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.*, PETITIONERS

v.

UNDER MY THUMB, INC., RESPONDENT.

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

BRIEF FOR RESPONDENT

TEAM R3
COUNSEL FOR THE RESPONDENT

QUESTIONS PRESENTED

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

II. Whether 11 U.S.C. § 1129(a)(10) prohibits separate and distinct entities in a jointly administered bankruptcy from confirming a plan when the sole creditor of one debtor rejects the plan.

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Under My Thumb, Inc. ("Under My Thumb"), the respondent in this case, rejected the Petitioners' proposed plan. (R. 8.) The bankruptcy court confirmed the proposed plan over Under My Thumb's objections. (R. 9.) Under My Thumb appealed that decision, and the Bankruptcy Appellate Panel affirmed. (*Id.*) Neither the bankruptcy court opinion nor the Bankruptcy Appellate Panel opinion are in the record below. The Thirteenth Circuit Court of Appeal, in the record below, found for Under My Thumb on both issues, with Judge Jones dissenting. (R. 15, 21.) Petitioner then filed for Writ of Certiorari, which this Court granted. (R. 1.)

STATEMENT OF JURISDICTION

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

STATEMENT OF THE FACTS

Tumbling Dice, Inc. ("TDI"), the owners and operators of eight casino and resort properties ("Operating Debtors"), and Tumbling Dice Development, LLC ("Development") (collectively, "Debtors") are one of the largest gaming operations in the United States. (R. 4.) Development serves as a special limited purpose entity. (*Id.*) Its sole purpose is to act as the licensee of Under My Thumb's patented software. (R. 4, 5.) Under My Thumb is a prominent software designer that specializes in developing programs for the hospitality industry. (R. 4.)

Development contracted with Under My Thumb in 2008 to create a complete and integrated software system that would improve Club Satisfaction, the Debtors' casino royalty program. (*Id.*) Under this contract, Under My Thumb funded approximately $10 million to research and develop software to revamp Club Satisfaction. (*Id.*) In return, Development promised to reimburse Under My Thumb for these costs pursuant to an unsecured $7 million promissory note (the "R&D Note"). (*Id.*)

Under My Thumb spent a full year creating, developing, and perfecting the modernized Club Satisfaction software. (R. 4.) Upon completion, Under My Thumb entered into a non-exclusive license agreement (the "Agreement") with Development. (R. 5.) Pursuant to the Agreement, Under My Thumb granted Development the right to use its patented software. (*Id.*) The Agreement expressly prohibited Development from assigning or sublicensing the right to use Under My Thumb's proprietary software without Under My Thumb's consent. (*Id.*) However, Under My Thumb permitted Development to extend usage rights solely to its affiliated entities. (*Id.*) The same prohibition against assigning or sublicensing the use of the software applied to Development's affiliated entities. (*Id.*) In exchange, Development agreed to pay Under My Thumb a monthly fee that would fluctuate depending on the amount of spending activity by Club Satisfaction members. (*Id.*)

The Debtors enjoyed immense success using Under My Thumb's modernized software. (*Id.*) Membership in Club Satisfaction tripled, and each member began spending more money. (*Id.*) The newfound success resulted in higher than expected monthly payments from the Debtors to Under My Thumb. (R. 5-6.)

In December 2011, Start Me Up, Inc. ("Start Me Up"), a hedge fund, acquired TDI's stock in a leveraged buy-out. (R. 6.) TDI and the Operating Debtors granted first priority liens on their assets to a group of lenders ("Lenders") in exchange for a $3 billion loan. (*Id.*) Development did not act as either a borrower or guarantor because, among other things, it was a limited purpose entity. (*Id.*) Because TDI and the Operating Debtors could not support the significant debt load from the leveraged buy-out, the Debtors commenced these chapter 11 proceedings on January 11, 2016. (R. 3, 6.) In the interest of administrative ease and judicial economy, the court jointly administered the Debtors' cases pursuant to Bankruptcy Rule 1015(b). (R. 3.) At the time of the petition, TDI and the Operating Debtors jointly and severally owed the Lenders nearly $2.8 billion. (R. 6.) Additionally, the Debtors collectively owed approximately $120 million to their unsecured creditors. (*Id.*) Of the $120 million, Development owed Under My Thumb, its sole creditor, approximately $6 million under the R&D note. (*Id.*) Although the Debtors stayed current on payments due under the Agreement, the Debtors had ceased making payments under the R&D Note in June 2015. (*Id.*)

The Debtors negotiated with Start Me Up and various stakeholders in a court ordered mediation. (*Id.*) Pursuant to the negotiation, the Debtors, Start Me Up, the Lenders, the unsecured creditors' committee, and certain other stockholders reached an agreement. (R. 6-7.) Notably, Under My Thumb was not included in the negotiations that led to the agreement. (R. 6.) The terms of the agreement provided that TDI and the Operating Debtors, along with the Lenders, would consensually restructure the secured indebtedness, lowering the interest rate and extending the payments over a twenty-year period. (R. 7.) Start Me Up would inject $31 million to help fund a 55% distribution to unsecured creditors in exchange for retaining its equity interest in the Debtors. (*Id*.) Sympathy for the Devil, LP ("SFD"), a private equity group, would invest the remaining $35 million in exchange for 51% of the voting shares[1] of reorganized TDI, along with several seats on its new board of directors. (R. 7-8.)

The Debtors filed the joint plan ("Plan") in August 2016, along with a disclosure statement. (R. 7.) The Plan expressly stated that the Debtors would not substantively consolidate their estates. (*Id*.) Under My Thumb did not agree to the Plan. (R. 7.) The Plan provided for the assumption of Under My Thumb's agreement under §§ 365 and 1123(b)(2). (*Id.*)

Although Under My Thumb did not initially object to the Plan, it grew suspicious of SFD's motives. (R. 8.) SFD's portfolio of companies included Under My Thumb's direct competitor. (*Id.*) This particular competitor had tried and failed to replicate Under My Thumb's software for several years. (*Id.*) Under My Thumb learned that SFD would have access to Under My Thumb's software. (*Id.*) Without protection for its software, Under My Thumb voted to reject the Plan. (*Id.*) With its sole creditor rejecting the Plan, Development had no accepting impaired class of claims. (*Id*.)

<u>STATEMENT OF THE STANDARD OF REVIEW</u>

The facts of this case are undisputed by both parties. (R. 9.) Thus, the applicable standard of review is *de novo*. *Everex Sys. V Cadtrak Corp. (In re CFLC, Inc.)*, 89 F.3d 673, 675 (9th Cir.

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[1] SFD, which now holds majority voting shares of reorganized TDI, also controls Under My Thumb's direct competitor.

1996). Under *de novo* review, this Court reviews the Thirteenth Circuit Court of Appeals' findings of facts for clear error and application of the law *de novo*. *See Id.*

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit Court of Appeals was correct in holding that the statutory language of the Bankruptcy Code precludes assumption or assignment of an intellectual property license without consent of a licensor and requires each debtor to have at least one accepting impaired class to confirm its respective plan of reorganization. Thus, this Court should apply § 365(c)(1) using the hypothetical test and § 1129(a)(10) using the per debtor approach.

While the Bankruptcy Code generally favors the debtor party, Congress intentionally wrote the Code to protect the rights of a non-debtor in specific circumstances. Section 365(c) limits the right of a debtor to assume or assign an executory contract over the objection of the non-debtor when applicable non-bankruptcy law excuses the creditor from accepting performance of or rendering performance to an entity other than the debtor. Here, Under My Thumb and Development entered into a non-exclusive license agreement. Development could not share Under My Thumb's proprietary software with anyone but its affiliated entities. As a result of the Debtors' reorganization, a direct competitor will have access to Under My Thumb's intellectual property. The applicable non-bankruptcy law—patent and copyright property law—prohibits the assignment of the license and grants ultimate power over the property to the author, Under My Thumb. Thus, absent Under My Thumb's consent, § 365(c) prohibits the Debtors from assuming or assigning such executory contract. Congress intended for this result. As such, it afforded certain protections to owners of intellectual property when it enacted § 365(c).

When a statutory scheme is coherent and consistent, there is no need for this Court to look beyond the plain meaning of the specific statute. Here, no judicially recognized exceptions warrant this Court to deviate from the plain meaning of § 365(c). Application of the plain statutory language in this case mandates that the Debtors may not assume an executory contract without the consent of Under My Thumb, the licensor. The Bankruptcy Code's history demonstrates that Congress intended for § 365(c) to be applied literally. Since § 365's enactment, Congress has made several amendments to § 365. Notably, however, the language of § 365(c) has never been amended. Thus, Congress intended for the statute to be read as it is written. In this case, this Court's inquiry should begin and end with the plain language of § 365(c).

Section 365(c) coexists and should be interpreted with the rest of the Bankruptcy Code. Judicial precedent shows that there is no conflict between subsections (c) and (f)(1). Although § 365(f)(1) creates a broad rule allowing the debtor to assume executory contracts, § 365(c) serves as an exception to that rule. When the identity of the contracting party is essential, the applicable law prevails over subsection (f)(1). In the case at hand, the identity of the contracting parties was material to the agreement, thus § 365(c) governs. Under My Thumb contracted only with Development and its affiliated entities. The identity of the party receiving access to Under My Thumb's software was crucial to the agreement. Therefore § 365(c) trumps § 365(f)(1).

Congress has long recognized the importance of intellectual property rights in American society. Thus, federal law grants intellectual property owners' absolute control over their property. Only a licensor has the power to extend use rights to third parties. With these values in mind, Congress afforded intellectual property owners extensive protection under the Bankruptcy Code. The language of § 365(c) demonstrates the protection of intellectual property owners that Congress intended. In the case of a non-exclusive license agreement, the interest of the licensor in controlling its property prevails over the interest of the debtor in maximizing its assets. Here, Under My Thumb has control over its federally patented software under intellectual property law. This Court should recognize the intent of Congress to protect that software and should apply the plain language of § 365(c).

This Court's duty is to apply the law as it *is* written, not as some people contend it *should* be written. Until Congress amends the statute, this Court should not trespass on a duty reserved for the legislative branch. Because § 365(c)(1)(a) is unambiguous, this Court should simply apply its language.

Furthermore, Debtors do not satisfy § 1129(a) confirmation requirements. The touchstone of chapter 11 is creditors' voting rights. Section 1129(a)(10) specifically protects creditors' right to vote on a plan of reorganization because it requires each debtor in a joint, multi-debtor plan to have at least one accepting impaired class. This approach ensures that debtors may confirm a plan only with proper creditor support. In contrast, the per plan interpretation of § 1129(a)(10) is tantamount to substantive consolidation and a serious alteration of the creditors' voting rights.

A per debtor approach is the only possible interpretation of § 1129(a)(10), given its statutory language and context. The statute provides that each plan must have at least one accepting impaired class, but the rules of construction allow the singular "plan" to be read as the plural "plans." The Delaware bankruptcy court determined that a joint plan of reorganization is a compilation of one plan for each debtor. Therefore, each debtor must satisfy §1129(a)(10). Further, statutory construction is a holistic exercise. Because other subsections of § 1129(a) apply on a per debtor basis, the Delaware bankruptcy court reasoned that subsection (a)(10) must also apply on a per debtor basis.

Recently, Congress amended the Bankruptcy Code and eliminated § 1129(a)(10) solely for small businesses. If Congress wished to eliminate § 1129(a)(10) in its entirety, it would have done so then. Congress' deliberate choice to remove the § 1129(a)(10) requirement for small business entities, but not other entities like the Debtors, demonstrates Congress' intent to keep § 1129(a)(10) intact. Here, Under My Thumb, rejected the plan, leaving Development without a single accepting impaired class. Accordingly, the Debtors do not satisfy §1129(a)(10) and cannot confirm a plan over Under My Thumb's rejection.

The Ninth Circuit's per plan approach allows debtors to enjoy the benefits of substantive consolidation without meeting its stringent requirements. The per plan approach, in effect, blends joint administration and substantive consolidation because it allows debtors of any jointly administered bankruptcy to confirm a plan when a single class of claims of any debtor accepts the plan. This approach renders the votes of all other classes, whether they are controlling or not, worthless. Contrary to the Ninth Circuit's approach, the Bankruptcy Code respects entity borders and will dissolve them only in extreme circumstances, which are not present in this case. For these reasons, this Court should affirm the Thirteenth Circuit on both decisions.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE THIRTEENTH CIRCUIT COURT OF APPEALS BECAUSE 11 U.S.C. § 365 (c)(1) PRECLUDES A DEBTOR IN POSSESSION FROM ASSUMING A NON-EXCLUSIVE LICENSE AGREEMENT ABSENT THE LICENSOR'S CONSENT.

As in all chapter 11 cases, the Debtors seek to reorganize in a manner that will best suit their future endeavors. While the text of the Bankruptcy Code is generally favorable to the financially distressed debtor, Congress did not sacrifice every right of the non-debtor in the reorganization process. Section 365(c)(1) limits the right of a debtor in possession to assume an executory contract over the objection of the non-debtor when applicable non-bankruptcy law excuses the non-debtor from accepting performance of or rendering performance to an entity other than the debtor in possession. 11. U.S.C. § 365(c)(1). As such, this Court should affirm the decision of the Thirteenth Circuit Court of Appeals and find that the Debtors cannot assume the software license agreement without the consent of Under My Thumb.

A. 11 U.S.C. § 365(c)(1) is Unambiguous and Thus, this Court Should Adhere to the Plain Meaning of the Statute.

Section 365(c)(1) of the Bankruptcy Code provides that:

> The trustee may not assume or assign any executory contract ... of the debtor ... if—
> (1)(A) applicable law excuses a party, other than the debtor, to [such executory contract] from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession …, and
> (B) such party does not consent to such assumption or assignment….

11. U.S.C. § 365(c)(1). The dispute in this case arises from a disagreement amongst circuit courts as to interpreting the meaning of the statute. A literal reading of the statue, and the interpretation of most circuit courts, produced the "hypothetical test". Under this test, courts read the statute to mean that "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." *Perlman v. Catapult Entm't (In re Catapult Entm't)*, 165 F.3d 747, 750 (9th Cir. 1999). This test adheres to the literal wording of the statute and treats the disjunctive term "or" as used in the "assume or assign" language of § 365(c)(1) as Congress intended. A different interpretation produced the "actual test." In this test, courts treat § 365(c)(1) as contemplating a case-by-case inquiry into whether the non-debtor party is *actually* "forced to accept performance under its executory contract from someone other than the debtor party with whom it originally contracted." *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997). This test strays from the literal wording of the statute and treats the disjunctive term "or" as a conjunctive term "and."

The case at hand highlights the split amongst circuit courts regarding the "hypothetical test" and the "actual test." First, this Court should note that "a license agreement is an executory contract as such is contemplated in the Bankruptcy Code." *See Everex Sys.*, 89 F.3d at 677. Second, "applicable law" as referenced in § 365(c)(1) includes federal patent law. *Id*. at 679. With these preliminary matters settled, the decision in this case rests directly on whether the "hypothetical" or "actual" test applies. Because no judicially recognized exceptions are present, this Court should adopt the "hypothetical test" and apply the plain statutory language.

i. <u>Literal application of § 365(c)(1) produces a result consistent with congressional intent.</u>

This Court has long held that when a statutory scheme is coherent and consistent, there is no need to inquire beyond the plain language of a statute. *United States v. Ron Pair Enters.*, 489 U.S. 235, 240-41(1989). In *Ron Pair*, this Court addressed the question of whether § 506(b) of the Bankruptcy Code entitled a creditor to receive post-petition interest on a non-consensual over-secured claim. *Id.* at 237. There, this Court relied solely on the plain statutory language because the wording expressed Congress' intent with clarity and precision. *Id*. at 241. Thus, this Court found that post-petition interest was available. *Id*. Emphasizing the grammatical structure of the statute, this Court noted that the phrase "interest on such claim" was set aside by commas and separated from the remainder of the statute by the conjunctive words "and any." *Id*. This Court reasoned that "the language and punctuation used by Congress cannot be read in any other way." *Id*. at 242. As such, in cases of statutory interpretation this Court should follow the plain meaning of a statute unless the party contending otherwise can demonstrate that the result is contrary to congressional intent. *RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257, 269 (4th Cir. 2004).

As in *Ron Pair*, this Court must begin with the statutory language. Similarly, it is where the judicial inquiry must end. Section 365(c)(1) prevents a debtor from either assuming *or* assigning an executory contract over the objection of the non-debtor party. This Court need not look any further than the statutory language and should presume the legislature wrote the statute as intended. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Application of the plain statutory language makes this Court's inquiry quite simple. The Debtors may not assume the executory software agreement absent the consent of Under My Thumb.

Furthermore, the statute's legislative history solidifies that § 365(c)(1) operates consistently with congressional intent. The bankruptcy court analyzed § 365's legislative history in *In re Cardinal Industries. In re Cardinal Indus.*, 116 B.R. 964, 978 (Bankr. S.D. Ohio 1990). There, the court noted that the Bankruptcy Amendments and Federal Judgeship Act of 1984 added § 365 to the Bankruptcy Code. *Id*. Additional discussion concluded that no authoritative legislative history exists for the Bankruptcy Amendments as enacted in 1984. *Id*. However, multiple circuit courts addressed the issue of whether § 365 is at odds with congressional intent.

In *Catapult*, the debtor party argued that although Congress enacted § 365(c)(1) in 1984, it originated from a 1980 House amendment to a Senate technical corrections bill. *Catapult*, 165 F.3d at 754. In a report accompanying this amendment, one House committee argued that the prohibition against a trustee's power to assume an executory contract did not apply when the performance under a personal service contract would be the same due to the personal nature of the contract. *Id*. For several reasons, the Ninth Circuit Court of Appeals rejected the argument that this presented a clear indication that § 365 was at odds with congressional intent. *Id*. First, the report and amendment predated the enactment of § 365. *Id*. Second, the court concluded that such an obscure report did not represent the overall opinion of Congress. *Id*. As such, the court declined to stray from the statutory language of § 365(c)(1). *Id*. The debtor party presented an identical argument to the Fourth Circuit Court of Appeals in *Sunterra.* There, the court also rejected the debtor's argument, noting that Congress never enacted the 1980 House proposal, the proposal predated the enactment of § 365, and it represented at most, the opinion of a single House committee. *Sunterra,* 361 F.3d at 270.

Additionally, Congress has amended the Bankruptcy Code multiple times since § 365's enactment, yet it has never changed the language of subsection (c)(1). The Act of 1986 appointed additional bankruptcy judges and altered bankruptcy proceedings in certain judicial districts. *See* Pub. L. 99–554, Title II, §257(a), Oct. 27, 1986, 100 Stat. 3088. More recently, the 2005 Act substantially amended the Bankruptcy Reform Act of 1978. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Congress consistently amends the Bankruptcy Code yet maintains the language of § 365(c)(1). If the statute was at odds with congressional intent, Congress would amend it. The fact that Congress continuously leaves § 365(c)(1) unchanged while amending other sections of the Code indicates that the statute produces results consistent with legislative intent.

Here, this Court's judicial inquiry must begin and end with the plain language of § 365(c)(1). The statutory language is coherent and unambiguous, and there is nothing in the legislative history that clearly demonstrates an inconsistency with congressional intent. The literal language of § 365(c)(1) demonstrates that Congress intended to protect the non-debtor party in certain situations such as the one before this Court. Any deviation from the plain statutory language would result in Under My Thumb losing control over its federally protected software that it worked diligently to develop and patent. Congress anticipated that these situations would arise in certain Bankruptcy proceedings, and it wrote the Code accordingly. To operate in accordance with congressional intent, this Court should adhere to the "hypothetical test" and apply the plain language of § 365(c)(1).

ii. Literal application of § 365(c)(1) does not produce a result that is truly absurd.

A second judicially recognized exception to adhering to statutory language is premised on absurdity and exists "when literal application of the statutory language at issue results in an outcome that can be truly characterized as absurd." *Sunterra*, 361 F.3d at 265. The standard required to trigger this exception is high, and the alleged absurdity must "be so gross as to shock the general moral or common sense." *Md. St. Dep't of Educ., Div. of Rehab. Servs. v. United States Dep't of Veterans Affairs*, 98 F.3d 165, 169 (4th Cir. 1996). Such circumstances are, and should be, exceptionally rare. *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 304 (4th Cir. 2000). In the case at hand, this exception is not present.

In *Sunterra*, the Fourth Circuit declined to adopt the absurdity exception, and this Court should adopt its rationale. There, the debtor party argued that a literal reading of § 365(c)(1) was absurd because it produced a result that conflicted with the general bankruptcy policy of maximizing the value of the debtor's assets. *Sunterra*, 361 F.3d at 268. The district court ruled in favor of the debtor, finding that a literal reading of § 365(c)(1) produced a "quite unreasonable" result. *Id*. The Court of Appeals reversed and reminded the district court that when assessing the absurdity exception, the standard is not whether the result is "quite unreasonable," but whether it is absurd. *Id*. The court emphasized that although the Bankruptcy Code is generally favorable to the debtor, several provisions protect the rights of the non-debtor as well. *Id*. For instance, the court referenced several sections that list exceptions to automatic stay, protect the non-debtor's rights under securities contracts, and protect the non-debtor under repurchase contracts. *Id*. The court stressed that because such non-debtor provisions exist, a court should not presume that "sections of the Bankruptcy Code unfavorable to the debtor were enacted in error." *Id*. In fact, such provisions convinced the court that Congress wrote the Bankruptcy Code intending to balance the rights of the non-debtor with those of the debtor. *See id*. Therefore, the Fourth Circuit rejected the debtor's argument that applying the plain statutory language of § 365(c)(1) produced a result so grossly inconsistent with bankruptcy policy to trigger the absurdity exception. *Id*.

Similar to the debtor in *Sunterra*, the Debtors argue that applying the plain meaning of § 365(c)(1) produces an absurd result that is inconsistent with bankruptcy policies. (R. 14.) The Thirteenth Circuit Court of Appeals properly rejected this argument, noting that a court's duty is to apply the statute as it *is* written, not perhaps as it *should be* written. (R. 15.) If this Court were to accept the Debtor's argument, it would require a direct amendment of § 365(c)(1). That task is not a job for this Court, but rather for Congress. To rule otherwise would trespass on a function reserved for the legislative branch. *Sigmon Coal*, 226 F.3d at 308. The Debtors cannot demonstrate that applying the plain meaning of § 365(c)(1) produces a result that is so grossly inconsistent with bankruptcy policies to trigger the absurdity exception. Judicial precedent solidifies this notion. Thus, this Court should apply the plain meaning of the statutory language.

B. Section 365(c)(1) is Consistent with § 365(f)(1).

Section 365(f)(1) provides that:

> 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 Debtors argue that applying the literal language of § 365(c)(1) renders § 365(f)(1) inoperative and superfluous. (R. 13.) As the Thirteenth Circuit noted, the dilemma between the two sections arises from the term "applicable law" used in each provision. (*Id.*) Section 365(c)(1) precludes assumption, absent consent, when "applicable law" bars assignment.

(*Id.*) Section 365(f)(1) provides that contrary to provisions in applicable law notwithstanding, debtors may assign executory contracts. (*Id.*) At first glance, the two subsections appear inconsistent. Judicial precedent, however, makes clear that the two subsections coexist harmoniously.

The Sixth Circuit Court of Appeals addressed the inconsistency between § 365(c)(1) and § 365(f)(1) in *In re Magness*. *In re Magness*, 972 F.2d 689, 695 (6th Cir. 1992) There, the court concluded that the legal parameters of each subsection are revealed through a straightforward reading of the statutory language. *Id*. The court noted that § 365(f)(1) states that "although the contract or applicable law prohibits assignment, these provisions do not diminish the broad power to assume and assign executory contracts granted to the trustee by § 365(a)." *Id*. However, because § 365(f)(1) deliberately references § 365(c), § 365(f) allows the power of the trustee to be diminished in a specific circumstance. *Id*. That specific circumstance occurs when the attempted assignment by the trustee will impact upon the rights of a non-debtor third party. *Id*. In that circumstance, "any applicable law protecting the right of such party to refuse to accept from or render performance to an assignee will prohibit assignment by the trustee." *Id*. The court emphasized that a careful reading of each subsection reveals that each recognizes an "applicable law" of markedly different scope. *Id*. Multiple sister circuits adopted this rationale. *See Catapult*, 165 F.3d at 752; *see also Sunterra* 361 F.3d at 266.

In *Catapult*, the Ninth Circuit held that § 365(f)(1) establishes a broad rule. *Catapult*, 165 F.3d at 752. As a general matter, subsection (f)(1) trumps a law that "prohibits, restricts, or conditions the assignment" of executory contracts. *Id*. Subsection (c)(1), however, establishes an exception to the broad rule of subsection (f)(1). *Id*. Where applicable law excuses a party from accepting performance from or rendering performance to an entity different from the one with which it originally contracted, the applicable law prevails over subsection (f)(1). *Id*. The court noted that when deciding whether a law stands or falls under § 365(f)(1), a court must determine *why* the applicable law prohibits assignment. *Id*. When the applicable law prohibits assignment on the rationale that the identity of the contracting party is material to the agreement, § 365(c)(1) will prevail. *Id*. The Fourth Circuit also adopted this interpretation in *Sunterra*. *Sunterra,* 361 F.3d at 266-67 (holding that "applicable anti-assignment law predicated on the rationale that the identity of the contracting party is material to the agreement is resuscitated by § 365(c)(1)."). Therefore, under circumstances like the one before this Court, § 365(c)(1) is not demonstrably at odds with § 365(f)(1).

Here, the Thirteenth Circuit properly categorized the conflict between the two subsections as illusory. (R. 13.) When the identity of the contracting party is material to the agreement, § 365(c)(1) must govern. Under My Thumb and Development entered into the Agreement under the condition that Development would "extend the benefits of the Agreement to its affiliated entities only." (R. 5.) The identity of the contracting party was not only material, but paramount, to the Agreement. Under My Thumb extended its software only to Development's known affiliates. As a result of the Debtors' reorganization process, SFD now maintains majority voting shares of the reorganized entities. (R. 8.) SFD is the parent company of a direct competitor of Under My Thumb. *Id*. This raises the inference that one of Under My Thumb's direct competitors will have access to its software. This possibility did not exist when Under My Thumb contracted with Development. If it had, Under My Thumb would not have contracted with Development at the risk of sharing its software with a competitor. Because the identity of the contracting party was material to Under My Thumb, § 365(c)(1) must govern. Thus, applying the plain statutory language of § 365(c)(1) mandates that the Debtors cannot assume the software agreement.

C. Congress Intended to Protect Owners of Intellectual Property When it Enacted the Bankruptcy Code.

Congress has historically recognized the inherent importance of intellectual property rights. *See* U.S. CONST. art. I, § 8, cl. 8. The Constitution gives Congress the power to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." *Id.* In granting this power to the intellectual property owner, the Constitution intended to motivate creative activity by providing a special reward to authors. *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). Only the author has the exclusive right to authorize the designated use of its protected work. *See* 17 U.S.C. § 106. If the author transfers ownership in the form of an exclusive license agreement, the licensee enjoys full intellectual property protection. *In re Patient Educ. Media, Inc.*, 210 B.R. 237, 240 (Bankr. S.D.N.Y. 1997). Conversely, if a transfer is made in the form of a *non-exclusive* license agreement, ownership remains in the licensor. *Id.* The non-exclusive license is personal in nature, and the licensee cannot assign the protected work to a third party without the consent of the intellectual property owner. *Id.*

Congress did not write the Bankruptcy Code at the expense of intellectual property owners. *See In re Golden Books Family Entm't*, 269 B.R. 300, 311 (Bankr. D. Del. 2001). Section 365(c) highlights the interaction between intellectual property law and bankruptcy proceedings. Courts traditionally treat non-exclusive license agreements as executory contracts. *In re Patient Educ. Media, Inc.,* 210 B.R. at 241. Additionally, courts recognize the importance of balancing the debtor's interests with the countervailing interests of the non-debtor. *Id.* at 243. In the case of a non-exclusive license agreement, the licensor's interest in controlling its protected work prevails over the debtor's interest in maximizing its assets. In *In re Golden Books Family Entertainment,* the Bankruptcy Court for the District of Delaware held that non-exclusive licenses do not give rise to ownership and the licensee cannot assign its interest absent consent of the licensor. *In re Golden Books Family Entm't*, 269 B.R. at 310. The process of reorganization does not give the licensee rights that it would not otherwise have under a non-exclusive license agreement. The licensor still controls the intellectual property, and the licensee cannot assume or assign such agreement without the licensor's consent.

Here, Under My Thumb should maintain control over its patented software. Under My Thumb granted Development a non-exclusive license to use its intellectual property. (R. 5.) Therefore, Development only has a personal interest in the software, rather than a property interest. Without the consent of Under My Thumb, Development has no legal right to assign its personal interest to a third party. As discussed, Congress wrote § 365(c) anticipating that intellectual property owners would need protection during bankruptcy proceedings. The case at hand exemplifies the importance of protecting the licensor's rights. Under My Thumb invested ample time and millions of dollars to produce its patented software. As a result of Debtor's reorganization, the result of that work is now threatened. This Court should recognize the intent of Congress to protect intellectual property owners and should prevent the Debtors from assuming the executory agreement without Under My Thumb's consent.

D. Producing a Better Policy-Based Result is a Congressional Duty.

As previously discussed, the Debtors argue that literal application of § 365(c)(1) produces a result that is inconsistent with general bankruptcy policies. Some notable bankruptcy commentators agree that the "actual test" produces a better result for reorganizing entities. *See* 3 Lawrence P. King, *Collier on Bankruptcy* § 365.06[1][d][iii] (15th ed. revised) (arguing that sound bankruptcy policy supports the actual test). Although these opinions may be persuasive, Congress is the policy maker, not the courts. *Catapult*, 165 F.3d at 754. While § 365(c)(1) may one day be amended, that day has not occurred. As such, this Court should apply the meaning of the statute Congress enacted, "not whether wisdom or logic suggests that Congress could have done better." *Sigmon Coal*, 226 F.3d at 308.

Furthermore, applying the literal language of § 365(c)(1) in this case produces the proper policy result. The Bankruptcy Code does not sacrifice every non-debtors' rights. *Sunterra,* 361 F.3d at 268. Under My Thumb extended its software only to the parties included in the original contract. (R. 5.) Prior to the Agreement, Development never disclosed that a separate entity would possibly acquire it, let alone the parent company of Under My Thumb's direct competitor. The parties to the Agreement were material to Under My Thumb. The Plan now seeks to alter those parties. This Court should not interpret the Code in a manner that forces Under My Thumb to share its federally protected software with entities it did not originally contract with. If this Court strayed from the plain statutory language of § 365(c)(1), it would violate Under My Thumb's intellectual property rights.

The duty of this Court is to apply the statutory language of § 365(c)(1). Any duty related to amending the Bankruptcy Code rests on the shoulders of Congress. Because Congress has written the § 365(c) unambiguously, this Court should simply apply the law as written. While the Bankruptcy Code generally favors the financially distressed debtor, this Court must not forget the protections afforded to the non-debtor party, specifically in situations involving intellectual property. Therefore, this Court should not trespass on a duty reserved to the legislature and should apply the plain statutory language of § 365(c)(1).

II. THIS COURT SHOULD AFFIRM THE THIRTEENTH CIRCUIT COURT OF APPEALS BECAUSE 11 U.S.C. § 1129(a)(10) REQUIRES ACCEPTANCE FROM AT LEAST ONE IMPAIRED CLASS OF CLAIMS FOR EACH DEBTOR UNDER A JOINT, MULTI-DEBTOR PLAN.

This Court should interpret § 1129(a)(10) to require at least one accepting impaired class of claims per debtor to confirm a chapter 11 plan of reorganization. 11 U.S.C. § 1129(a)(10); *see also In re Tribune Co.*, 464 B.R. 126, 183 (Bankr. D. Del. 2011). Principles of statutory construction and policy considerations require a per debtor approach to § 1129(a)(10). *See In re Tribune,* 464 B.R. at 182-83. Under a per debtor approach, the Plan fails to satisfy § 1129(a)(10) because Development did not have an impaired class accept the Plan. (R. 8.) Therefore, this Court should affirm the Thirteenth Circuit Court of Appeals and find that the Plan does not satisfy the requirements set out in § 1129(a)(10).

A. Principles of Statutory Construction Mandate a Per Debtor Approach.

The statutory language and context of § 1129(a)(10) indicate that each debtor must have at least one accepting impaired class to confirm a plan of reorganization. *In re Tribune Co.*, 464 B.R. 126, 182-83 (Bankr. D. Del. 2011). Furthermore, Congress' deliberate choice to remove § 1129(a)(10) as a confirmation requirement for small business entities, but, notably, not other entities, indicates it intended to retain more rigorous confirmation requirements for entities like the Debtors. *See* 11 U.S.C. § 1191(b) (effective February 22, 2020).

i. <u>The plain meaning of § 1129(a)(10), in coordination with the Code's rules of construction, requires each debtor to have an accepting impaired class.</u>

To confirm a chapter 11 plan of reorganization, debtors must satisfy sixteen requirements provided in § 1129(a). 11 U.S.C. § 1129(a); *See Buffalo Sav. Bank v. Marston Enters., Inc.* (*In re Marston Enters., Inc.*), 13 B.R. 514, 516-18 (Bankr. E.D.N.Y. 1981) (Duberstein, J.). Section 1129(a)(10) provides:

> (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.

Even if debtors seek to confirm a plan via cram down over the objection of a class of creditors, they must satisfy § 1129(a)(10). *See* 11 U.S.C. § 1129(b)(1).

To interpret § 1129(a)(10), this Court begins with the statutory language, fully understanding that "a legislature says in a statute what it means and means in a statute what it says there." *Ron Pair*, 489 U.S. at 24; *see also Germain*, 503 U.S. at 254. If "the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (citing *Ron Pair,* 489 U.S. at 241)(internal quotations omitted).

In *In re Tribune*, Judge Carey of the influential Bankruptcy Court in the District of Delaware held that confirmation was not proper for either of the proposed joint plans because neither plan had an accepting impaired class for each debtor. *In re Tribune*, 464 B.R. at 183. One plan "lack[ed] an impaired accepting class of 39 of 111 Debtors," and the second plan "yield[ed] an accepting impaired class at only *two* of the 111 Debtors." *Id.* at 180 (citations excluded). The court determined that because the debtors expressly retained their corporate identities, each proposed joint plan contained 111 individual plans, i.e., one plan per debtor. *Id.* at 182. Therefore, to satisfy § 1129(a)(10), each debtor needed to have an accepting impaired class for its individual plan. *See id.*

The *In re Tribune* court reasoned that the Code's rules of construction allowed for § 1129(a)(10)'s reference to the singular "plan" to be read in the plural "plans." *Id*. at 182; 11 U.S.C. § 102(7) ("the singular includes the plural"). "[T]he fact that § 1129(a)(10) refers to 'plan' in the singular is not a basis, alone, upon which to conclude that, in a multiple debtor case, only one debtor—or any number fewer than all debtors—must satisfy this standard." *Id.* The plain meaning of the language, read through the lens of the Code's rules of construction, required that each debtor's individual plan meet the requirements of § 1129(a)(10). *Id.* at 183.

In another Delaware multi-debtor bankruptcy, Judge Walrath reiterated that § 1129(a)(10) provides for a per debtor approach. *See In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293, 302 (Bankr. D. Del. 2011). The court determined that a joint reorganization plan had no prospect of being confirmed because the single creditor of one of the debtors would not consent to the plan, leaving that debtor without any accepting impaired class. *Id*. In other words, when a debtor has a single creditor, that creditor must consent to the plan. Without its sole creditor's acceptance, the debtor will fail to satisfy § 1129(a)(10). Accordingly, the plan will not be confirmed.

Debtors cannot confirm a plan over Under My Thumb's rejection because it is Development's sole creditor. Like the proposed plans in *In re Tribune*, the Debtors proposed a joint plan providing that they were not substantively consolidating their individual estates. (R. 7.) Consequently, the proposed Plan had the practical effect of containing ten separate plans, one for each Debtor. Just as the plans in *In re Tribune* lacked acceptance from a single class of impaired creditors for each debtor, the Plan lacks acceptance from Under My Thumb, Development's sole creditor. Under My Thumb's rejection of the proposed joint Plan bars confirmation here.

Creditor support for the Plan does not outweigh Under My Thumb's rejection because each debtor must have an accepting impaired class. *In re JER/Jameson Mezz Borrower II* demonstrates that where a single creditor controls a class, its disapproval of a plan bars confirmation. *In re JER/Jameson Mezz Borrower II*, 461 B.R. at 302-03. Pursuant to the language of § 1129(a)(10), at least one impaired class for each debtor must accept a plan for debtors to confirm. The requirement of § 1129(a)(10) is not nullified merely because Under My Thumb is the single rejecting creditor to the Plan.

The Ninth Circuit's per plan approach loosens the requirements of § 1129(a)(10). *See JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc.* (*In re Transwest Resort Props., Inc.*), 881 F.3d 724, 730 (9th Cir. 2018). This per plan approach leads to the incongruent result that the requirements for a solitary plan are more stringent than those for a joint plan. If a debtor proposes a plan, it must have an accepting impaired class to comply with § 1129(a)(10), but if multiple debtors propose a joint plan, the per plan approach would loosen the requirements of § 1129(a)(10) and allow compliance from only one debtor. Contrary to the Ninth Circuit's reasoning, the plain meaning of the statute does not lead to such incongruent results. Rather, the plain meaning of the statute requires each debtor to have its own accepting impaired class. The impaired class of one debtor is not authorized to accept an individual plan of another debtor. Because ten separate plans make up the joint Plan, each individual plan, i.e. each debtor, must have at least one accepting impaired class to comply with § 1129(a)(10).

ii. <u>To the extent that the statutory language is not clear, the statutory context surrounding § 1129(a)(10) resolves any ambiguity and requires a per debtor approach.</u>

Following a plain meaning analysis, this Court should read a statute "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) (citation omitted). Reading § 1129(a)(10) to support a per plan approach makes the statute incohesive. Only the per debtor approach allows § 1129(a)(10) to make sense.

Contrary to the logic of the per plan approach, each debtor must satisfy §§ 1129(a)(1) and 1129(a)(3). 11 U.S.C. § 1129(a)(1); 11 U.S.C. § 1129(a)(3); *see also In re Tribune*, 464 B.R. at 183. Section 1129(a)(1) provides that a "plan compl[y] with the applicable provisions of this title," and § 1129(a)(3) provides that a plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(1); 11 U.S.C. § 1129(a)(3). As Judge Carey opined in *In re Tribune*, "could either of these requirements be met if only one or more—but fewer than all—debtors proposing a joint plan satisfies them? The answer is no." *In re Tribune*, 464 B.R. at 183.

Just as each debtor in a multi-debtor bankruptcy must satisfy §§ 1129(a)(1) and 1129(a)(3), each Debtor, here, must satisfy § 1129(a)(10). A per plan approach leads to the inconsistent conclusion that all the Debtors must comply with §§ 1129(a)(1) and 1129(a)(3) but only one Debtor needs to comply with § 1129(a)(10). This inconsistency is unwarranted. It follows that the context of § 1129(a) supports a per debtor approach.

Section 1129(a)(8) further illustrates that § 1129(a)(10) follows a per debtor approach. 11 U.S.C. § 1129(a)(8). Section 1129(a)(8) provides that "[w]ith 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." *Id.* (emphasis added). Section 1126(c) provides:

> A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

11 U.S.C. § 1126(c). Therefore, absent non-impairment, confirmation of a plan can only occur if *each* class has creditors holding at least two-thirds in amount and more than one-half in number of the allowed claims accepting the plan. 11 U.S.C. § 1129(a)(8); 11 U.S.C. § 1126(c); *see also In re Tribune*, 464 B.R. at 183. If § 1129(a)(8) explicitly mandates that *each* impaired class accepts the plan, it is inconsistent to read § 1129(a)(10) to allow confirmation with an accepting impaired class of a single debtor. Though § 1129(b) allows for confirmation of a plan via cram down, without complying with § 1129(a)(8), such confirmation must nonetheless meet the remaining

requirements of §1129(a)—namely, subsection (a)(10). 11 U.S.C. § 1129(b)(1). Reading subsection (a)(10) together with subsection (a)(8) indicates that a joint plan of reorganization must have an accepting impaired class for each debtor.

In this case, Under My Thumb is Development's single creditor; therefore, it controls Development's sole class of claims. Under My Thumb's rejection of the Plan prohibits satisfaction of § 1129(a)(8) because it controls 100% in amount and 100% of the claims in the class. Though the Debtors may proceed through cram down without satisfying § 1129(a)(8), they cannot proceed without satisfying § 1129(a)(10). Therefore, Debtors may not confirm the Plan because Development's only creditor rejected the Plan, leaving Development without an accepting impaired class.

The Ninth Circuit's disjointed reading of § 1129(a) neglects the statute's context altogether. Rather than reading each subsection as informing the other, the Ninth Circuit summarily stated that there was no proof that "all subsections must uniformly apply on a 'per debtor' basis." *Transwest Resort Props.*, 881 F.3d at 730. The Ninth Circuit's per plan approach provides that subsections (a)(1), (a)(3), and (a)(8) apply on a per debtor basis, whereas subsection (a)(10) applies on a per plan basis. Such an incongruous result is unnecessary and inconsistent with a contextual reading of § 1129(a). Only a per debtor approach complies with the entirety of § 1129(a).

iii. <u>Notwithstanding the Small Business Reorganization Act, Congress expressly retained § 1129(a)(10) for entities like the Debtors</u>

Legal authorities have disputed § 1129(a)(10)'s purpose in chapter 11 bankruptcies.[2] However, it is the role of Congress, not the Court or any other body, to amend the Code. Only an

[2] The American Bankruptcy Institute "recommended eliminating section 1129(a)(10) in its entirety from the Bankruptcy Code" because "the potential delay, cost, gamesmanship, and value destruction attendant to section 1129(a)(10) in all cases significantly outweighed its presumptive gating role." AMERICAN BANKRUPTCY INSTITUTE, COMMISSION TO STUDY THE REFORM OF CHAPTER 11, FINAL REPORT AND RECOMMENDATIONS 261 (2014).

act of Congress can eliminate § 1129(a)(10). The Ninth Circuit's per plan approach undermines § 1129(a)(10) and relaxes confirmation requirements, thereby abrogating Congress' role. Though § 1129(a)(10) may burden chapter 11 debtors, Congress has repeatedly retained it as a confirmation requirement for other entities. *See* 11 U.S.C. § 1191(b) (effective February 22, 2020).

After the American Bankruptcy Institute ("ABI") issued its Commission Report, Congress eliminated § 1129(a)(10) for small business debtors, while retaining it for other debtors. In the Small Business Reorganization Act of 2019, Congress "establishe[d] a subchapter within Chapter 11 of the Bankruptcy Code under which small business debtors can reorganize using simplified and expedited procedures." BILL ANNOUNCEMENT, 2019 WL 3985780, at *1. Section 1191(b) of this new subchapter provides:

> Notwithstanding section 510(a) of this title, if all of the applicable requirements of section 1129(a) of this title, other than paragraphs (8), **(10)**, and (15) of that section, are met with respect to a plan, the court, on request of the debtor, shall confirm the plan notwithstanding the requirements of such paragraphs 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.

11 U.S.C. § 1191(b) (effective February 22, 2020) (emphasis added). Congress authorized only small business debtors to confirm a plan via cram down without meeting § 1129(a)(10)'s requirement. In doing so, Congress expressly intended to preserve more rigorous confirmation requirements for other chapter 11 debtors.

Congress had the opportunity to eliminate § 1129(a)(10) altogether; instead, it chose to retain § 1129(a)(10) as a confirmation requirement for other entities and protect the voting rights of impaired classes. Section 1126(a) affords impaired classes the right to vote on a plan of reorganization. 11 U.S.C. § 1126(a). Section 1129(a)(10) protects the voting power because it prohibits confirmation of a plan that lacks sufficient support. *See, e.g.*, *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 243-44 (3d Cir. 2004) (citations omitted) ("The purpose of [§ 1129(a)(10)] is 'to provide some indicia of support [for a plan of reorganization] by affected creditors and prevent confirmation where such support is lacking.'") On *In re Tribune*'s facts, for example, the per plan approach would require that only one of the 111 debtors have an accepting impaired class to confirm the joint plan of reorganization. If such minimal support satisfies § 1129(a)(10), as the Ninth Circuit and the Debtors contend, it nullifies critical chapter 11 voting rights and invalidates the purpose of § 1129(a)(10). Though the goal in a chapter 11 bankruptcy is to confirm a plan of reorganization, this policy cannot invalidate the voting right of each impaired class. Additionally, it is beyond the Ninth Circuit's or any court's power to supersede Congress' choice to retain § 1129(a)(10) as a confirmation requirement for entities other than small businesses.

In this case, Under My Thumb is an impaired class with a right to vote, and § 1129(a)(10) binds each Debtor. The Debtors posit that the overwhelming support for the joint Plan should allow for confirmation, but the Debtors cannot quash Under My Thumb's vote against the Plan simply because other creditors view the Plan favorably. As Development's only impaired class, the Debtors cannot achieve confirmation without Under My Thumb's vote of approval. The Bankruptcy Code does not allow a policy that favors confirmation to override Under My Thumb's right to reject the Plan. Congress' clear choice to retain § 1129(a)(10) for entities like the Debtors honors Under My Thumb's rejection and prohibits confirmation of the Plan.

B. A Per Plan Approach Impermissibly Conflates Joint Administration and Substantive Consolidation

Although multiple debtors may file for joint bankruptcy for administrative ease and judicial economy, it does not result in the automatic substantive consolidation of the debtors. *Reider v. Fed. Deposit Ins. Corp.*, 31 F.3d 1102, 1109 (11th Cir. 1994). Joint administration is a procedural tool that allows affiliated debtors to proceed under one docket without combining the debtors' respective estates and eases the economic and judicial burden of complex multi-debtor cases. *Id.*

Alternatively, substantive consolidation is an equitable remedy that implicates vital substantive rights of the debtors and creditors by combining the debtors' estates. *Id*; *see also In re Owens Corning*, 419 F.3d 195, 205 (3d Cir. 2005). Post substantive consolidation, the various debtor-entities will emerge from the reorganization as one unit. *Reider*, 31 F.3d at 1109; *see also In re Owens Corning*, 419 F.3d at 205.

Substantive consolidation is not proper when debtors with jointly administered bankruptcies are separate and distinct. *See Reider*, 31 F.3d at 1109. In *Reider*, the Eleventh Circuit held that the bankruptcy court erred in substantively consolidating the debtors merely because the debtors jointly administered their bankruptcies. *Id.* There, the Eleventh Circuit determined that the debtors' conduct during the operation of the business was more important than the trustee's commingling of assets post-petition. *Id.* at 1110. When the Eleventh Circuit considered the pre-petition conduct of the debtors, it found that the entities' assets were sufficiently and separately identifiable. *Id.* Although one of the debtors operated its business on the real estate of the other debtor, the court determined that this was an insufficient showing of commingling that would necessitate substantive consolidation. *Id.* Because the debtors' conduct was common practice, they maintained their separate identities. *Id.*

Courts place high importance on the corporate form and have been traditionally hesitant to disregard it without extreme circumstances. *Skidmore, Owings & Merril v. Canada Life Assurance Co.*, 907 F.2d 1026, 1027 (10th Cir. 1990); *see also In re Owens Corning*; *see also In re Tribune*, 464 B.R. at 180 (noting that in circumstances where the parties have not agreed to substantive consolidation, "entity separateness is fundamental"). In *In re Tribune*, Judge Carey determined that a per debtor approach was the only logical interpretation of § 1129(a)(10) because the court must treat each debtor as a separate entity, absent substantive consolidation. *In re Tribune*, 464

B.R. at 182. As discussed above, a joint plan contains an individual plan for each debtor. *Id.* The *In re Tribune* court reasoned that as entity separateness is crucial, each debtor must individually meet the requirements of § 1129(a)(10). *Id.* at 183.

Debtors seeking to substantively consolidate without express agreement must satisfy a high burden. Such debtors must prove: (1) pre-petition, the debtors disregarded entity separateness to such a degree that its creditors relied on the treatment of the entities as one legal unit, and (2) entangling assets post-petition is harmful to all parties involved. *In re Woodbridge Group of Companies, LLC*, 592 B.R. 761, 775-76 (Bankr. D. Del. 2018). In *In re Woodridge*, following a fraudulent Ponzi scheme involving the debtors, the 279 debtors commenced a voluntary chapter 11 bankruptcy. *Id.* In an effort to return as much money as possible to the creditors, the debtors sought to quickly confirm a plan. *Id.* The plan proposed liquidating each debtor and substantively consolidating the debtors by combining the estates. *Id.* Judge Carey held that because all of the assets of each entity were so entangled, the debtors met the high burden for substantive consolidation. *Id.* Thus, the plan only required one impaired class accept the plan. *Id.*

Here, the Debtors do not meet the high burden necessary to substantively consolidate. They explicitly stated that the reorganization would not change the overall corporate structure and that they did not wish to substantively consolidate the individual Debtors' estates. (R. 7.) A primary function of substantive consolidation is to combine the various debtor entities into one legal unit post-bankruptcy. Thus, without the parties' explicit agreement to substantively consolidate, this Court must consider whether the Debtors' circumstances necessitate substantive consolidation.

Neither the Debtors nor the creditors treated the separate debtor entities as one legal unit. Unlike in *In re Woodbridge*, where the debtor entities' assets and estates were entangled, Development was a special purpose entity created for the sole purpose of acting as a licensee of

Under My Thumb's software. (R. 4.) The Court can easily identify and separate Development's contracts and debts from those of TDI and the Operating Debtors. *See* (R. 4-5.) Moreover, unlike the commingled nature of the *In re Woodbridge* debtors' corporate structure, Development's separateness as an entity was essential to Under My Thumb. Development specifically contracted the right to share Under My Thumb's patented software with its affiliates. (R. 5.) Had Under My Thumb relied on a breakdown of borders between the Debtors, Development would not have needed to negotiate for this right in the licensing agreement.

In this case, the mere fact that the Operating Debtors used the software Development contracted for is not sufficient to constitute substantive consolidation. Much like in *Reider*, where the court determined that conducting business on another entity's property is not sufficient entanglement to allow substantive consolidation, the Operating Debtors' use of the software pursuant to a licensing agreement is common practice. Negotiating the right for affiliated entities to use patented software is frequent in the hospitality industry, and therefore, it does not result in the commingling of the Operating Debtors' and Development's estates.

The Ninth Circuit's per plan interpretation of § 1129(a)(10) effectively allows all debtors who jointly administer bankruptcies to enjoy the benefits of substantive consolidation without meeting any of the requirements. Judge Jones' dissent in the Thirteenth Circuit opinion below states that § 1129(a)(10) vests no "substantive rights to creditors." (R. 30.) This echoed the sentiments of the Eleventh Circuit in *Reider*, which determined that joint administration created no substantive rights. *See Reider,* 31 F.3d at 1109. However, interpreting § 1129(a)(10) as a per plan approach does just that. A per plan approach groups all of the separate classes of the various debtors together, thereby granting a substantive right to any single accepting impaired class of claims. If this Court determines that § 1129(a)(10) requires acceptance from only one impaired class of all the debtors combined, a single controlling creditor of one impaired class could confirm a plan over the rejection of the classes of all remaining debtors. Contrary to the dissent's reasoning, the per plan approach allows one debtor's accepting impaired class to override all other debtors' rejecting impaired classes. This interpretation of § 1129(a)(10) vests a single controlling creditor with the substantive right of controlling the plan's confirmation.

Congress enacted joint administration for administrative ease and judicial economy. Interpreting a statute in a manner that would increase litigation is contrary to the purpose of a jointly administered bankruptcy. The per plan approach does just that. The absolute power that the per plan approach could potentially give an accepting impaired class of claims would increase the potential for gamesmanship when classifying creditors. Discrepancies and deliberate actions regarding classifying creditors already exist. A per plan interpretation of §1129(a)(10) would increase litigation over the classification of debtors and create the potential for abuse and misuse of this provision. Affiliated debtors may seek to group all creditors who are partial to the confirmation of a plan together in a class of claims to ensure confirmation over the rejection of all other creditors. Therefore, this Court should adopt the per debtor interpretation of §1129(a)(10).

CONCLUSION

For the foregoing reasons, Under My Thumb respectfully requests this Court affirm the Thirteenth Circuit Court of Appeals.

Respectfully Submitted,

Team R3
Counsel for Respondent
DATED: January 21, 2020

APPENDIX A

UNITED STATES CONSTITUTION

U.S. CONST. art. I sec. 8, cl. 8

The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

APPENDIX B

UNITED STATES CODE TITLE 11: BANKRUPTCY

11 U.S.C. § 102(7) – Rules of Construction

In this title -
(7) the singular includes the plural;

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; or

11 U.S.C. § 365(f)(1) – Executory Contracts and Unexpired Leases

(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. § 506(b) – Determination of Secured Status

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.

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(c) – Acceptance of Plan

(c) A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

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:

(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) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that—

(A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

(B) with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive—

(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;

(C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim regular installment payments in cash—

(i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;

(ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and

(iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)); and

(D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

(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) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(12) All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

(14) If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.

(15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan—

(A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

(16) All transfers of property under the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

11 U.S.C. § 1129(b)(1) – Confirmation of Plan

(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.

11 U.S.C. § 1191(b) – Confirmation of Plan

(b)EXCEPTION. —
Notwithstanding section 510(a) of this title, if all of the applicable requirements of section 1129(a) of this title, other than paragraphs (8), (10), and (15) of that section, are met with respect to a plan, the court, on request of the debtor, shall confirm the plan notwithstanding the requirements of such paragraphs 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.

APPENDIX C

UNITED STATES CODE TITLE 17: COPYRIGHTS

17 U.S.C. § 106 – Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

APPENDIX D

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 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).