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, RESPONDENT

On Writ of Certiorari to the
United States Court of Appeals for the Thirteenth Circuit

Brief for Respondent

Team R37
Counsel for Respondent

QUESTIONS PRESENTED

I. Does 11 U.S.C. § 365(c)(1) permit a debtor in possession to assume an executory contract, absent the non-debtor party's consent, when applicable non-bankruptcy law excuses the non-debtor party from render performance to an entity other than the debtor?

II. Does 11 U.S.C. § 1129(a)(10) require an acceptance from at least one impaired class for each debtor, or acceptance from at least one impaired class from any debtor in a joint administration bankruptcy proceeding?

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The Bankruptcy Court held in favor of the Debtor, Tumbling Dice, Inc. and its affiliated debtors, on both questions. The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

The relevant statutory provisions are listed below. The provisions are reproduced in Appendix A.

11 U.S.C. § 102(7)

11 U.S.C. § 362(b)

11 U.S.C. § 365(c)(1)

11 U.S.C. § 365(f)(1)

11 U.S.C. § 1015(b)

11 U.S.C. § 1123(a)(2)

11 U.S.C. § 1123(a)(3)

11 U.S.C. § 1124(1)

11 U.S.C. § 1126(a)

11 U.S.C. § 1126(f)

11 U.S.C. § 1129(a)

11 U.S.C. § 1129(a)(1)

11 U.S.C. § 1129(a)(3)

11 U.S.C. § 1129(a)(8)

11 U.S.C. §1129(a)(10)

STATEMENT OF THE CASE

Under My Thumb, Inc. ("Under My Thumb") rejected the reorganization plan in this case as a result of protecting their proprietary software from a devious competitor.

Under My Thumb is a leading software designer that serves the hospitality industry by developing customer loyalty and reservations programs. R. at 4. Tumbling Dice, Inc. ("TDI") is a holding company which owns the membership interests of nine debtor-subsidiaries (collectively, the "Debtors"). R. at 4. Eight of TDI's debtor-subsidiaries own and operate luxury casinos and resorts while Tumbling Dice Development, LLC ("Development"), the remaining debtor-subsidiary, acts as a licensee for the agreement with Under My Thumb. R. at 4.

It is common in the gaming industry to provide a customer loyalty program that will serve as an incentive for loyal customers. R. at 4. As a result, the Debtors launched a casino loyalty program to reward loyal customers and create brand loyalty. R. at 4.

After several years, the Debtors found that their customer loyalty program became outdated and insufficient. R. at 4. The Debtors selected a leading software designer, Under My Thumb, to modernize their customer loyalty program and subsequently increase profits. R. at 4. Over the course of one year, Under My Thumb advanced millions of dollars of their own capital in order to develop the customer loyalty program software (the "Software") for Development. R. at 4. After Under My Thumb developed the Software, the parties entered into a license agreement (the "Agreement") that granted Development a non-exclusive license for the use of the copyrighted and patented Software. R. at 5. This Agreement was written in order to prevent the Debtors from assigning or sublicensing their rights under any circumstances without Under My Thumb's express written consent. R. at 5. Under My Thumb generously allowed Development to pay for the development of the Software over time. R. at 5. The Software proved

to be extremely successful for the Debtors and their casino operations. R. at 5. In fact, the number of membership accounts tripled and spending by these members skyrocketed. R. at 5.

In January of 2016, the Debtors filed for bankruptcy under chapter 11 of the Bankruptcy Code. R. at 6. The Debtors planned to negotiate a deal that would restructure TDI and refinance their multi-billion-dollar debt. R. at 6. At the time the Debtors filed for bankruptcy, they owed Under My Thumb, an unsecured creditor, more than $6 million under the Agreement. R. at 6.

The parties to the bankruptcy proceeding reached a deal and memorialized the terms in a plan support agreement. R. at 6, 7. In August of 2016, the Debtors then filed a plan (the "Plan") that was consistent with the plan support agreement, along with a disclosure statement. R. at 7. The Plan was a joint plan which would join all of the Debtors and unsecured creditors. R. at 7. Although the Plan was jointly filed, it specifically states that "the Debtors' estates are not being substantively consolidated, and no Debtor is to become liable for the obligations of another." R. at 7.

Under the proposed Plan, the payment plan of the Agreement with Under My Thumb would remain intact. R. at 7. Additionally, the unsecured distribution would be funded by a Start Me Up, a hedge fund, and Sympathy for the Devil, a private equity group (collectively, the "Debtors in Possession"). Upon careful review of the disclosure statement, Under My Thumb discovered that Start Me Up funded only a minority portion of the unsecured distribution. R. at 7. The majority portion of the unsecured distribution was to be funded by Sympathy for the Devil. R. at 7, 8. In turn, Sympathy for the Devil would receive a majority of the voting shares and several seats on TDI's reconstituted board of directors. R. at 8.

While Under My Thumb initially favored the Plan, the perception of the Plan turned negative once Under My Thumb became aware that Sympathy for the Devil would be the

majority shareholder. R. at 8. The change in perception was due to the fact that Sympathy for the Devil's portfolio includes a direct competitor of Under My Thumb "who had, for several years, tried to replicate the Software." R. at 8. Sympathy for the Devil's involvement forced Under My Thumb to become immediately suspicious of both the Plan and Sympathy for the Devil's intentions. R. at 8.

Under My Thumb, who controlled Development's only class of creditors, voted to reject the Plan because it is concerned that Sympathy for the Devil could gain access to the Software that it created specifically for Development. R. at. 8. Furthermore, Under My Thumb timely objected to the Plan on numerous grounds. R. at 8. First, Under My Thumb objected to the Plan on the grounds that section 365(c)(1) precluded assumption of the Agreement because applicable non-bankruptcy law excused performance by Under My Thumb absent its express consent. R. at 8. Second, Under My Thumb objected to the Plan on the grounds that the Plan could not be confirmed under section 1129(a)(10) because Development's only impaired class of creditors did not vote on the Plan or accept it. R. at 8.

The bankruptcy court ruled in favor of the Debtors because it noted that a majority of the creditors voted in favor of the Plan. R. at 9. On appeal from the bankruptcy court, the Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court on both issues. R. at 9. The United States Court of Appeals for the Thirteenth Circuit reversed the decisions of the bankruptcy court and ruled in favor of Under My Thumb on both issues. R. at 9.

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the United States Court of Appeals for the Thirteenth Circuit and hold that Under My Thumb should be released from rendering performance to the Debtors in Possession, absent Under My Thumb's express written consent.

This case sets out to determine two issues in a chapter 11 bankruptcy proceeding. First, this Court must determine whether the Debtors in Possession can assume an executory contract, specifically a non-exclusive software license, without the licensor's express consent. Second, this Court must also determine whether the Plan should be confirmed under section 1129(a)(10) despite the fact that Under My Thumb, as an impaired creditor, did not vote on the Plan.

In regard to the first issue, this Court should affirm the United States Court of Appeals for the Thirteenth Circuit's holding, which states that section 365(c)(1) precludes the Debtors in Possession from assuming the non-exclusive software license under the Agreement absent express consent from the licensor. Debtors typically possess the ability to assign an executory contract regardless of contractual provisions prohibiting assignment. However, section 365(c)(1) was written for the purpose of serving as an exception to this rule in cases where assuming an executory contract would not be equitable. This exception to the rule is present in the case before this Court.

In determining whether section 365(c)(1) bars assumption of an executory contract, this Court will be faced with adopting one of two conflicting tests. The majority of circuit courts have adopted the hypothetical test, including the Court of Appeals for the Thirteenth Circuit, as opposed to the actual test. The hypothetical test asserts that a debtor cannot assume an intellectual property license as a debtor in possession if it could not otherwise assign the contract to a third party under applicable law, even if it does not intend to assign its license rights to a third party. The hypothetical test is the correct approach to employ in cases centering on intellectual property licenses because several courts have found that the identity of the parties to the original contract are material to the agreement. Further, these courts held that intellectual property licenses are personal and non-delegable. Federal intellectual property law has long

advocated for owner's rights and specifically, the licensor's right to control who has access to its protected work. As a result, the actual test is not the correct approach because it fails to respect federal intellectual property laws, and it mistakenly treats the Debtors in Possession as the same entity as the prepetition Debtors.

This Court must also review the statutory language of section 365(c)(1), and in doing so, should find that statutory interpretation is unnecessary because the plain language of the text is clear and unambiguous. First, the Debtors ask this Court to depart from the plain language of the text and conclude that the disjunctive term "or," as used in the "assume or assign" language of section 365(c)(1), should be construed in the conjunctive as "and." Second, the Debtors ask this Court to resolve an alleged conflict between the term "applicable law" in sections 365(c)(1) and 365(f)(1) of the Bankruptcy Code. This Court has stated that "when the words of a statute are unambiguous, then this first canon is also the last: judicial inquiry is complete." Therefore, the inquiry before this Court must both begin and conclude with the plain language of the statutory text.

However, if this Court desires to interpret the text anyways, it will find that the term "or" has not been defined in the statute. When a term has not been defined in the statute itself, it must be interpreted in accord with its original or natural meaning. Here, the term "or" used in the "assume or assign" language of section 365(c)(1) is plain and does not allow more than one meaning. The term "or" functions as a disjunctive term in order to separate two alternatives. On the other hand, the term "and" is entirely the opposite and functions as a conjunctive term in order to combine two alternatives in the same class. Furthermore, the Bankruptcy Code itself does not allow for this Court to construe the term "or" in section 365(c)(1) in such a fashion.

The Debtors here may argue that reading section 365(c)(1) in accordance with its literal meaning would produce an absurd result and does not align with bankruptcy policy. However, this argument is unfounded because achieving a better policy outcome is a task for Congress. This Court cannot construe the disjunctive term "or" to mean the conjunctive term "and" without trespassing on a function owned by the legislative branch. Adopting the actual test would require this Court to ignore the plain text of the statute, which would not only violate the Bankruptcy Code, but also Congress's duty in writing it.

Turning to the term "applicable law" as used in sections 365(c)(1) and 365(f)(1) of the Bankruptcy Code, this Court must look to *why* "applicable law" prohibits assignment. Several circuit courts have held that applicable non-bankruptcy law includes federal intellectual property law. As previously mentioned, intellectual property licenses are personal and non-delegable. As a result of this rationale, sections 365(c)(1) and 365(f)(1) are not in conflict as the applicable non-bankruptcy law, intellectual property law, allows the exception of section 365(c)(1) to prohibit assignment because the identity of the original contracting parties is material to the agreement. The dispute in this case only arose because Under My Thumb does not consent to assignment of the Agreement and blatantly disapproves of the Debtors in Possession having access to the Software. Further, if a third party was granted access to proprietary intellectual property worth millions of dollars, in blunt opposition of the inventor, the invasion is analogous to that of trespass. In order for Under My Thumb to exercise its intellectual property rights to the fullest extent, it must be able to control the identity of its licensees. Therefore, intellectual property law precludes assumption because Under My Thumb has not consented to assignment of the personal and non-delegable Agreement.

In regard to the second issue, this Court should affirm the Court of Appeals for the Thirteenth Circuit's decision, which held that section 1129(a)(10) should be interpreted using the *per debtor* approach in order to protect Under My Thumb and other impaired creditors' voting rights. Congress intended to afford creditors the power of negotiation under chapter 11 bankruptcy proceedings by granting creditors voting rights. The Bankruptcy Code is strongly rooted in the principles of equity and the balancing of interests of debtors and creditors.

First, bankruptcy courts rely heavily on statutory interpretation in order to administer decisions that are in sync with Congress' intent. Section 1129(a)(10) requires a *per debtor* approach because the Debtors were not substantively consolidated and a reading of a *per plan* approach would treat all of the Debtors' assets and liabilities as essentially the same. The Bankruptcy Code states that the singular includes the plural which, in turn, signifies that the word "plan" under section 1129(a)(10) includes "plans" in the plural. It would be absurd to think that because the statute states "plan" in the singular, then only one impaired class of creditors could potentially accept a plan on behalf of one hundred impaired creditors.

Additionally, statutory interpretation necessitates the reading of section 1129(a)(10) in conjunction with other subsections. Here, the Plan was not adopted in good faith under section 1129(a)(3) on the grounds that Sympathy for the Devil, a majority shareholder in TDI and Under My Thumb's direct competitor, could gain access to the Software that Under My Thumb developed. Thus, Under My Thumb would be put at a competitive disadvantage if their patented and copyrighted Software was no longer special to their company. Because the Plan fails under section 1129(a)(3), then the Plan also fails under section 1129(a)(10). This Court should not confirm the Plan on the sole basis that it would be convenient because, as a result, creditors' rights will be stripped away giving all negotiating power to the hands of the Debtors. In order to

maintain the separation of power between the branches of government, this Court should interpret section 1129(a)(10) in light of Congress' intent.

Second, bankruptcy courts are courts of equity that order decisions by applying the Bankruptcy Code on a case-by-case basis in order to administer fair results for both debtors and creditors in the reorganization process. A *per debtor* approach under section 1129(a)(10) ensures that each creditor is treated as a separate legal entity under a joint administration. The core base of corporate law is rooted in the foundation of "separateness" that allows Under My Thumb, as a separate legal entity, to vote on a plan without coercion from the Debtors. It is important to account for the fact that the Debtors are jointly administered and not substantively consolidated - therefore, the Debtors' should not be treated as if they are in fact one and the same.

Bankruptcy courts have the power to prevent fraud, injustice, and unfair results in bankruptcy proceedings that would unjustifiably harm creditors. The Plan unreasonably harms Under My Thumb because the Plan could potentially defraud Under My Thumb from the rights of its Software if Sympathy for the Devil gains access to the Software. Not only did Under My Thumb create a Software that tripled Development's membership accounts and skyrocketed profits, but it also allowed Development to pay for the Software over time. Under My Thumb's generous contributions would go unnoticed if a *per plan* approach is adopted because there is a lack of compromise being struck between the Debtors and creditors. A *per debtor* approach under section 1129(a)(10) will ensure that both parties have an equal voice and opportunity to strike a compromise that will relieve the Debtors and achieve the goal of chapter 11 bankruptcy proceedings.

If a *per plan* approach is adopted, then it would run in direct conflict with the statutory interpretation of section 1129(a)(10) as well as the principles of equity. In order to provide

equitable relief for Under My Thumb and the Debtors, section 1129(a)(10) requires a *per debtor* approach to protect creditors' rights granted to them by Congress. Thus, this Court should affirm the decision of the United States Court of Appeals for the Thirteenth Circuit and hold that Under My Thumb should be released from rendering performance to the Debtors in Possession, absent Under My Thumb's express written consent.

ARGUMENT

I. Section 365(c)(1) Bars Assumption of a Non-Exclusive License of Intellectual Property Absent Express Consent of the Licensor.

This Court should affirm the judgment of the United States Court of Appeals for the Thirteenth Circuit. The Court of Appeals for the Thirteenth Circuit correctly held that the hypothetical test should be applied and that the non-exclusive software license signed by the Debtors and the creditor cannot be assumed by the Debtors in Possession. The Bankruptcy Code has been written to preserve the rights of creditors because the debtor may not have otherwise existed without the security provided by the creditor. 11 U.S.C. § 362(b) (2019). The issue before this Court is one that has been debated for decades and now begs for resolution. This Court must determine whether the Debtors in Possession can assume, over the licensor's objection, a non-exclusive software license. Although not on its face, this case effectively centers around intellectual property rights. The Court of Appeals for the Thirteenth Circuit has acknowledged that federal law on intellectual property licenses "respects the right of the licensor to control who uses its intellectual property, and generally excuses a licensor from rendering performance to any entity different from its original licensee." R. at 11.

A. The hypothetical test adopted by the majority of courts should be applied when determining whether a debtor in possession may assume an executory contract held by the prepetition debtor.

1. The hypothetical test should be adopted in cases involving intellectual property because license agreements are personal to the original parties and assignment requires express consent from the licensor.

The hypothetical test is the correct approach in determining whether an executory contract, specifically in regard to intellectual property licenses, may be assumed. The hypothetical test is applied when applicable non-bankruptcy law precludes assumption and the non-debtor party does not consent to assignment of the license. *In re Sunterra Corp.*, 361 F.3d 257, 262 (4th Cir. 2004). The majority of circuit courts, including the Third, Fourth, Ninth, and Eleventh Circuits have elected to adopt the hypothetical test, as opposed to the actual test, when determining whether a debtor may assume or assign an intellectual property license to the debtor in possession. *In re Sunterra Corp.*, 361 F.3d at 262; *In re Catapult Entm't, Inc.*, 165 F.3d 747, 750 (9th Cir. 1999); *In re James Cable Partners*, 27 F.3d 534, 539 (11th Cir. 1994); *In re W. Elecs., Inc.*, 852 F.2d 79, 83 (3d Cir. 1988). The hypothetical test asserts that the debtor cannot assume an intellectual property license as a debtor in possession if the debtor could not otherwise assign the contract to a third party under applicable law, even if it does not intend to assign its license rights to a third party. *In re Trump Entm't Resorts, Inc.*, 526 B.R. 116, 122 (Bankr. D. Del. 2015). A debtor typically possesses the ability to assign an executory contract regardless of provisions omitting assignment. 11 U.S.C. § 365(f)(1) (2019). However, the Bankruptcy Code contours an exception to section 365(f)(1) which applies directly to intellectual property cases.

This exception specifically states that a debtor in possession may not assume or assign an executory contract of the debtor if both: 1) applicable law excuses a party to the contract from accepting performance from or rendering performance to an entity other than the debtor in

possession, and 2) the party does not consent to assumption or assignment. 11 U.S.C. § 365(c)(1) (2019). Whether section 365(c)(1) applies to prohibit assignment absent the licensor's consent may depend on both: 1) whether the rights granted to the licensee are non-exclusive or exclusive, and 2) the type of intellectual property involved. For example, trademarks, as opposed to copyrights and patents, may present challenges. However, even with regard to trademarks, bankruptcy courts have adopted the hypothetical test. *In re Trump Entm't Resorts, Inc.*, 526 B.R. at 122. The court in *Perlman* barred assumption of an executory contract because applicable non-bankruptcy law precluded assignment to a third party. *In re Catapult Entm't, Inc.*, 165 F.3d at 750. The court found that the identity of the parties to the original contract were material to the agreement. *Id.* at 754-755. Specifically, intellectual property licenses are recognized as personal and non-delegable. *Id.* at 750. Moreover, the court in *Unarco Industries* held that federal intellectual property law applied to issues of assignability and that license agreements were regarded as "personal to the licensee and not assignable unless expressly made so in the agreement." *Unarco Indus. v. Kelley Co.*, 465 F.2d 1303, 1306 (7th Cir. 1972). This rule of non-assignment has *never* been questioned in post-Erie decisions. *Id.*

In the case at hand, Under My Thumb did not consent to assumption or assignment of the Agreement concerning the non-exclusive software license. In fact, Under My Thumb both voted to reject the Plan and timely objected to the Plan on numerous grounds. R. at 8. First and foremost, section 365(c)(1) bars assumption of the Agreement because applicable non-bankruptcy law, specifically intellectual property law, excuses performance by Under My Thumb in the absence of its express consent. R. at 8. It would be absurd to force Under My Thumb to render performance of the Agreement to another entity other than Development, with whom it originally contracted with, due to the fact that the software license was developed

specifically for Development's use. R. at 4, 8. Similarly to the non-debtor party in *Perlman*, express consent by the licensor in this case has unquestionably not been provided. Thus, the executory contract may not be assumed or assigned to a third party.

Under My Thumb explicitly rejects the Plan because the majority of voting shares after reorganization will be held by Sympathy for the Devil. R. at 7. Sympathy for the Devil's portfolio includes a direct competitor of Under My Thumb who has displayed a years-long pattern of attempting to replicate the precise Software involved in this case. R. at 8. This Software has been both copyrighted and patented by Under My Thumb. R. at 5. Under intellectual property law, Under My Thumb is provided with the right to protect their proprietary invention and dictate whom has access to it. The Agreement in this case consists of a non-exclusive software license which broadly prohibits assigning or sublicensing the rights. R. at 5. This contractual provision displays Under My Thumb's intent to preserve and exploit its intellectual property protection rights.

Therefore, the hypothetical test is the correct approach to be applied in cases involving intellectual property licenses because the parties involved are material to the agreement and Under My Thumb has expressly declined consent in assuming or assigning the Agreement.

2. The actual test should not be adopted in cases involving intellectual property because it presents complications and fails to respect fundamental intellectual property rights.

The actual test should not be applied in cases regarding intellectual property licenses. The actual test is not the appropriate approach because it fails to respect intellectual property laws, and the Debtors in Possession are not the same entity as the prepetition Debtors. *In re Catapult Entm't, Inc.*, 165 F.3d at 750. A minority of circuit courts have adopted the actual test. *See Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997); *In re Mirant*

Corp., 440 F.3d 238, 249 (5th Cir. 2006). The actual test is differentiated from the hypothetical test in that "the assignment limitations under applicable non-bankruptcy law are not triggered unless the debtor actually intends to assign the contract to a third party." *In re Mirant Corp.*, 440 F.3d at 246. These courts improperly treat the Debtors in Possession as the same entity as the prepetition Debtors for purposes of permitting assumption of an executory contract that would not otherwise be assignable to third parties without the licensor's consent. This is a misinterpretation of the law because as a technical matter, the Debtors and the Debtors in Possession may be the same legal entity. However, as a practical matter, many chapter 11 cases incorporate a complete change in management as part of the reorganization. Thus, the company may undergo fundamental changes in both its goals and operation, which these circuit courts fail to consider.

Moreover, the actual test presents several complications because it requires a case-by-case analysis. *Id.* at 248. Among the most notable complications is that case-by-case analysis is both 1) time consuming, and 2) may breed inaccuracies due to the intricacies of each individual set of facts. Ultimately, court dockets could become congested if the courts dedicate the time required to break down each and every meticulous case involving an executory contract and a debtor in possession. Furthermore, although the actual test is aimed at determining whether a party is receiving the full benefit of their agreement or whether a party is declining to perform its contractual obligations, it fails to consider the fundamental principles rooted in intellectual property law. These time-honored and fundamental principles of intellectual property are aimed at protecting the rights of the owner, which subsequently promote and encourage inventors to continue disclosing their inventions to society. *Unarco Indus. v. Kelley Co.*, 465 F.2d at 1306. Inventors currently believe that their rights will be protected and that they will have control over

who has access to them. Thus, it would be detrimental to our society to obstruct or alter this mentality.

Here, the Debtors in Possession are not the same fundamental entity as the prepetition Debtors. Although the Plan asserts that the overall corporate structure will not change, the Debtors fail to recognize that in regard to intellectual property rights, the party to a contract is a material part of the agreement. R. at 7. In this case, the Under My Thumb's Software is both patented and copyrighted. R. at 5. Intellectual property law has long advocated for strong protection of owner's rights. As a result, Under My Thumb should be afforded its legal right to control which entities have access to its Software without question. Furthermore, unlike the actual test, the hypothetical test provides a bright line rule which can be utilized consistently in every circuit and prevent frivolous litigation. Under the hypothetical test, an intellectual property license agreement may not be assumed or assigned absent the express consent of the licensor. 11 U.S.C. § 365(c)(1) (2019). Under My Thumb is suspicious of Sympathy for the Devil and is simply exercising the rights provided by federal copyright and patent law to control access to its invention. This is the sole purpose why inventors, such as Under My Thumb, go through the extensive and tedious process of filing copyright and patent applications.

Accordingly, the actual test should not be applied in cases regarding intellectual property licenses because it fails to respect intellectual property law, and the Debtors in Possession are not the same entity as the prepetition Debtors.

B. Section 365(c)(1) of the Bankruptcy Code should be interpreted as it is written because it is clear and unambiguous.

As previously mentioned, the issue before this Court is one that has been debated for decades and now begs for resolution. Put simply, the discrepancies result from differing interpretations of the statutory language. First, the Debtors ask this Court to depart from the plain

language of the text and conclude that the disjunctive term "or," as used in the "assume or assign" language of section 365(c)(1), should be construed in the conjunctive as "and." Second, the Debtors ask this Court to resolve an alleged conflict between the term "applicable law" in sections 365(c)(1) and 365(f)(1). This Court has acknowledged that the division in circuit courts is an important one to resolve and that it has awaited a suitable case to address the issue. *N.C.P. Mktg. Grp., Inc. v. BG Star Prods.*, 556 U.S. 1145, 1147 (2009). Additionally, while many cases implicate patents, courts have analogized non-exclusive patent licenses to non-exclusive copyright licenses. *See In re Patient Educ. Media, Inc.*, 210 B.R. 237, 240-241 (Bankr. S.D.N.Y. 1997). With regard to both types of intellectual property, non-exclusive licenses do not "grant the licensee any ownership interest in the work and thus may not be assigned." *Id.* In this case, Under My Thumb and Development entered into a non-exclusive license agreement for Development to utilize Under My Thumb's patented *and* copyrighted Software. R. at 5.

This Court has avowed that when it must resolve a dispute by interpreting statutory language, it is essential that the court first turn to "one, cardinal canon before all others," which instructs the court to presume that Congress "says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1991). This Court has further stated that "when the words of a statute are unambiguous, then this first canon is also the last: judicial inquiry is complete." *Id.* Therefore, the inquiry before this Court must both begin and conclude with the plain language of the statutory text. *U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989).

1. The term "or" used in section 365(c)(1) is clear and unambiguous.

The term "or" used in the "assume or assign" language of section 365(c)(1) is plain and does not allow more than one meaning, thus, this Court should not interpret the statute. If the

language of a statute is clear and unambiguous, then statutory interpretation is superfluous and should not ensue. *Hillman v. IRS*, 263 F.3d 338, 342 (4th Cir. 2001). It has further been recognized that deviating from the clear and unambiguous text of a statute should only occur in "exceptionally rare" instances. *Id.* The term "or" in section 365(c)(1) of the Bankruptcy Code has not been defined by the statute. This Court has consistently held that when a term has not been defined in the statute, it should be construed "in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993); *Accord Perrin v. United States*, 444 U.S. 37, 42 (1979); *Asgrow Seed Company v. Winderboer*, 513 U.S. 179, 179 (1995).

The term "or" is ordinarily "used as a function word to indicate an alternative." *Or*, merriam-webster.com, https://www.merriam-webster.com/dictionary/or (last visited Jan. 13, 2020). Moreover, the example provided along with the definition is "coffee or tea." *Id.* This straightforward example displays that the disjunctive term "or" is used to separate two different options. On the contrary, the term "and" is ordinarily "used as a function word to indicate connection or addition." *And*, merriam-webster.com, https://www.merriam-webster.com/dictionary/and, (last visited Jan. 13, 2020). There is no basis in law to support the interpretation of the ordinary term "or" to include "and;" thus, the Court of Appeals for the Thirteenth Circuit correctly held that the text is unambiguous and that judicial inquiry is unnecessary. R. at 12. In addition, the Bankruptcy Code itself does not allow for this Court to construe the term "or" in section 365(c)(1) in such a fashion. R. at 10.

Furthermore, the Debtors may argue that reading section 365(c)(1) to mean "assume or assign" would produce an absurd result and does not align with bankruptcy policy. This argument is unfounded as it could not possibly produce such an absurd and gross result as to shock the conscious. If the result was gross and absurd, this decades-long debate would not be

before this Court for resolution now, rather it would have been resolved many years ago. More importantly, achieving a better policy outcome is a task for Congress. This Court cannot construe the disjunctive term "or" to mean the conjunctive term "and" without trespassing on a function owned by the legislative branch. *See United States v. Noland*, 517 U.S. 535, 542 n.3 (1996) ("[I]t is up to Congress, not this Court, to revise the [policy] if it so chooses."). Adopting the actual test requires this Court to ignore the plain text of the statute, which would not only violate the Bankruptcy Code, but also Congress's duty in writing it. Arguments in favor of the actual test do not justify departing from the plain meaning rule. *N.C.P. Mktg. Grp., Inc.*, 556 U.S. at 1147 (2009). Thus, the literal reading of section 365(c)(1) must prevail and statutory interpretation should not ensue.

2. The plain language in section 365(c)(1) bars assumption when applicable non-bankruptcy law would bar assignment.

Under My Thumb did not consent to assignment of the personal and non-delegable Agreement and thus, intellectual property law precludes assumption. Section 365(c)(1) precludes assumption when a licensor has not provided express consent to assign a personal and non-delegable license. *In re Adelphia Commc'ns Corp.*, 359 B.R. 65, 73 (Bankr. S.D.N.Y. 2007). The dispute in this case arises in the application of the word "applicable law" as used in sections 365(c)(1) and 365(f)(1) of the Bankruptcy Code. As the Court of Appeals for the Fourth Circuit explained, this Court must look to *why* "applicable law" prohibits assignment. *In re Sunterra Corp.*, 361 F.3d at 266. Many courts have adopted the view that "applicable law" as used in section 365(c)(1) includes federal intellectual property law. *See In re CFLC, Inc.*, 89 F.3d 673, 680 (9th Cir.1996) (concluding that because the federal common law principle of non-assignability governs non-exclusive licenses, it is applicable under section 365 of the Bankruptcy

Code); *In re Supernatural Foods, L.L.C.*, 268 B.R. 759, 796 (Bankr. M.D. La. 2001) (asserting that section 365(c)(1) of the Bankruptcy Code enforces the common law of non-assignability).

Further, intellectual property law designates that licenses are personal and non-delegable. *In re Adelphia Commc'ns Corp.*, 359 B.R. at 73. Consequently, intellectual property law is "predicated on the rationale that the identity of the contracting party is material to the agreement." *In re Sunterra Corp.*, 361 F.3d at 267; *In re Catapult Entm't, Inc.*, 165 F.3d at 752. As a result of this rationale, sections 365(c)(1) and 365(f)(1) are not in conflict as the applicable non-bankruptcy law, intellectual property law, allows the exception in section 365(c)(1) to prohibit assignment because the identity of the contracting parties is material to the agreement. For example, the court in *Sunterra* held that federal copyright law was the "applicable non-bankruptcy law." *In re Sunterra Corp.*, 361 F.3d at 262. Therefore, the debtor in possession was precluded from assuming the non-exclusive license because the federal common law prohibited assignment. *Id.* Furthermore, a non-exclusive license does not constitute a sale of the invention and does not confer ownership rights. *See In re Access Beyond Techs., Inc.*, 237 B.R. 32, 44 (Bankr. D. Del. 1999). Thus, the "debtor licensee cannot sell its license agreement in order to pay its creditors in a bankruptcy proceeding." *Id.*

Here, the dispute only arose because the licensor, Under My Thumb, did not provide express consent to assign the Agreement and blatantly disapproves of the Debtors in Possession gaining access to its Software. R. at 8. In the case at hand, the contracting party's identities are material to the Agreement, and the Debtors in Possession are not the same entity that Under My Thumb contracted with. It is important to recognize that Under My Thumb viewed the Plan favorably until it became aware that the majority shareholder owns its direct competitor "who had, for several years, tried to replicate the Software." R. at 8. Once aware of this information,

Under My Thumb voted to reject the Plan and timely objected to it. R. at 8. Under My Thumb is now simply exercising the rights granted to it that are rooted in the fundamental concept of intellectual property protection, and which courts have fiercely defended. If this Court were to adopt the actual test and force Under My Thumb to render performance to a third party which it did not contract with, and further provide this third party with access to its intellectual property, inventors may be disincentivized to disclose their work subsequently stifling innovation.

Further, if a third party were to be granted access to proprietary intellectual property worth millions of dollars, in blunt opposition of the inventor, the invasion is analogous to that of trespass. Jennifer Ying, *The Plain Meaning of Section 365(c): The Tension Between Bankruptcy and Patent Law in Patent Licensing*, 158 U. Pa. L. Rev. 1225, 1278 (2010). Under My Thumb is not simply being "asked to do nothing more than honor its existing contractual obligation with Development." R. at 9. This statement is unreservedly false. Not only is Under My Thumb being asked to render performance to an entity which is not Development, the entity with whom it contracted, but the Debtors are also asking this Court to ignore the plain text of the statute and the fundamental principles of intellectual property law which have enforced the rights of inventors since the 1800s. In order for Under My Thumb to exercise its intellectual property rights to the fullest extent, it must be able to control the identity of its licensees. If an intellectual property owner were forced to render performance to a third party that it did not contract with, then the owner would in effect lose its fundamental right to control access to its invention. This, in and of itself, displays that adopting the hypothetical test would not render an absurd result. The Debtors here rely far too much on legislative history and finagling an illogical conclusion of an "absurd result," rather than paying close attention to the language of section 365(c)(1).

Therefore, intellectual property law precludes assumption because Under My Thumb has not consented to assignment of the personal and non-delegable Agreement.

II. Section 1129(a)(10) Requires That Each Impaired Class Have a Vote and Thus, to Remain Equitable, Requires a Joint, Multi-Debtor Plan Accepted By At Least One Impaired Class for Each Debtor.

This Court should affirm the Court of Appeals for the Thirteenth Circuit's holding because Under My Thumb, as an impaired class/creditor, is afforded voting rights by Congress under section 1129(a)(10). The Court of Appeals for the Thirteenth Circuit correctly held that chapter 11 proceedings in a joint administration require a *per debtor* approach.

Bankruptcy courts' decisions rely both on statutory interpretation and equity in order to administer fair decisions. *Mediofacturing v. McDermott (In re Connolly N. Am.*, LLC), 802, F.3d 810, 814 (6th Cir. 2015). This Court held that statutory interpretation is the first step in resolving disputes that are based on a statute's meaning. *Ron Pair Enters.*, 489 U.S. at 241. If a statute is unclear, courts possess discretion in analyzing the construction of the statute without blatantly disregarding Congress' intent. *Commissioner v. Asphalt Products Co.*, 482 U.S. 117, 121 (1987). Second, this Court has long held that equity is a strong motive in bankruptcy court opinions. *Local Loan Co v. Hunt*, 292 U.S. 234, 240 (1934). Additionally, despite increased regulations in bankruptcy proceedings, the Bankruptcy Code remains rooted in equity and balancing the interests of debtors and creditors. *In re W.R. Grace & Co.*, 475 B.R. 34, 88 (D. Del. 2012).

Chapter 11 is a bankruptcy proceeding created by Congress that helps debtors emerge from bankruptcy with the confirmation of a reorganization plan. Congress' intent was to form a safeguard by creating relatively few requirements for chapter 11. R. at 15. A reorganization plan first identifies classes of claims that are impaired, then identifies a treatment for the impaired classes. 11 U.S.C. §§ 1123(a)(2), (3) (2019). Impaired classes of claims are claims that alter

creditors' pre-bankruptcy legal, equitable or contractual rights under the reorganization plan. 11 U.S.C. § 1124(1) (2019). When a class is impaired, it elicits rights under chapter 11, including the right to vote on the reorganization plan. 11 U.S.C. §§ 1126(a), (f) (2019). Voting rights under section 1126 are an essential right of an impaired creditor in the bankruptcy process that is of the upmost importance.

Bankruptcy courts under chapter 11 proceedings may allow debtors to substantively consolidate to create one debtor entity. Substantive consolidation is a judicial equitable remedy in bankruptcy where assets and liabilities of all debtors are pooled together. *Alexander v. Compton (In re Bonham)*, 229 F.3d 750, 764 (9th Cir. 2000). After assets and liabilities are pooled together, the entities are treated as if they are, in fact, a single legal entity. *Id.* Courts tend to use substantive consolidation sparingly. However, substantive consolidation is adequate "if proponent proves corporate disregard creating contractual expectations of creditors that they were dealing with debtors as one indistinguishable entity." *In re Owens Corning Co.*, 419 F.3d 195, 212 (3rd Cir. 2005). In absence of substantive consolidation in a bankruptcy proceeding, "entity separateness is fundamental." *In re Tribune*, 464 B.R. 126, 182 (Bankr. D. Del. 2011). Here, since the Plan specifically states that the Debtors' assets and liabilities are not substantively consolidated, then Under My Thumb remains a separate legal entity. R. at 7. Therefore, section 1129(a)(10) is interpreted as using a *per debtor* approach because the Debtors are jointly administered. R. at 3. Any other statutory interpretation of section 1129(a)(10) in a jointly administered bankruptcy case would abrogate creditors' core voting rights under section 1126 and would unjustifiably harm creditors.

A. Under My Thumb, as an impaired creditor, is allowed to object to the Plan because section 1129(a)(10) is subject to broad interpretation and warrants a *per debtor* approach.

Under My Thumb rightfully objected to the Plan because the Plan erroneously treated the Debtors and Under My Thumb as a single legal entity. "A single impaired accepting class can support multiple debtors only where a substantive consolidation is requested and ordered." *In re SGPA, Inc.*, No. 1-01-02609, 2001 Bankr. LEXIS 2291 *1, *13 (Bankr. M.D. Pa. Sep. 28, 2001).

Canons of construction of statutory interpretation help courts determine the meaning of statutes which will aid in administering decisions based on the interpretations. *Ron Pair Enters.*, 489 U.S. at 241. This Court held that when a statute is clear, the statute should be interpreted as the text indicates and there is no need to inquire beyond the text. *Id.* at 241. However, if a statute is silent, ambiguous, or open to more than one interpretation, this Court held that courts may defer to statutory interpretation and Congress' intent. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 866 (1984); *see also Ron Pair Enters.*, 489 U.S. at 241. Thus, so long as the statutory interpretation is within the bounds of Congress' intent and goal, then the interpretation is deemed reasonable and permissible. *Id.* at 863.

The word "plan" in section 1129(a)(10) should be interpreted as "plans." *Tribune*, 464 B.R. at 182. Under section 102(7), the Bankruptcy Code's statutory construction states that the singular includes the plural. *Id.* In *Tribune*, the court found that the mere fact that section 1129(a)(10) refers to a reorganization "plan" in the singular and not the plural cannot be the sole basis that, in a multi-debtor bankruptcy proceeding, only one debtor – or less than all debtors – may satisfy section 1129(a)(10). *Id.* The court in *Tribune* further reasoned that because it was expressly stated that there were non-substantive consolidation provisions, then each "joint plan" actually comprises separate plans for each debtor. *Id.* The court further reasoned that reading

section 1129(a)(10) as "plans" is "logical and consistent with such a scheme" or purpose. *Id.; see also In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293, 302 (Bankr. D. Del 2011); *In re Woodbridge Grp. of Cos., LLC*, 592 B.R. 761 (Bankr. D. Del. 2018).

Section 1129(a)(10) should be read in conjunction with the other subsections of section 1129(a) when evaluating the rights of impaired unsecured creditors. *Tribune*, 464 B.R. at 182. The rule of statutory construction is that "statutes should be read as a whole since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991); *see also Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Execs. Ass'n*, 487 U.S. 1231 (1988). In *Tribune*, the court held that section 1129(a)(10) need to be read in conjunction with sections 1129(a)(1), (3), and (8). *Id.* at 183. The court in *Tribune* held that because section 1129(a)(1) requires that the plan must comply with the Bankruptcy Code and section 1129(a)(3) requires that a plan must be proposed in good faith, then neither of these requirements could be met if only one or more debtor – but less than all debtors – accepts a plan. *Id.* In *Tribune*, the court further reasoned that since section 1129(a)(8) requires that each class of claims must either accept the plan or be unimpaired by the plan, and a few creditors did not accept the plan but were impaired by the plan, then section 1129(a)(10) could not be satisfied. *Id.* Therefore, the court in *Tribune* concluded that a *per debtor* approach is required in order to comply with the Bankruptcy Code since the debtors were not substantively consolidated. *Id.*

Section 1129(a)(10) requires an affirmative acceptance of the reorganization plan by an impaired class. *In re Polytherm Indus., Inc.*, 33 B.R. 823, 836 (W.D. Wis. 1983). In *Polytherm Indus.*, the court held that if an impaired class does not accept the plan, then the debtor did not successfully negotiate a reorganization plan with the creditor. *Id.* at 835. The court further explained that a "deemed acceptance" by an unimpaired class does not meet the requirements

under section 1129(a)(10). *Id.* Nothing in the Bankruptcy Reform Act suggests that Congress "intended that the bankruptcy courts could saddle creditors with a stake in a reorganized corporation under a plan that had received no acceptance from impaired classes of creditors." *Id.* In *Polytherm Indus.*, the court further argued that if an impaired class did not accept a plan, yet the plan is confirmed, that this would go against the purpose of the Bankruptcy Reform Act of 1978, which is to protect creditors. *Id.; see also SGPA*, 2001 Bankr. LEXIS 2291 at *13 (the court held that deemed rejections eliminates any possibility that an impaired class of creditors accepted).

Here, section 1129(a)(10) allows for multiple reorganization "plans" because Under My Thumb was not substantively consolidated with the Debtors. R. at 7. Since the statute requires acceptance by one impaired class of creditors *for each debtor*, then Under My Thumb rightfully objected the Plan. R. at 8. Like the express provisions in *Tribune*, the Plan expressly stated that the Debtors would not become liable to one another and ensured that each entity's assets and liabilities remained separate. R. at 7. If section 1129(a)(10) is read using the *per plan* approach, then creditors' voting power will be taken away, a right that chapter 11 specifically gave to creditors for protection. Because the Bankruptcy Code states that "the singular includes the plural," then as the court stated in *Tribune,* it is entirely logical to allow Under My Thumb, as an impaired creditor, a separate plan that does not provide its competitors with access to the Software that it created for Development. R. at 8.

The Plan does meet the requirements under section 1129(a) because Under My Thumb, as an impaired creditor, did not consent to the Plan as required by section 1129(a)(8). R. at 8. As stated in *King*, the rule of statutory construction requires that statutes be read as a whole. Here, the Plan fails under three subsections of section 1129(a). First, the Plan was not proposed in good

faith, as required by section 1129(a)(3), because Under My Thumb's direct competitors could obtain access to the Software. R. at 8. Due to Sympathy for the Devil's heavy involvement in TDI, Under My Thumb rightfully became suspicious of their intentions regarding the proposed Plan. R. at 8. Second, the Plan fails under section 1129(a)(8) because Under My Thumb did not accept the Plan, however, Under My Thumb was impaired by it. Third, due to numerous violations under the Bankruptcy Code, the Plan fails under section 1129(a)(1) because fewer than all of the Debtors, who are jointly administered, accepted the Plan. R. at 8. Although a joint plan would allow for faster confirmation, "convenience alone is not sufficient reason to disturb the rights of impaired classes of creditors of a debtor not meeting confirmation standards." *Tribune*, 464 B.R. at 183.

Under My Thumb did not affirmatively accept the Plan, but rather timely objected to the Plan. R. at 8. If the Plan is accepted despite Under My Thumb's rejection, it would run in direct conflict with Congress' intent when it passed the Bankruptcy Reform Act of 1978. The *per plan* approach and the reading of section 1129(a)(10) as "plan" completely abrogates the negotiating power of creditors and allows the Debtors to control the reorganization Plan most favorably toward their interests. The *per debtor* approach is tailored to each impaired creditor's needs while also factoring in the debtor's interests. Thus, allowing Under My Thumb to practice its voting and negotiating rights under a separate plan, as intended by Congress, could nevertheless allow Development access to the Software and allow for Under My Thumb to fulfill its contractual obligations.

Therefore, the statutory interpretation of section 1129(a)(10) requires a reading of a *per debtor* approach in order to maintain a level of fairness between Under My Thumb and Development, as well as all of the other creditors and debtors in a joint administration under a

chapter 11 bankruptcy proceeding. In order to maintain the separation of power between the branches of government, courts should interpret section 1129(a)(10) in light of Congress' intent.

B. Section 1129(a)(10) requires a *per debtor* interpretation because bankruptcy courts are rooted in principles of equity providing Under My Thumb with the fundamental right to vote against a plan.

Equity is one of the two important principles in bankruptcy law. *Connolly N. Am.*, 802 F.3d at 814. Bankruptcy courts are "courts of equity, empowered to invoke equitable principles to achieve fairness and justice in the reorganization process." *In re Combustion Eng'g, Inc.*, 391 F.3d 190 (3d. Cir. 2004). The principle of equity is an essential factor to consider in every case because it allows bankruptcy courts the authority to go beyond what the Bankruptcy Code indicates, without blatantly disregarding the Code, in order to administer fair results for both the debtor and the creditor. *Holmberg v. Armbrecht,* 327 U.S. 582, 583 (1956). Bankruptcy courts administer equitable results by applying the Bankruptcy Code to specific facts of each case rather than applying the Code broadly. *Id.*

1. The foundation of corporate law supports a *per debtor* approach under section 1129(a)(10) because corporate law is built on the concept of corporate "separateness."

A *per debtor* approach under section 1129(a)(10) allows each debtor to remain a separate legal entity despite the fact that the Debtors are related.

A fundamental concept of corporate law is that it is essential to treat each corporation as a separate legal entity with its own assets and liabilities. *Kreisler v. Goldberg*, 478 F.3d 209, 213 (4th Cir. 2007). A balance must be struck between the substantive rights of impaired creditors and a desire to confirm a successful reorganization under section 1129(a)(10). *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d. Cir. 1996). In *Martin*, the court held that a compromise between creditors and debtors is desired in order to minimize [further] litigation. *Id.* In assessing a good faith compromise, courts consider whether the settlement is a product of "arms-length

bargaining" rather than fraud or collusion. *In re Exide Techs.*, 303 B.R. 48, 68 (Bankr. D. Del. 2003). If creditors object a plan because they relied on the separateness of the [legal] entities, then consolidation cannot be justified. *Owens Corning*, 419 F.3d at 210.

In the case at hand, Under My Thumb practiced its substantive voting right under section 1129(a)(10) and acted on the fundaments of corporate law when it objected the Plan. R. at 8. A *per debtor* approach will complement the fundamental concepts of corporate law because the approach allows for each creditor, such as Under My Thumb, to act and vote as a separate legal entity without any coercion from the Debtors or other creditors under the Plan. The voting rights of creditors is granted by Congress to ensure the power of negotiation. If a *per plan* approach is adopted, then any leverage the creditors had would be stripped away. While a *per plan* approach is more efficient and convenient, the approach takes away corporate separateness by allowing the Debtors to speak on behalf of all entities. The convenience of such an approach is not enough to act against Congress' intent. *SCA Hygiene Prods. Atkiebolag v. First Quality Baby Prods, LLC*, 137 U.S. 954 (2017). Here, "arms-length bargaining" was not present because Under My Thumb's direct competitors could gain access to their Software, which in turn, would put them at a competitive disadvantage under the Plan. R. at 8.

Even though the Plan is supported by the majority of creditors, joint administration under chapter 11 cannot evade the meticulous requirements for substantive consolidation. R. at 8. The Bankruptcy Code allows for joint administration and instructs courts "to give consideration to protecting creditors of different estates against potential conflicts of interest." 11 U.S.C. § 1015(b) (2019). Like the creditor in *Owens Corning*, Under My Thumb relied on the fact that the Plan would be separate from the other Debtors because the Plan put Under My Thumb at a competitive disadvantage as compared to the original Agreement between the two parties. R. at

5. Therefore, while a confirmation of a reorganization plan is important, Congress intended that Under My Thumb be protected from conflicts of interest with Start Me Up and Sympathy for the Devil. R. at 7.

Thus, under a *per debtor* approach, Under My Thumb's substantive right would be balanced with a desire for a successful reorganization because Under My Thumb's voting power could bring about a compromise with Development through "arms-length bargaining" and negotiation.

2. A *per debtor* approach under section 1129(a)(10) is equitable because it ensures that Under My Thumb and other creditors' interests will be protected.

This Court has long held that bankruptcy courts have the power and duty to ensure that claims do not result in inequitable acts and must inquire if claims result in such acts. *Lesser v. Gray*, 236 U.S. 70 (1915). Section 2 of the Bankruptcy Code states that bankruptcy courts are courts of equity because these courts apply principles of equity and justice in their proceedings. *Local Loan Co.*, 292 U.S. at 234. Bankruptcy courts have the power, granted by Congress, to reject claims that are not in accordance with principles of equity to a specific case and administer decisions that are necessary to follow provisions of the Bankruptcy Code. *Pepper v. Litton*, 308 U.S. 295, 304 (1939).

Bankruptcy courts have the power to ensure that fraud does not predominate and that technical terms do not prevent justice and fairness in bankruptcy proceedings. *Pepper*, 308 U.S. at 305. In *Pepper*, the sole stockholder brought a claim against a bankruptcy estate despite the fact that the stockholder allowed the salary claim to lie dormant for years. *Id.* at 311. The sole stockholder insisted that the claim be enforced on the plaintiff only because the plaintiff was in financial struggle. *Id.* at 301. This Court held that the principles of equity demand the sole

stockholder's claim be rejected because there existed a fraudulent scheme that would unjustifiably and unreasonably impair creditors. *Id.* at 312. This Court argued, on the basis of equity, that if the claim was allowed, then there would be inequitable treatment to creditors, officers, or stockholders. *Id.* at 308. Irrespective of how the corporation is run, whether by an individual or group, this Court noted that equity is necessary to ensure that creditors are not impaired. *Id.* at 313.

A reorganization plan should not be confirmed if the plan does not allow for an equal voice and participation of creditors, stockholders, and subsidiaries. *Taylor v. Standard Gas & Electric Co.*, 306 U.S. 307, 324 (1939). In *Taylor*, a parent corporation controlled a subsidiary that was in an unstable financial situation, undercapitalized, and acquired a substantial amount of debt. *Id.* at 315. This Court held that there was a blatant disregard to the principles of equity when the parent corporation took complete control of all decisions and disregarded the ramifications that the decisions will have on creditors and subsidiaries. *Id.* at 323.

Here, Start Me Up and Sympathy for the Devil attempted to defraud Under My Thumb when they purchased 100% of TDI's voting shares. R. at 8. Like this Court ruled in *Pepper*, the Plan was rightfully rejected by Under My Thumb because the Plan unjustifiably harms Under My Thumb. R. at 8. Thus, under the principles of equity, a *per debtor* approach to section 1129(a)(10) allows for an equitable and fair plan between creditors and debtors. It would be unfair to allow the Debtors control over the guidelines of a Plan involving more than one creditor. Not only did Under My Thumb create a Software that tripled the number of membership accounts and skyrocketed spending by these members, but it also allowed Development to pay for the development of the Software over time. R. at 5. Under My Thumb's

generous contributions should not go unnoticed by essentially obliging them to accept a Plan that harms its rights over the Software if a *per plan* approach is adopted.

The Plan should not be confirmed because Under My Thumb, as in impaired creditor, did not have an equal voice in negotiating the Plan. R. at 7. Like the parent corporation in *Taylor*, there would be a complete disregard of the principles of equity if the Debtors took control of the reorganization Plan without recognizing the ramifications that the Plan has on Under My Thumb. R. at 7. A *per debtor* approach will ensure that no one party has complete control over the reorganization plan, and that in light of fairness and equity, there will be equal participation. If a *per plan* approach is adopted, not only will a joint administration under chapter 11 be continuously treated as a substantive consolidation, but the Debtors will also be the sole party in power which strips all negotiating power away from Under My Thumb.

In conclusion, under statutory interpretation and the principles of equity, section 1129(a)(10) necessitates a *per debtor* approach because all creditors will have negotiating and voting powers, all entities will remain separate, and no one party will have complete control over the other.

CONCLUSION

For the foregoing reasons, Under My Thumb-Respondent requests this Court to reverse the judgment of the Court of Appeals for the Thirteenth Circuit.

APPENDIX A

11 U.S.C. § 102(7)

Rules of Construction

(7) The singular includes the plural;

11 U.S.C. § 362(b)

Automatic Stay

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay;

11 U.S.C. § 365(c)(1)

Executory contracts and unexpired leases

(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(f)(1)

Executory contracts and unexpired leases

(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.

11 U.S.C. § 1015(b)

Consolidation or Joint Administration of Cases Pending in Same Court

(b) CASES INVOLVING TWO OR MORE RELATED DEBTORS. If a joint petition or two or more petitions are pending in the same court by or against (1) spouses, or (2) a partnership and one or more of its general partners, or (3) two or more general partners, or (4) a debtor and an affiliate, the court may order a joint administration of the estates. Prior to entering an order the court shall give consideration to protecting creditors of different estates against potential conflicts of interest. An order directing joint administration of individual cases of spouses shall, if one spouse has elected the exemptions under §522(b)(2) of the Code and the other has elected the exemptions under §522(b)(3), fix a reasonable time within which either may amend the election so that both shall have elected the same exemptions. The order shall notify the debtors that unless they elect the same exemptions within the time fixed by the court, they will be deemed to have elected the exemptions provided by §522(b)(2).

11 U.S.C. § 1123(a)(2)

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;

11 U.S.C. § 1123(a)(3)

Contents of plan

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

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

11 U.S.C. § 1124(1)

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;

11 U.S.C. § 1126(a)

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.

11 U.S.C. § 1126(f)

Acceptance of plan

(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.

11 U.S.C. § 1129(a)

Confirmation of plan

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

11 U.S.C. § 1129(a)(1)

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.

11 U.S.C. § 1129(a)(3)

Confirmation of plan

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

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

11 U.S.C. § 1129(a)(8)

Confirmation of plan

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

(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.

11 U.S.C. §1129(a)(10)

Confirmation of plan

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

(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.