was proper for Section 1129(a)(10) voting, it also stated that "[i]t is quite common for debtors with a complex corporate structure to file a joint Chapter 11 plan pursuant to which the corporate form is preserved." *Id*. at 236.

Here, nine wholly owned subsidiaries are owned by a holding company, Tumbling Dice, Inc. and are all related businesses. R. at 4. Eight of these subsidiaries operate as individual casinos within the larger corporate context, with Development being the sole subsidiary whose function is not part of the gaming operations. *Id*. The casinos all work with Development, who has the rights to extend its Agreement that governs the use of a membership rewards Software, designed by Under My Thumb, LLC, "to its affiliated entities only." R. at 5. The Debtors use the Software gather data on their customers to understand and analyze food and drink purchases, what games are played, how long games are played. *Id*. This loyalty program provides Debtors with invaluable insight to their customers, allowing Debtors to tailor their organizations in order to generate greater revenue through the individualization of member experience. The Software became quickly integrated into all Debtor's business models, made available via the Agreement between Under My Thumb and Developer. Because the core facet of the Debtors business model, gaming revenue, is conducted on an integrated basis, it is reasonable that they would file for joint administration of the Chapter 11 bankruptcy case.

The joint administration of a joint plan for Tumbling Dice, Inc. and its wholly owned subsidiaries is permissible even without substantive consolidation. The plan at hand preserves the corporate structure of the casino enterprise and promotes the reorganization of the enterprise. Further, the joint administration of the plan does nothing to abrogate Under My Thumb's rights as a creditor when Section 1129(a)(10) is applied on a per-plan basis. *See In re SGPA, Inc.*, Ch. 11 Case No. 1-01-02609 2012 WL 34750646 (Bankr. M.D. Pa. Sept. 28, 2001) (holding that a joint Chapter 11 reorganization plan complied with Section 1129(a)(10) when at least *one* class of impaired creditors voted to accept the plan even when the plan was not a substantive consolidation). Courts have held that where the evidence presents that a business is run on an integrated basis, such as the case for Debtors here, that it is "reasonable and administratively convenient to propose a joint plan" and only one accepting impaired class is required. *See JPMorgan Chase Bank, N.A. v. Charter Commc'ns Operating, LLC* (*In re Charter Commc'ns*), 419 B.R. 221, 266 (Bankr. S.D.N.Y. 2009) aff'd, 691 F.3d 476 (2d Cir. 2012), cert. denied, 133 S. Ct. 2021 (2013). For the case at hand, the Debtors' joint plan received near universal acceptance from all its creditors, including impaired creditors, except for Under My Thumb, and satisfies 11 U.S.C. 1129(a)(10).

Because Debtors' joint plan preserves the corporate form and separateness and does not require separate cases, the Debtors' filing of joint plan was proper, and since the majority of courts and the only Circuit Court to have addressed the issue hold that Section 1129(a)(10) applies on a per-plan basis, this Court should therefore reverse the Circuit Court's holding, and uphold the Bankruptcy Court's decision.

(ii) The Debtor's reorganization plan provides satisfactory and adequate protection to unsecured creditors and does not unfairly prejudice Respondent.

The purpose of Section 1129 is to set forth certain requirements of a "cramdown" plan that must be met in order to be approved. This requirement has its genesis in Section 1129(b)(1) that requires that a "cramdown" plan satisfies all of Section 1129 in order to ensure protection for dissenting creditors when there is no acceptance by all voting classes under 1129(a)(8). This procedure first protects against unfair discrimination, which occurs when there is (a) a dissenting class of creditors; (b) an additional class or classes the same priority; and (c) a difference in the treatment of the classes by the plan that results in either (i) a substantially lower distribution for the class that dissents or (ii) "regardless of percentage recovery, an allocation under the plan of materially greater risk to the dissenting class in connection with its proposed distribution." Paek.

An unfair discrimination analysis will show that Under My Thumb has not been unfairly discriminated against, and further emphasis that the joint reorganization plan in the current case is designed to distribute more to Under My Thumb than would be possible in a Chapter 7 liquidation case. While there is at least one dissenting class of impaired creditors, Under My Thumb, and the presumably per the record additional unsecured creditors within the same class, there is no material lower distribution for Under My Thumb for dissenting to the plan. Under the Plan, Under My Thumb would continue to receive monthly payments for the casinos' use of the Software per the Agreement. R. at. 7. Additionally, the Plan also provides for $66 million to distribute to the unsecured creditors. Under My Thumb's distribution would include $6 million for the majority of the obligation owed under the Research and Development Note. Id. This distribution schedule results in payment to Under My Thumb of nearly its nearly entire claim over the Plan period, which also exceeds the value of Development's individual assets, resulting in a substantial payment of Under My Thumb's claim.

Next, the procedure protects creditors by requiring "fair and equitable" treatment for those who do not accept the plan. For unsecured creditors, like Under My Thumb, the multi-debtor, joint reorganization plan must satisfy the "absolute priority rule," which provides that a dissenting unsecured creditor will be paid in full or receive property under the plan before any junior claim is satisfied. 11 U.S.C. § 1129(b)(2)(B). Again, here, the Debtors' Plan satisfied the absolute priority rule because it provides for Under My Thumb's claim in full through a distribution of over $6 million to satisfy the payment of the R&D note while continuing the monthly payments for a percentage of revenue under the Software Agreement. R. at 7.

CONCLUSION

Based on the foregoing reasons, this Court should reverse the decision of the U.S. Court of Appeals for the Thirteenth Circuit, and uphold the bankruptcy court's decision, of overruling both of Respondent's objections and confirming Petitioner's plan for reorganization.