No. 19-1004

IN THE

Supreme Court of the United States

OCTOBER TERM, 2019

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

TUMBLING DICE, INC. ET AL., PETITIONER

V.

UNDER MY THUMB, INC., RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

BRIEF FOR PETITIONER

Team 34P
Counsel for the Petitioner

Oral Argument Requested

QUESTIONS PRESENTED

(1) Whether, under 11 U.S.C. § 365(c)(1), a debtor in possession may assume a non-exclusive license of intellectual property over the objection of the licensor?

(2) Whether acceptance from one impaired class of claims under a joint, multi-debtor plan satisfies the requirements under 11 U.S.C. § 1129(a)(10)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutory Provisions:

Other Authorities:

OPINIONS BELOW

The decision and order of the U.S. Bankruptcy Court for the District of Moot is unreported and therefore unavailable. The decision for the Bankruptcy Appellate Panel for the Thirteenth Circuit is unreported and therefore unavailable. This opinion is set forth in the Decision of the U.S. Court of Appeals for the Thirteenth Circuit in Case No. 18-0805.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

The statutory provisions listed below are relevant to the present case and are produced in Appendix A.

11 U.S.C. §§ 102, 365, 1107, 1122, 1123, 1124, 1126, 1129

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Tumbling Dice, Inc. et al., appellant in Docket 19-1004 before the U.S. Court of Appeals for the Thirteenth Circuit, respectfully submits this brief on the merits and asks this Court to reverse the decision of the Thirteenth Circuit Court of Appeals.

STATEMENT OF FACTS

In 2008, one of Debtors'[1] subsidiaries ("Development") entered into a Research and Development Agreement ("R&D Agreement") with Under My Thumb, Inc. ("Respondent") to create a software system for Debtors. (R. 4). Pursuant to the R&D Agreement, Respondent incurred approximately $10 million in costs to create the software system. (R. 4). Development agreed to reimburse $7 million of Respondent's costs pursuant to an unsecured promissory note ("R&D Note"). (R. 4). After Respondent completed the software system, Development and Respondent entered into a license agreement ("the Agreement") granting Development a non-exclusive license to use its copyrights and patented software system and permitting Development to "extend the benefits of the Agreement to its affiliated entities only, even though such affiliated entities were technically not parties to the Agreement. (R. 5). More importantly, the Agreement broadly prohibited the Debtors from assigning or sublicensing their rights to others. (R. 5). However, this assignment could not occur without Respondent's express written consent. (R. 5).

The software system created under the R&D Agreement and the licensing rights under the Agreement became an essential component of the Debtors' ongoing business because it allowed Debtors' to tailor their business to the wants and needs of their customers by analyzing their customers' preferences and spending habits. (R. 5). Not only was the R&D Agreement beneficial to Debtors, it was also beneficial for Respondent because the Agreement permitted Respondent to license similar versions of the software system to third parties. (R. 5). As a result,

[1] Debtors in this case are: (i) Tumbling Dice, Inc. (holding company owning its subsidiaries); (ii) Tumbling Dice Atlantic City, LLC (subsidiary); (iii) Tumbling Dice Chicagoland, LLC (subsidiary); (iv) Tumbling Dice Detroit, LLC (subsidiary); (v) Tumbling Dice Lake Tahoe, LLC (subsidiary); (vi) Tumbling Dice Las Vegas, LLC (subsidiary); (vii) Tumbling Dice New Orleans, LLC (subsidiary); (viii) Tumbling Dice Palm Springs, LLC (subsidiary); (ix) Tumbling Dice Tunica, LLC (subsidiary); (x) Tumbling Dice Development, LLC (subsidiary). (R. 2).

Debtors and Respondent received higher than expected payments under the Agreement each month due to the increased popularity of Debtors' use of the software system. (R. 5).

In December 2011, a hedge fund acquired Debtors' stock through a leveraged buy-out. (R. 6). As part of this transaction Debtors, except for Development, granted first priority liens to a syndicated group of lenders (the "Lenders") in exchange for a $3 million loan. (R. 6). The Lenders did not require Development to act as a borrower or guarantor under the credit facility. (R. 6).

Debtors continued to make payments under the R&D Note until they stopped making payments in June 2015. (R. 6). Unfortunately, the Debtors had significant and unserviceable debt from the leveraged buy-out transaction and commenced these Chapter 11 bankruptcy cases in January 2016 to reorganize or refinance their debt. (R. 6). As of the petition date, Debtors, except for Development, jointly and severally owed the Lenders approximately $2.8 million. (R. 6). Additionally, Debtors owed approximately $120 million to their unsecured creditors, including Respondents, who was owed more than $6 million under the R&D Note. (R. 6). Thankfully, the Debtors were current with respect to payments due under the Agreement. (R. 6).

After lengthy negotiations, including non-binding mediation ordered by the bankruptcy court, Debtors, the hedge fund, the Lenders, the unsecured creditors' committee and other stakeholders reached a deal that was memorialized in a plan support agreement (the "Plan"). (R. 6-7). Respondent was not involved in those negotiations. (R. 6). The Plan was a joint plan, meaning that one plan was filed on behalf of all Debtors. (R. 6). Additionally, the Plan expressly stated that "the Debtors' estates are not being substantively consolidated and no Debtor is to become liable for the obligations of another." (R. 7).

Moreover, the Plan proposed to assume the Agreement under sections 365 and 1123(b)(2) of the Bankruptcy Code. By assuming the Agreement, Respondent would continue to receive the monthly payments, under the Agreement, for the use software system. (R. 7). Also, the Plan provided for a pro rata distribution of $66 million to Debtors' unsecured creditors, including the $6 million plus Development's obligation to Respondent under the R&D note. (R. 7). With its assumption of the Agreement and because the distribution greatly exceeded the value of Development's assets, Respondent favorably viewed the Plan. (R. 7).

Nearly all creditor groups universally supported the Plan for Debtors, (R. 8)—exceeding the Debtors requirement to have approval of the Plan from at least one impaired class in a joint, multi-debtor plan, like the one that existed here (R. 9). Although Debtors had nearly universal support from the creditors for the Plan, Respondent, who controlled Development's only class of creditors, rejected the plan. (R. 8).

After Respondent objected to the Plan on multiple grounds, but only two of which are on appeal. (R. 8). Upon careful consideration, the bankruptcy court overruled the objections and confirmed the Plan because assuming the Agreement would only ask Respondent to honor its existing contractual obligations with Development under the Agreement and at least one impaired class in a joint, multi-debtor plan accepts the plan. (R. 9). Respondent appealed to the Bankruptcy Appellate Panel for the Thirteenth Circuit, where that court affirmed the bankruptcy court. (R. 9). Now, Respondent appealed to this Court. (R. 9).

SUMMARY OF ARGUMENT

First, on de novo review, this Court should reverse the Thirteenth Circuit's decision to not allow Debtors to assume an executory contract under section 365(c) of the Bankruptcy Code because a literal reading of section 365(c)(1) renders section 365(f)(1) inoperative, and policy

considerations demand the Court adopt "the actual test." The Bankruptcy Code should be read in a manner that minimizes disagreement between related provisions. Section 365(f)(1) allows a debtor to assign an executory contract notwithstanding applicable federal law. A literal reading of 365(c)(1) renders section 365(f)(1) inoperative because it would bar assignment of an executory contract even though subsection (f)(1) expressly provides an executory contract may be assigned regardless of what applicable law says. Thus, to prevent those sections from being at odds with each other, the court should adopt the "actual test" and read the relevant language in section 365(c)(1) as conjunctive rather than disjunctive. Furthermore, policy implications demand the Court adopt the "actual test" because it better serves the fundamental purpose of bankruptcy by allowing the debtor to reorganize and restructure its debts. The limitation in section 365(c)(1) is directed at protecting non-debtor parties from having to accept performance from an entity other than the one they originally contracted with. Thus, it follows that the Court should look to whether the non-debtor is *actually* being forced to accept performance from a different entity and adopt the "actual test." This furthers the fundamental purpose of bankruptcy because otherwise a debtor would lose its option to assume the contract—even without intent to assign it to another party—thus negatively impacting their ability to reorganize their debts.

Second, on de novo review, this Court should reverse the Thirteenth Circuit's decision to interpret section 1129(a)(10) of the Bankruptcy Code to require the approval of a reorganization plan by an impaired class of claims for each debtor because the plain language of the statute only requires the approval of only *one* impaired class of claims. When the Court is discerning the congressional intent of statutory language, the beginning point is to look to the statutory text itself. When the plain language of the statute results in a disposition that is not "absurd," the sole function of the court is to enforce it according to its terms. Section 1129(a)(10) has no inclusion

of a prepositional phrase such as "at least one class of claims *for each debtor*" that would impose a per debtor requirement. Thus, the inquiry should end here, and this Court should reverse the Thirteenth Circuit's decision to impose a per debtor requirement. Use of the per plan requirement would be in line with a majority of courts that have addressed the issue of multi-debtor plans seeking approval by an impaired class of claims. Additionally, the per plan interpretation comports with fundamental goals of Chapter 11 Bankruptcy to promote efficient and equitable reorganization for businesses, which is often completed in complex cases by jointly administering multi-debtor plans. To impose the per debtor requirement would substantially impede the efficiency of such cases, effectively require substantive consolidation to meet the requirements of section 1129(a)(10), and disproportionally shift "veto" power to a sole creditor of a single debtor in multi-debtor plans.

For the foregoing argument, Debtors, Tumbling Dice, Inc. et al., respectfully requests this Court reverse the Thirteenth Circuit's holding on both issues.

STANDARD OF REVIEW

De novo review is required for questions of law regarding the decisions of Thirteenth Circuit below. *ASM Capital, LP v. Ames Dep't Stores, Inc., (In re Ames)*, 582 F.3d 422, 426 (2d Cir. 2009). "Under a de novo standard of review, the reviewing court decides an issue as if the court were the original trial court in the matter." *Razavi v. Commissioner of Internal Revenue*, 74 F. 3d 125, 127 (6th Cir. 1996).

ARGUMENT

I. Section 365(c)(1) Permits Assumption of a Non-Exclusive License of Intellectual Property Over the Objection of the Licensor

The Thirteenth Circuit's reversal of the lower court's decision was improper because section 365(c)(1) permitted the assumption of the Agreement over the objection of the

Respondent. In cases not involving a trustee, such as in a Chapter 11 case, the debtor in possession performs the same functions and assumes the same duties as a trustee under the Bankruptcy Code. 11 U.S.C. § 1107. Essentially, where "trustee" is used in a statute, "debtor in possession" may be used in its stead when no trustee has been appointed. *In re Cybergenics Corp.*, 226 F.3d 237, 243 (3d Cir. 2000); *see Commodity Futures Trading Comm'n v. Weintraub,* 471 U.S. 343, 355, 105 S. Ct. 1986, 1994, 85 L. Ed. 2d 372 (1985).

There are essentially two schools of thought by courts when it comes to interpreting section 365(c)(1) of the Bankruptcy Code. Some courts have adopted the "hypothetical test," meaning "a debtor in possession may not assume 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 in question to any such third party." *In re Catapult Entm't, Inc.*, 165 F.3d 747, 750 (9th Cir. 1999). Meanwhile, other courts have adopted the "actual test" which means 365(c)(1) "bars assumption by the debtor in possession only where the reorganization in question results in the non-debtor *actually* having to accept performance from a third party. *Id.* at 751.

Debtors recognize that federal patent law constitutes "applicable law" within the meaning of section 365(c), and that non-exclusive licenses are assignable only with the consent of the licensor. *Id* at 750. Furthermore, Debtors acknowledge Under My Thumb has not given consent under section 365(c)(1)(B). However, these facts are irrelevant because the language of section 365(c)(1) stating "may not assume or assign" must be read as conjunctive and the "actual test" should be applied.

This Court should adopt the "actual test" for two reasons: 1) a literal reading of section 365(c)(1) renders section 365(f)(1) superfluous and inoperative; and 2) policy considerations

warrant the adoption of the "actual test" because Congress did not intend to bar debtors in possession from assuming their own contracts where there is no intent to assign that contract. Therefore, this Court should reverse the Thirteenth Circuit holding and find that the Debtors could assume the Agreement under section 365(c)(1).

A. A literal reading of section 365(c)(1) would render section 365(f)(1) superfluous.

If the Court were to read section 365(c)(1) literally, as Respondent suggests, section 365(f)(1) is rendered inoperative. Section 365(a) gives a debtor in possession the power to assume—and continue to receive the benefits of—executory contracts that were held by the debtor prior to the commencement of a Chapter 11 case. 11 U.S.C. § 365(a). However, this power is expressly limited by section 365(c)(1), which states:

> (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. § 365(c)(1). A literal reading of the above language that states "The trustee *may not assume or assign any executory contract*" would create an inconsistency with section 365(f)(1). Section 365(f)(1) reads:

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

11 U.S.C. § 365(f)(1). The conflict between subsections (c)(1) and (f)(1) comes from the treatments of the phrase "applicable law." By reading the text of subsection (c)(1) literally, this

conflict between subsections (c) and (f) of section 365 is inescapable. *In re Catron*, 158 B.R. 629, 636 (E.D. Va. 1993), *aff'd*, 25 F.3d 1038 (4th Cir. 1994).

It is generally accepted that the Bankruptcy Code should be interpreted in a manner "so as to minimize discord among related provisions. *In re Catapult Entm't, Inc.*, 165 F.3d at 751. As one court put it, "a general principle of statutory construction the [non-bankruptcy anti-assignment laws] and the bankruptcy provisions relating to such statutes should be read harmoniously to achieve a consistent result, especially when two statutes share a common goal." *In re Hartec Enterprises, Inc.,* 117 B.R. 865, 871 n.9 (Bankr. W.D.Tex. 1990).

As the court in *In re Catapult Entm't, Inc.*, noted, "The plain language of subsection (c)(1) bars assumption (absent consent) whenever 'applicable law' would bar assignment." *In re Catapult Entm't, Inc*., 165 F.3d at 751. This means that if applicable law bars the assignment of a contract, it also bars assumption of a contract. Meanwhile, a plain reading of subsection (f)(1) states that, "contrary provisions in applicable law notwithstanding, executory contracts may be assigned." *Id.* As subsection (f)(1) allows executory contracts to be assigned, notwithstanding applicable law, and assumption is a necessary prerequisite to assignment, *see* 11 U.S.C. § 365(f)(2)(A), a literal reading of subsection (c)(1) renders subsection (f)(1) inoperative. As one bankruptcy court, in adopting the "actual test," stated succinctly regarding adopting the hypothetical test and focusing on assignability, "[A] chapter [sic] 11 filing would have the virtual effect of rejecting executory contracts covered by section 365(f). [T]his analysis would extend section '365(c) beyond its fair meaning and intended purpose, contrary to the ultimate goal of rehabilitation of the debtor's enterprise.'" *In re Virgin Offshore USA, Inc.*, No. CIV.A. 13-79, 2013 WL 4854312, at *5 (E.D. La. Sept. 10, 2013) (quoting *Cajun Elec. Members Comm. v. Mabey* (*In re Cajun Elec. Power Coop., Inc.*), 230 B.R. 693, 705 (Bankr. M.D. La. 1999). In that

case, the court found that the relevant inquiry was whether the debtor in possession "had any intention of assigning the License to a third party." *Id.* at *6. The court held that, absent any evidence showing an intention of assigning the license to a third party, the executory contract could be assumed by the debtor in possession. *Id.*

Applying the above law to the facts in this case, this Court should reverse the Thirteenth Circuit and find that the Agreement could have been assumed by Debtors. As stated previously, there is no dispute that applicable federal patent law would excuse Respondent from accepting performance from or rendering performance to an entity other than the debtor in possession. What is disputed, is whether section 365(c)(1) permits the Debtors to assume the executory contract over the objection of Respondent where there was no actual intent to assign the contract. The answer to that inquiry is in the affirmative, Debtors were permitted to assume the executory contract as there was no actual intent on behalf of the Debtors to assign the contract. Debtors entered into the Agreement with Respondent under the express condition that they would not assign or sublease their rights to the software without express written consent from Respondent. This shows intent on behalf of Debtors to not assign the Agreement to a third party. Furthermore, because Development never acted as a borrower in the loan agreement with Lenders, no lien was granted on the Agreement and it was never under any threat to be assigned.

Due to the conflict presented by a literal reading of section 365(c)(1), the Court should adopt the "actual test", thus preserving the operative value of section 365(f)(1). The Debtors would be permitted to assume the contract they had originally entered into and continue performing their obligations, because they never had any actual intent to assign it to a third party.

B. Policy considerations demand the adoption of the "actual test."

There are also policy reasons to prefer the "actual test" as opposed to the "hypothetical test" Respondent argues in favor for. The limitation contained in section 365(c)(1) is "aimed at protecting non-debtor parties to personal services contracts from being forced to accept service from or render service to an entity other than the entity with whom it originally contracted." *In re Aerobox Composite Structures, LLC,* 373 B.R. 135, 141 (Bankr. D.N.M. 2007). Thus, determining whether the non-debtor party is *actually* being forced to accept performance by someone other than the debtor is the appropriate test. In adopting the "hypothetical test" as the Respondent advocates, the debtor would be placed in a worse position than before filing for protection under the Bankruptcy Code—which is designed to provide relief to debtors rather than penalize them. By adopting the "actual test," the Court would further one of the fundamental purposes of bankruptcy by allowing a debtor to reorganize so that it may pay its debts.

One of the fundamental purposes of a Chapter 11 case is to allow the unfortunate debtor to reorganize and restructure its debts. *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 51, 128 S. Ct. 2326, 2339, 171 L. Ed. 2d 203 (2008). In *Institut Pasteur v. Cambridge Biotech Corp.*, the court rejected the "hypothetical test." *Institut Pasteur v. Cambridge Biotech Corp*., 104 F.3d 489, 493 (1st Cir. 1997). As the court stated:

> Under such an approach, the chapter 11 debtor would lose its option to *assume* the contract, even though it never intended to assign the contract to another entity, if either the particular executory contract or the applicable non-bankruptcy law purported to terminate the contract automatically upon the filing of the chapter 11 petition or to preclude its assignment to an entity not a party to the contract.

Id. In that case, the court found that subsection 365(c) requires a case-by-case analysis about whether the non-debtor party was actually being "forced to accept performance under its executory contract from someone other than the debtor party with whom it originally contracted." *Id.* The court further stated, "Where the particular transaction envisions that the

debtor in possession would assume and continue to perform under an executory contract, the bankruptcy court cannot simply presume as a matter of law that the debtor in possession is a legal entity *materially* distinct from the prepetition debtor with whom the non-debtor party contracted." *Id.* Thus, the court held that the ultimate test "must focus on the performance actually to be rendered by the debtor in possession with a view to ensuring that the non-debtor party [] will receive 'the full benefit of [its] bargain.'" *Id.*

In *Institut*, the court found in favor of the debtor, who had contracted with a patent holder in order to be granted a nonexclusive license for use of patented technology. *Id.* at 489. The debtor in that case filed for Chapter 11 bankruptcy, and purported to assume the license to continue using the patented technology. *Id* at 490. The debtor then decided to sell all of its stock to another company, who was a competitor of the patent holder, leading to the patent holder to object to the Chapter 11 plan. *Id.* The patent holder argued that the sale of the stock amounted to a third party assuming the contract, and therefore the executory contract could be avoidable under section 365(c)(1). *Id.* at 491. However, the court found in favor of the debtor, holding that the debtor remained the corporate legal entity the patent holder had originally contracted with and was not forced to accept performance from a third party. *Id.* at 495.

Conversely, the facts of this case are substantially different from those in received *In re CFLC, Inc. See In re CFLC, Inc.*, 89 F.3d 673, 675 (9th Cir. 1996). In that case, the court held that a patent license was not assumable under 11 U.S.C. § 365(c) where federal law excused the acceptance of performance from anyone other than the debtor and consent was not given. *Id.* at 673. However, the reorganization plan in that case provided for an outright assignment of the patent license to a completely different corporation with which the licensor had never contracted. *Id.* at 679–80.

The facts of this case are similar to those in *Institut*. Here, Debtors also engaged in a nonexclusive licensing contract to use Respondent's patented technology. Debtors also filed for Chapter 11 bankruptcy and engaged in a leveraged buyout which purported to change ownership. This case is also much different than *In re CFLC, Inc.* The reorganization plan in this case, as opposed to the plan in *In re CFLC, Inc.*, did not provide for the assignment of the Agreement to another party. As stated previously, Debtors entered into the Agreement with Respondent under the express condition that they would not assign or sublease their rights to the software without express written consent. Furthermore, as the court stated in *Institut*, the change in ownership resulting from the leveraged buyout did not change the fact that the Debtors remained the legal entity Respondent originally contracted with. As there is no presumption that the debtor in possession is a legal entity materially distinct from the prepetition debtor with whom the non-debtor party contracted, and there is no evidence showing the legal entity responsible for the Agreement changed, Respondent was not forced to accept performance from someone other than the Debtors. It follows that Respondent was afforded the "full benefit of its bargain" as required by section 365(c). Thus, Debtors should be allowed to assume the Agreement under section 365(a).

Policy considerations justify such a decision because the purpose of a Chapter 11 bankruptcy case is to allow a debtor to reorganize and restructure its debts. By allowing Respondent to abandon its obligations and prohibit Debtors from assuming the contract, Debtors will be forced to forfeit property that is essential to their efforts to reorganize. To be consistent with the Bankruptcy Code and the fundamental purposes of bankruptcy, Debtors respectfully request this Court reverse the Thirteenth Circuit's decision.

II. This Court should reverse the Thirteenth Circuit's holding because Section 1129(a)(10) requires acceptance from one impaired class of claims of any one debtor under a joint, multi-debtor plan.

The Thirteenth Circuit's reversal of the lower court's decision was improper because Section 1129(a)(10) allows confirmation of a multi-debtor plan so long as at least one impaired class of claims of any debtor accepts the plan. The main goal of Chapter 11 debtors is for the reorganization plan to be confirmed, ideally with collaboration among all interested parties, for the best outcome for the future of the debtor's enterprise.

In order for creditor claims to be equitably dealt with during Chapter 11, claims are placed into particular classes, based on whether claims are "substantially similar to other claims . . . of such class." 11 U.S.C. § 1122(a). The plan must specify impaired classes of claims and the treatment for the impaired classes. 11 U.S.C. §§ 1123(a)(2), (3). Impairment, meaning that the creditors' pre-bankruptcy legal, equitable, and contractual rights will be altered under the plan, allows the impaired creditors to vote on the proposed plan. 11 U.S.C. §§ 1124, 1126(a), (f). Section 1129(a) provides the requirements for a plan to be accepted in the instance of objecting classes of creditors in a "cramdown" scenario. Section 1129(a)(10) in particular requires, "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) (emphasis added).

Judicial authority is relatively "split" over the correct interpretation of "at least one class of claims," especially in the situation of a jointly-administered, multi-debtor plan. Respondent advocates for the *per debtor* approach, positing that section 1129(a)(10) requires acceptance of the plan by at least one impaired class of creditors for each debtor. *See In re Tribune Co.*, 464 B.R. 126 (Bankr. D. Del. 2011). Debtors assert the *per plan* approach is the more logical reading,

allowing a plan to be confirmed so long as one impaired class of creditors of any debtor under a multi-debtor plan voted in favor of the plan. *See JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (In re Transwest Resort Props., Inc.)*, 724, 729 (9th Cir. 2018).

In the case at hand, creditors overwhelming support the Debtors' Plan, except for the single rejecting class of Under My Thumb—the sole creditor of one debtor in the multi-debtor Plan. A reading of the plain language of section 1129(a)(10), along with the recognition that a single creditor of one may hold veto power over an overwhelmingly supported plan, supports the conclusion that the *per plan* approach should be adopted by this Court to promote the language and intent of Congress in Chapter 11 reorganizations.

A. The plain language of Section 1129(a)(10) requires acceptance from only one impaired class of claims under a joint, multi-debtor plan.

The plain language of section 1129(a)(10) makes no reference to a need for an impaired class of claims for each debtor to vote in favor of a multi-debtor plan. Thus, the per plan approach to 1129(a)(10) voting should be adopted by this Court. When Congressional intent of statutory language is being discerned by the court, the beginning point is to look to the statutory text itself. *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). When the plain language of the statute results in a disposition that is not "absurd," the sole function of the court is to enforce it according to its terms. *Id*. When two statutes are able to exist without conflict, "it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Executives Ass'n*, 491 U.S. 490, 510 (1989). Additionally, the Bankruptcy Code provides rules of construction, including that the "singular includes the plural." 11 U.S.C. § 102(7). Section 1129(a)(10) provides that a reorganization plan can be confirmed when "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 Ninth Circuit dealt with the statutory reading of section 1129(a)(10) in the context of a joint, multi-debtor plan in *In re Transwest Resort Props., Inc.* and ultimately reached the decision that the per plan approach was the correct reading that best comports with the intent of Congress in the administration of a Chapter 11 proceeding. 881 F.3d at 730. There, multiple debtors sought confirmation in a jointly administered Chapter 11 bankruptcy without substantive consolidation. *Id* at 726. The sole creditor of a single debtor sought to vote against the plan, and asserted that section 1129(a)(10) required at least one impaired class for *each debtor* to confirm a multi debtor plan (the per debtor approach). *Id*. The court reasoned that this reading was not in line with the plain language of the statute, as it does not make any reference to or distinguish between creditors and different debtors, nor does it distinguish between single-debtor or multi-debtor plans. *Id* at 729. The court also noted that the rule of construction of 11 U.S.C. § 102(7)—providing that when reading the code that the singular includes the plural—does not change any analysis since section 1129(a)(10) would instead read, "at least one class of claims that is impaired under the plans has accepted the plans," essentially reaching the same result of requiring at least one impaired class of claims to vote in favor of the plans. *Id* at 730.

Indeed, a majority of courts to have reached the issue of jointly administered multi-debtor plans found the per plan approach to section 1129(a)(10) to be the most persuasive and in line with the statutory text. *J.P. Morgan Chase N.A. v. Charter Communications Operating, LLC (In re Charter Communications)*, 419 B.R. 221, 266 (Bankr. S.D.N.Y. 2009) ("it is appropriate to test compliance with section 1129(a)(10) on a peplan basis, not . . . on a per debtor basis"); *In re SPGA, Inc*., 2001 WL 34750646, at *6-7 (Bankr. M.D. Pa. Sept. 28, 2001) ("An overly broad

reading of [section 1129(a)(10)] - arguably barred and certainly not supported by its plain language -- would inappropriately complicate multi-debtor cases by exalting form over substance and would, in some cases, potentially make a negotiated plan unworkable."); *In re Station Casinos, Inc*., 2010 WL 11492265, at *23 (Bankr. D. Nev. Aug. 27, 2010) ("section 1129(a)(10) therefore does not require an accepting impaired class for each debtor under a joint plan."); *In re Dynegy Holdings*, LLC, 2013 WL 1874640, at *12 (Bankr. S.D.N.Y. May 2, 2013) (referencing the use of the per plan approach to section 1129(a)(10) used by the court in *In re Charter Communications* for a jointly administered multi-debtor case).

The Thirteenth Circuit in its ruling relied substantially on the results of a "handful" of decisions from the bankruptcy courts of Delaware, including *In re Tribune Co.*, where the court reasoned that section 1129(a)(10) required a per debtor satisfaction of impaired creditor approval of multi-debtor plans. 464 B.R. 126, 184 (Bankr. D. Del. 2011). There, the court jumped immediately into the Bankruptcy Code's rule of construction, section 102(7), reading the plural in "plans" in section 1129(a)(10) and concluding that a multi-debtor plan is functionally an individual plan for each debtor that must be approved by at least one impaired class of claims for each debtor plan. *Id* at 182. The court also read section 1129(a)(10) in conjunction with other subparts of section 1129, notably section 1129(a)(8) which requires that each class of claims consents or is unimpaired by the plan. *Id* at 183. The court believed that since section 1129(a)(8) applies to each class of claims, that equitable treatment for each class of claims for each debtor follows as part of the larger statutory scheme and could not result in the confirmation of a plan in a cramdown scenario if at least one impaired class of claims for each debtor votes affirmatively. *Tribune* is particularly unpersuasive, however, because the court there was dealing with a factually distinct case of multiple, competing plans for a large number of debtors. *Id* at 182.

Conversely, here there is only one jointly administered Plan, requiring approval by *at least one* impaired class of creditors for the *plan* as required by section 1129(a)(10).

Here, Debtors' case is substantially similar to *In re Transwest Resort Props*, as Debtors have sought the approval of a jointly administered, multi-debtor Plan with the sole creditor of a single debtor—Respondent—voting against the Plan. The reading of section 1129(a)(10) that confirms the per plan approach most closely resembles both the plain reading of the statute, and is supported even when using the Bankruptcy Code's rule of construction that the singular incudes the plural. Section 1129(a)(10) does not refer to the need for an affirmative vote by one impaired class of creditors for "each debtor," but rather the affirmative vote of "at least one class of claims that is impaired." This applies whether reading the statute in the singular ("plan") or the plural ("plans"). Nowhere in section 1129(a)(10) is there a reference to at least one impaired class of claims *for each debtor* in a multi-debtor plan. Additionally, the fact that section 1129 makes reference to treatment of each class of claims—such as in section 1129(a)(8)—does not mean that 1129(a)(10) is rendered inoperative or absurd. Congress did not specify that at least one impaired class *for each debtor* must vote in favor of a plan. The fact that Congress did not include such a requirement necessitates that the statute be read plainly to not import such a requirement. Both statutes are capable of coexistence, and thus the court must enforce the statute as it reads.

Since the proposed multi-debtor Plan here received the affirmative vote of at least one impaired class of creditors (and actually received the affirmative vote of nearly all classes of claims notwithstanding Respondent) the application of section 1129(a)(10) requires that the Plan be held valid and enforceable.

B. <u>The policy goals of the Bankruptcy Code support the per plan approach to impaired creditor approval of a joint, multi-debtor plan.</u>

The use of a joint, multi-debtor plan, such as Debtors propose here, is a useful "feature" of Chapter 11 reorganization bankruptcies that promote the goal of making a business reorganization a "quicker, more efficient procedure," while still providing "protection for debtors, creditors, and the public interest." H.R. Rep. No. 95-595, at 5 (1978). A clear purpose for section 1129(a)(10) is to provide some protection to impaired creditors in the event of a cramdown by requiring "some" creditor support for a debtor's plan. *In re LOOP 76, LLC*, 442 B.R. 713, 722 (Bankr. D. Ariz. 2010). There is no support for the contention that Congress enacted this provision to provide a single creditor veto power over substantial creditor support for a debtor's plan based on its classification. *Id*.

Additional protections still exist for impaired creditors under this provision as well, since acceptances of the plan by insiders are not counted. *Id* at 723. It should be noted, however, that section 1129(a)(10) does not provide or alter the substantive rights of creditors, but instead is merely a technical requirement to be met for approval of a plan. *In re Rhead*, 179 B.R. 169, 177 (Bankr. D. Ariz. 1995). This is an important note, particularly in response to the rationale of the Thirteenth Circuit in its ruling that joint, multi-debtor plans confirmed using the per plan approach essentially results in substantive consolidation, which the Debtors concede has not been done here. Substantive consolidation is an equitable, uncodified, and sparingly used judicial doctrine used by bankruptcy courts to essentially pool the assets and liabilities of separate but related entities in order to promote fairness to all creditors. *In re Clark*, 548 B.R. 246 (B.A.P. 9th Cir. 2016). While there may be instances where an impaired creditor may object to a joint, multi-debtor plan that is approved with the affirmative consent of an impaired class of another debtor, the contention that this functions essentially as substantive consolidation is erroneous since

section 1129(a)(10) is not a source of substantive rights for creditors and meeting the plain language of the technical requirement is all that is necessary for approval of a plan.

Keeping in mind the broad policy goals of Chapter 11, along with the practical application to the Debtors' case here, the per plan approach to approval of a plan under section 1129(a)(10) is the proper result. By adopting the per debtor approach, the Thirteenth Circuit opted for the ability of a single creditor of a single debtor out of multiple debtors, including those operating on an integrated basis with substantially similar interests, to prevent the confirmation of an otherwise heavily-supported plan that results in positive outcomes for all parties. The per plan approach, however, better aligns with the purposes of Chapter 11 cases to allow efficient administration of complex, multi-debtor cases by promoting a clearer pathway to confirmation without obstruction by a single party.

Debtors received overwhelming support for their joint, multi-debtor Plan that would be essentially subject to a veto by Respondents with the adoption of the per debtor interpretation. Section 1129(a)(10) was implemented to ensure *some* impaired creditor support, but not all. Here, every impaired class of creditors voted in favor of the Plan, save for Respondents, which would not only contradict the furtherance of the efficient and equitable goals of Chapter 11 bankruptcies, but also result in a harsh outcome for *all* parties, including Respondents should Debtors instead be forced to liquidate. The current 55% distribution for creditors under the plan is far greater than any liquidation value of the Debtors' enterprise. The perverse result of requiring an impaired class of creditors for *each* debtor to vote in favor of the plan would confound the goals of Chapter 11 and allow for an imbalance in power held by a single creditor to the detriment of not only the parties to the bankruptcy, but those stakeholders and employees whose livelihood depends on the continuation of the Debtors' enterprise.

Thus, in order to adequately further the fundamental goals of Chapter 11 Bankruptcy as Congress intended and to properly balance the interests of *all* parties, Debtors respectfully request this Court to reverse the Thirteenth Circuit's decision to adopt the per debtor interpretation of section 1129(a)(10).

CONCLUSION

For the foregoing reasons, Debtors, Tumbling Dice, Inc. et al., respectfully requests this Court reverse the Thirteenth Circuit's holding on both issues.

Appendix A: Selected Provisions of Title 11 of the U.S. Code

§ 102. Rules of Construction

In this title--

(1) [Omitted]

(2) [Omitted]

(3) [Omitted]

(4) [Omitted]

(5) [Omitted]

(6) [Omitted]

(7) the singular includes the plural;

(8) [Omitted]

(9) [Omitted]

§ 365. Executory contracts and unexpired leases

(a) [Omitted]

(b) [Omitted]

(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; or
>
> (2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or
>
> (3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

(d) [Omitted]

(e) [Omitted]

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

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

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) [Omitted]

(h) [Omitted]

(i) [Omitted]

(j) [Omitted]

(k) [Omitted]

(l) [Omitted]

(m) [Omitted]

(n) [Omitted]

(o) [Omitted]

(p) [Omitted]

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

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

(b) Notwithstanding section 327(a) of this title, a person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case.

§ 1122. Classification of claims or interests

(a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

(b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

§ 1123. Contents of plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall--

(1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(2), 507(a)(3), or 507(a)(8) of this title, and classes of interests;

(2) specify any class of claims or interests that is not impaired under the plan;

(3) specify the treatment of any class of claims or interests that is impaired under the plan;

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

(5) [Omitted]

(6) [Omitted]

(7) [Omitted]

(8) [Omitted]

(b) [Omitted]

(c) [Omitted]

(d) [Omitted]

§ 1124. Impairment of claims or interests

Except as provided in section 1123(a)(4) of this title, a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan--

(1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest; or

(2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default--

(A) cures any such default that occurred before or after the commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title or of a kind that section 365(b)(2) expressly does not require to be cured;

(B) reinstates the maturity of such claim or interest as such maturity existed before such default;

(C) compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law;

(D) if such claim or such interest arises from any failure to perform a nonmonetary obligation, other than a default arising from failure to operate a nonresidential real property lease subject to section 365(b)(1)(A), compensates the holder of such claim or such interest (other than the debtor or an insider) for any actual pecuniary loss incurred by such holder as a result of such failure; and

(E) does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest.

§ 1126. Acceptance of plan

(a) The holder of a claim or interest allowed under section 502 of this title may accept or reject a plan. If the United States is a creditor or equity security holder, the Secretary of the Treasury may accept or reject the plan on behalf of the United States.

(b) [Omitted]

(c) [Omitted]

(d) [Omitted]

(e) [Omitted]

(f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.

(g) [Omitted]

§ 1129. Confirmation of plan

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

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

(5)(A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

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

(A) each holder of a claim or interest of such class--

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

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

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

(9) [Omitted]

(10) If a class 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) [Omitted]

(12) [Omitted]

(13) [Omitted]

(14) [Omitted]

(15) [Omitted]

(16) [Omitted]

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

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides--

(i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims--

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may

retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

(C) With respect to a class of interests--

(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

(c) Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127(b) of this title, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this title. If the requirements of subsections (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.

(d) [Omitted]

(e) [Omitted]