No. 19-1004

IN THE

Supreme Court of the United States

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

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

V.

UNDER MY THUMB, INC., RESPONDENT.

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

BRIEF FOR THE PETITIONER

Team # 42 P
Counsel for Petitioner

QUESTIONS PRESENTED

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

2. Whether, in a case where a class of claims is proposed to be impaired under a joint, multi-debtor plan, § 1129(a)(10) of chapter 11 of the United States Code requires acceptance from at least one impaired class of claims of each debtor or, alternatively, acceptance from one impaired class of claims of any one debtor.

PARTIES TO THE PROCEEDINGS

Petitioners and Appellees are Tumbling Dice, Inc., Tumbling Dice Atlantic City, L.L.C., Tumbling Dice Chicagoland, L.L.C., Tumbling Dice Detroit, L.L.C., Tumbling Dice Lake Tahoe, L.L.C., Tumbling Dice Las Vegas, L.L.C., Tumbling Dice New Orleans, L.L.C., Tumbling Dice Palm Springs, L.L.C., Tumbling Dice Tunica, L.L.C., and Tumbling Dice Development, L.L.C.

Respondent and Appellant is Under My Thumb, Inc.

CORPORATE DISCLOSURE STATEMENT

Petitioner Tumbling Dice, Inc., states that Start Me Up, Inc. is a parent company and no publicly held company owns 10% or more interest in any of the companies.

Petitioners Tumbling Dice Atlantic City, L.L.C., Tumbling Dice Chicagoland, L.L.C., Tumbling Dice Detroit, L.L.C., Tumbling Dice Lake Tahoe, L.L.C., Tumbling Dice Las Vegas, L.L.C., Tumbling Dice New Orleans, L.L.C., Tumbling Dice Palm Springs, L.L.C., Tumbling Dice Tunica, L.L.C., and Tumbling Dice Development, L.L.C. state they are wholly-owned subsidiaries of Tumbling Dice, Inc., and no publicly held company owns 10% or more interest in any of the companies.

Respondent Under My Thumb, Inc. states that it has no parent corporation and that no publicly held corporation owns 10% or more interest in the company.

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The opinion of the Court of Appeals for the Thirteenth Circuit has not yet been published in the Federal Reporter, but is found at Under My Thumb, Inc. v. In re Tumbling Dice, Inc., *et al.*, No. 18-0805 (13th Cir. March 4, 2019), https://drive.google.com/file/d/1ifv-xYGlMhUeTjeKIwEP5ZPmsoA2-W7_/view. Additionally, a copy can be found on the Record 2-32.

The opinion of the Bankruptcy Appellate Panel for the Thirteenth Circuit is unreported but cited as Under My Thumb, Inc. v. In re Tumbling Dice, Inc., *et al.*, (B.A.P. 13th Cir).

The opinion of the Bankruptcy Court for the jointly administered case is unreported but cited as In re Tumbling Dice, Inc., *et al.*, No. 16-47250 (Bankr.).

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

Section 365(c) of Title 11 of the United States Code provides:

> **(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."

Executory Contracts and Unexpired Leases, 11 U.S.C. § 365(c) (2019).

Section 1129(a)(10) of Title 11 of the United States Code provides that "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 any acceptance of the plan by any insider." Confirmation of Plan, 11 U.S.C. § 1129(a)(10) (2019).

STATEMENT OF FACTS

This appeal arises out of the jointly administered chapter 11 bankruptcy cases of Tumbling Dice, Inc. ("TDI") and its nine subsidiary companies: Tumbling Dice Atlantic City, L.L.C., Tumbling Dice Chicagoland, L.L.C., Tumbling Dice Detroit, L.L.C., Tumbling Dice Lake Tahoe, L.L.C., Tumbling Dice Las Vegas, L.L.C., Tumbling Dice New Orleans, L.L.C., Tumbling Dice Palm Springs, L.L.C., Tumbling Dice Tunica, L.L.C., and Tumbling Dice Development, L.L.C. (collectively, the "Debtors"). (R. at 2). As is common in chapter 11, the bankruptcy court ordered joint administration of the individual debtor cases based on their parent and wholly-owned subsidiary relationship for the convenience of the Debtors and for the efficiency of the court pursuant to the Fed. R. Bankr. P. 1015(b), (R. at 3-4).

At issue are two objections by a sole creditor, Under My Thumb, Inc. ("Under My Thumb"), to the confirmation of the *Joint Plan of Reorganization* (the "Plan") of the Debtors. (R. at 3). First, Under My Thumb objected to the assumption of their software license agreement with Tumbling Dice Development, L.L.C. ("Development"). (R. at 3). Second, Under My Thumb objected to a per plan approach for evaluating acceptance of the Plan. (R. at 3). The bankruptcy court held both questions in favor of the Debtors. (R. at 3). The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the rulings in favor of the Debtors. (R. at 3). The Thirteenth Circuit reversed both issues to favor Under My Thumb, Inc. (R. at 3).

While the facts in this case are not in dispute, a brief history is required to understand the nature of the objections and the impact of the decision. (R. at 3). As a parent company, TDI operates one of the largest gaming operations in the United States consisting of eight casino and resort properties. (R. at 4). Each of the eight resort locations scattered throughout the country is operated by one of the debtor-subsidiaries ("Operating Debtors"). (R. at 4). The remaining debtor-subsidiary,

Development, acts as the licensee under a software license agreement ("Agreement") with Under My Thumb. (R. at 4).

Nearly thirty years ago, the Debtors launched Club Satisfaction, a customer loyalty program aimed at creating brand loyalty across their chain by incentivizing and rewarding Club Satisfaction members. (R. at 4). The loyalty program rewards members for engaging in activities at any of the properties in the chain with complimentary meals at any of the steakhouses, free or discounted nights at any of the resorts, VIP tickets for concerts held at their in-house concert venue, or private chefs' table dinners. (R. at 4). Having the ability to earn these perks through a customer loyalty program is common in the gaming industry and an essential part of the Debtor's business model. (R. at 4-5).

Wanting to modernize their customer loyalty program, the Debtors approached Under My Thumb with a research and development proposal in 2008. (R. at 4). As a leading software designer of customer loyalty and reservation programs for the hospitality industry, Under My Thumb would maintain the copyright and patent on the Club Satisfaction Software ("Software") they created for TDI with Development financing a portion of these costs with an unsecured $7 million promissory note (the "R&D" Note). (R. at 4).

After the Software was completed, Under My Thumb and Development entered into an Agreement that (1) granted Development a non-exclusive license to use the Software, (2) extended the benefits of the Agreement to Development's affiliated entities, while (3) prohibiting Development from assigning or sublicensing their rights to others without Under My Thumb's express written consent. (R. at 5). In exchange for the license, Under My Thumb received a monthly fee that was calculated based upon the amount of spending activity of Club Satisfaction members. (R. at 5).

Through the Software, the Debtors gathered information about each member's habits while at their chain. (R. at 5). This data allowed Debtors to capture a member's preferences so that they can entice the member to return frequently, play longer, and spend more. (R. at 5). The Software was a

tremendous success resulting in increased spending and a tripling of membership enrollment across the entire chain. (R. at 5). With the prevalence of casino loyalty rewards across the industry in recent years, the Software is critical to the Debtor's ongoing business model. (R. at 5, 26).

Also, the relationship proved beneficial for Under My Thumb. (R. at 5). Under My Thumb, as sole owner of the copyright and patent, is free to license similar versions of the Software to third parties. (R. at 5). With the increase in revenue and membership, the monthly fee was higher than anticipated. (R. at 5). When Debtors filed for bankruptcy in January 2016, Development had never breached the Agreement. (R. at 26). The monthly fee payments were made on-time and the affiliates were the only users of the Software. (R. at 26.)

In December 2011, the stock of TDI was acquired by a hedge fund, Start Me Up, Inc. ("Start Me Up"), through a leveraged buy-out. (R. at 6). As part of the transaction, TDI and the Operating Debtors granted first priority liens on their assets to a syndicated group of lenders (the "Lenders") in exchange for a $3 billion loan. (R. at 6). Development was excluded from this transaction due to the non-exclusive nature of the license for the Software and the restrictive covenants contained in the Agreement. (R. at 6).

By January 2016, the Debtors were saddled with a significant and unserviceable debt load that resulted in the need to seek protection in bankruptcy. (R. at 6). As of the petition date, the Debtors owed the Lenders approximately $2.8 billion from the leveraged buy-out, they owed Under My Thumb more than $6 million for the R&D note, and they owed an estimated $120 million to unsecured creditors. (R. at 6). Restructuring the organization and refinancing the debt load with Lenders is a primary goal for the Debtors according to their first day filings. (R. at 6). The bankruptcy court authorized the Debtors to continue using the prepetition cash management system of their integrated business enterprise post-petition. (R. at 3-4).

After lengthy negotiations between the Debtors, Start Me Up, the Lenders, the unsecured creditors' committee, and certain other stakeholders (but, notably, not Under My Thumb), the Debtors announced that a deal had been reached and a plan support agreement was created. (R. at 6-7).

In August 2016 the Debtors filed the Plan and disclosure statements which were consistent with the plan support agreement created in negotiations. The Plan was a joint plan, meaning one plan was filed on behalf of all the Debtors to expediate the cases while expressly stated that "the Debtors' estates are not being substantively consolidated, and no Debtor is to become liable to the obligations of another." (R. at 7). The Plan provides for (a) the assumption of the Agreement; (b) a pro rata distribution of $66 million (i.e., 55%) to the Debtor's unsecured creditors, including the $6 million plus obligation owed by Development to Under My Thumb under the R&D Note; (c) a reduction of the interest rate owed to the Lenders while simultaneously extending payments to the Lenders over a twenty year period; and (d) the cancellation of all existing shares with the issuance of new shares without change to the overall corporate structure of the Debtors. (R. at 7).

The Plan enjoyed nearly universal support from all creditor groups. (R. at 8). After creditor ballots were reviewed and tallied, TDI and each of the Operating Debtors had at least one impaired accepting class of creditors. (R. at 8). Development's only class of creditors, controlled by Under My Thumb, voted to reject the plan leaving Development with no impaired accepting class of creditors. (R. at 8).

Under My Thumb initially viewed the Plan favorably on account of the Agreement being assumed, and its distribution on the unsecured R&D Note greatly exceeded the value of Development's assets. (R. at 7). This changed when Under My Thumb learned that Start Me Up was directly funding $31 million of the unsecured distribution, and the remaining $35 million was being invested by Sympathy for the Devil, L.P. ("SFD"), a private equity group. (R. at 8). SFD's portfolio of companies includes a direct competitor of Under My Thumb who has tried to replicate the customer

loyalty Software. Concerned with SFD's potential access to the Software under the Plan, Under My Thumb voted to reject despite maintaining the benefit of their bargain with the Agreement and receiving substantially more funding on the unsecured R&D Note than Development has in assets. (R. at 7-8).

SUMMARY OF THE ARGUMENT

Giving a drowning company a fresh start by granting them time to reorganize, the ability to restructure its debt load, and the ability to continue to fulfill obligations while maintaining its operations is the purpose for chapter 11 bankruptcy filings. Generally, bankruptcy preserves the estate of a debtor in order to redistribute the assets in a fair way to all creditors.

One important component of a successful reorganization is the ability for the company to assume or reject executory contracts under § 365. For the Debtors, the assumption of the Software Agreement is vital to its continued operation. Without a modern customer loyalty program in place, an expectation of customers within the casino industry, the Debtors decline would be inevitable. Forcing Development to surrender a long-standing license Agreement under bankruptcy, not based upon sound review of the benefit to both companies involved, but based solely on an absurd interpretation that results in a policy where all intellectual property contracts are not capable of assumption by a debtor in possession.

A second component of a successful reorganization is the adoption of a plan that will govern a fair and equitable redistribution to all involved parties. The Court should find that the Thirteenth Circuit erred by adopting the "per debtor" approach over the "per plan" approach because the "per debtor" approach is counterintuitive and fatally flawed. With the exception of just one court, the District of Delaware Bankruptcy Court, the majority of courts hold that § 1129(a)(10), in a jointly administered, multi-debtor chapter 11 bankruptcy proceeding, requires only one impaired class of creditor of any one debtor in the plan vote to approve the plan for a plan to be accepted. By the very nature of a bankruptcy proceeding, not all creditors will be made whole. Bankruptcy is about making the best out of a company's bad financial situation for all parties and will require compromise. A court should not allow one creditor, against his own interest as a creditor, to be the sole vote that derails an

otherwise beneficial compromise for all. Making the "per debtor" approach the rule abrogates the compromise and general consensus necessary for successful chapter 11 reorganizations.

A court should not disturb the intent of Congress by adding language to an unambiguous statute even if a statute may lead to an undesirable result. It unnecessarily encroaches on the powers vested in the legislative branch. As this Court has continually reminded the nation, Congress means what it says and can amend a statute to provide the intended results. The courts narrow interpretation that § 365(c) applies only to personal service contracts is not found in the plain language of the statute. The Thirteenth Circuit's expansion of § 1129(a)(10) by adding the words "of each debtor" is a harmful addition. Both cause an absurd result.

For § 365(c)(1) this Court must look beyond the plain language of this single subsection by examining the entirety of § 365 under the light of Congressional intent to eliminate the absurdity. Congress intended to grant a debtor in possession the powers necessary to assume a contract that existed pre-petition. This is evident in § 365(a) and § 365(f). This allows both parties to maintain the benefit of their bargain.

For § 1129(a)(10), adhering to the statute's plain meaning produces a result that is not absurd or demonstrably at odds with Congress' intent and has been consistently applied this way by the majority of courts. Ensuring that a restructuring plan has some showing of creditor support is the only purpose for Congress' addition of § 1129(a)(10), a technical requirement easily measured by acceptance of one impaired class of creditor of the plan. This technical requirement had no predecessor in the law, and it functions as a minimum safeguard for creditors. Although there was some discussion by the Thirteenth Circuit surrounding how substantive consolidation and joint administration would implicate § 1129(a)(10), none of that is relevant to the application of § 1129(a)(10) because it is simply a technical requirement requiring nothing more than a showing of some indicia of creditor support for the plan. In the case at bar, the support of the majority of creditors

in acceptance of the plan is overwhelming and beyond the statute's minimum requirements. Therefore, the Court should maintain the original, express language of Congress in its "per plan" approach to § 1129(a)(10).

Under My Thumb is attempting to circumvent the purpose and nature of the bankruptcy proceedings to obtain assurance that its patented Software will remain unavailable to a competitor. First by using § 365(c) to force the surrender of a long-standing Agreement that was never breached by either party. Second by using a technicality in § 1129(a)(10) to ensure the failure of the Plan even though it would benefit them.

It is commonplace for corporation ownership to change by stock sales, leverage buyouts, and private equity group funding. Under My Thumb claimed no issue with the ownership change when Start Me Up, a hedge fund, acquired TDI through a leverage buy-out in 2011 despite the fact that TDI's parent company became comprised of an anonymous pool of investors. The Agreement continued without any breach to its restrictive covenant through 2019. Under My Thumb is now contesting the Plan simply because it allows a partial transfer of ownership to an equity funding group, SFD, who has a single company in its multi-company portfolio that competes with Under My Thumb by using a claim that § 365(c) prevents the assumption of the contract based upon an overly broad interpretation that would prevent all executory contracts from ever being assumed by any debtor in possession.

If there were to be any dispute surrounding whether a case should be substantively consolidated or jointly administered for plan creation purposes, the time for that would have been at the beginning of the proceeding, not at the voting stage of the proposed plan where § 1129(a)(10) is triggered. None of the creditors presented the bankruptcy court with any opposition to the joint administration of the Debtors' cases at inception, nor is there any assertion of that now. It is not necessary for the Thirteenth Circuit to address substantive consolidation here because it is not

relevant to the voting part of the process. Section 1129(a)(10) makes no mention of whether a plan is one of substantive consolidation or joint administration. Again, the statute's purpose is just a technical one, to ensure some indicia of creditor support for the plan, which is met in the instant case.

The "per debtor" approach is a pointless exercise in futility because future organizations in bankruptcy cases can deploy preemptive, legal activities or undetectable, illegal activities to circumvent the "per debtor" approach. The "per debtor" approach contains legal loopholes that do not exist under the "per plan" approach of § 1129(a)(10).

Typically, large, complex corporate entities know when they are in trouble financially and work towards correcting their financial problems. This could go on for months or even years before filing for bankruptcy protection through liquidation or restructuring. If it appears that restructuring is the desired course of action, and knowing that in a jointly administered, multi-debtor case that there will be a "per debtor" standard to meet, companies will plan for that ahead of time to be able to meet this requirement in whatever way they can, whether it be a legal course of action or an illegal method that is hard to detect. No matter which path the corporation takes, it is extremely likely that it will be able to satisfy the "per debtor" standard and the plan will get approved.

Maintaining the "per plan" approach significantly reduces the risk of prohibited conduct by corporations or the need for companies to resort to other legal loopholes for circumventing the "per debtor" approach. And, the "per plan" approach ensures that there is some creditor support for the plan. Under the "per debtor" approach, even a bad plan for creditors can get approved which is not fair and equitable to creditors.

Lastly, the "per debtor" approach puts the veto power of the whole plan in the hands of one creditor of the only impaired class of one of the Debtors which completely derails what would otherwise be a highly successful reorganization effort. In the instant case, the only impaired class creditor of Development had an ulterior motive for voting against the plan.

Under My Thumb has absolutely no desire to see the plan succeed, despite being paid 55% of the balance due on the R&D Note by Development, and for a highly lucrative license Agreement to continue generating monthly revenue. Without the ability to confirm the Plan, the remaining options available to the Debtors require liquidation of all ten companies resulting in thousands of unemployed workers across the United States and billions in lost revenue to creditors.

This behavior by Under My Thumb goes against the very fabric of what bankruptcy proceedings are designed to do and should not be aided by the courts. It is time for this Court to eliminate the confusion that has developed concerning § 365 by viewing the entire section as a whole and restoring the clear intent of Congress to the application of the statute in our courts. Additionally, the Court should maintain the "per plan" approach of § 1129(a)(10) because it serves the intended purpose of Congress, provides a legitimate safeguard for creditors, does not force debtors to engage in undesirable conduct, nor will it bend to the whim of a single, unhappy, impaired creditor.

ARGUMENT

The overall purpose of chapter 11 of the Bankruptcy Code ("the Code") is "to empower a debtor with going concern value to reorganize its operations to become solvent once more." N.C.P. Mktg. Grp., Inc. v. BG Star Prods., 556 U.S. 1145, 1147 (2009). With that goal in mind, the "debtor and creditors try to negotiate a plan that will govern the distribution of valuable assets from the debtor's estate and often keep the business operating as a going concern." Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 978 (2017). During this time of negotiation, the debtor continues "to operate its business as a 'debtor in possession'." Travelers Cas. & Sur. Co. of Am. v. PG&E, 549 U.S. 443, 446 (2007) (*citing* Rights, Powers, and Duties of Debtor in Possession, 11 U.S.C. §§ 1107(a), 1108 (2019)). A debtor in possession can "exercise the statutory rights and powers of an estate trustee." Lamie v. U.S. Tr., 540 U.S. 526, 532 (2004) (*citing* § 1107(a)). Therefore, in § 365, trustee and debtor in possession are "essentially interchangeable." Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery (In re Cybergenics Corp.), 226 F.3d 237, 243 (3d Cir. 2000).

The Debtors commenced chapter 11 cases in January 2016 with its primary goal to reorganize its significant, jointly held debt load. (R. at 6). The Debtors are operating as a debtor in possession while performing the functions and duties of a trustee in the chapter 11 proceedings. (R. at 9). For convenience, the bankruptcy court authorized joint administration of the cases and permitted the Debtors to continue utilizing their integrated cash management system post-petition. (R. at 3-4). Negotiations between the Debtors and its creditors resulted in a *Joint Plan of Reorganization* ("Plan") that allowed the Debtors to continue operating one of the largest gaming operations in the United States with eight resort location scattered across the nation. (R. at 3, 4, 6).

I. A DEBTOR IN POSSESSION IS PERMITTED TO ASSUME AN EXECUTORY CONTRACT UNDER § 365.

Section 365(a) of the Code allows for a debtor in possession, "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." Executory contracts

and unexpired leases, 11 U.S.C. § 365(a) (2019). The Code does not define an "executory contract," so this Court has provided a definition in Mission. "A contract is executory if performance remains due to some extent on both sides." Mission Prod. Holdings v. Tempnology, L.L.C., 139 S. Ct. 1652, 1658 (2019) (*citation omitted*). When a debtor in possession assumes a contract, the debtor is required to fulfill "its obligations while benefiting from the counterparty's performance." Id. . This assumption sustains the business's operation so that it will "continue to provide jobs, to satisfy creditors' claims, and to produce a return for its owners." United States v. Whiting Pools, 462 U.S. 198, 203 (1983).

In the present case, the executory contract is a software license agreement ("Agreement") between Development and Under My Thumb that granted the use of Club Satisfaction Software to Development. (R. at 5). The Agreement required Under My Thumb to provide the Software and to "extend the benefits of the Agreement to [Development's] affiliated entities." (R. at 5). Development was required to pay Under My Thumb a monthly fee based on the amount of spending activity by Club Satisfaction members at the affiliated entities' casino resort locations and to "refrain from sharing the Software with anyone other than its affiliates." (R. at 26). In January 2016, when Development commenced its chapter 11 case, the Agreement was an "ongoing material obligation [] under the terms of the [l]icense Agreement, making it an executory contract." RPD Holdings, L.L.C. v. Tech Pharm. Servs. (In re Provider Meds, L.L.C.), 907 F.3d 845, 856 (5th Cir. 2018). When Development assumes the Agreement under the Plan, (R. at 7), both parties would simply continue to receive the benefit of their bargain, (R. at 26), by fulfilling their obligations under the Agreement.

The assumption of the Agreement is "an essential part of the Debtors' ongoing business model" due to the prevalence of loyalty reward programs in the casino industry with the Software providing the ability to track spending for those rewards. (R. at 5). Without the Software, the Debtors may be unable to sustain employment to thousands of employees, satisfy trade creditors' claims in the millions, and provide a return to the other stakeholders. (R. at 32).

When analyzing § 365(a) in isolation, Development clearly has the power to assume the Agreement. However, "the Code is designed to work" by "interpreting statutory provision in the context of the operative chapters." Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938, 1951 (2016) (Sotomayor, J., dissenting).

Therefore, the broad power of assumption found in § 365(a) is limited by Congress in § 365(c). Specifically, § 365(c)(1) provides that a debtor in possession

> may not assume or assign any executory contract... of the debtor, if— (A) applicable law excuses a party to such contract... from accepting performance from or rendering performance to an entity other than the debtor... whether or not such contract... prohibits or restricts assignment of rights or delegation of duties and (B) such party does not consent to such assumption.

Executory Contracts and Unexpired Leases, 11 U.S.C. § 365(c) (2019). To determine what law will trigger this limitation, the term "applicable law" is "naturally understood to provide that, with limited exceptions, any [excuse] that is available outside of the bankruptcy context is also available in bankruptcy." Travelers Cas. & Sur. Co. of Am., 549 U.S. at 450. The United States Constitution provides that Congress has been granted 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." U.S. Const. art. I, § 8, cl. 8. When a patent holder exercises that exclusive right by extending a license of their invention in order to profit from their originality, "the policy behind such licensing is so intertwined with the sweep of federal statutes, that any question with respect thereto must be governed by federal law." Unarco Indus. v. Kelley Co., 465 F.2d 1303, 1306 (7th Cir. 1972).

The Thirteenth Circuit held that applicable federal intellectual property law renders the Agreement non-assignable, since the law "is predicated on the rationale that the identity of the licensee is material to the agreement." (R. at 15). Indeed, both parties stipulated the non-assignability of the Agreement because Under My Thumb is "excused from rendering performance to an entity

other than Development and its affiliates." (R. at 8, n. 7). This prohibition on the assignment of the contract does not bar the assumption of the contract under § 365(c)(1).

A. The Plain Language of § 365(c)(1) Allows for the Assumption of an Executory Contract.

In 1803 Chief Justice John Marshall distinguished the role of Congress from the courts by declaring, "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). From that time forward in statutory construction cases, the Court begins "by analyzing the statutory language." Rotkiske v. Klemm, 205 L. Ed. 2d 291, 297 (2019). When "the statutory language is unambiguous and the statutory scheme is coherent and consistent, the inquiry ceases." Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 1971 (2016).

The Thirteenth Circuit held that § 365(c)(1) is unambiguous and they are bound to follow it. (R. at 12). Debtors agree with that statement, but not with that courts limited review of the plain language in § 365(c)(1).

The determination of ambiguity in § 365(c)(1) is key to this issue. Ambiguity occurs when "the statutory language is unclear." Toibb v. Radloff, 501 U.S. 157, 162 (1991) (quoting Blum v. Stenson, 465 U.S. 886, 896 (1984)). This Court has instructed us to "presume that a legislature says in a statute what it means and means in a statute what it says there." Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992). It is a "cardinal principal of statutory construction," Williams v. Taylor, 529 U.S. 362, 404 (2000), that the courts have a "duty to give effect, if possible, to every clause and word of a statute." Duncan v. Walker, 533 U.S. 167, 174 (2001) (*citing* United States v. Menasche, 348 U.S. 528, 538-539 (1955) (*quoting* Montclair v. Ramsdell, 107 U.S. 147, 152 (1883)); (see also Market Co. v. Hoffman, 101 U.S. 112, 115 (1879)).

The Thirteenth Circuit focused on the disjunctive term "or" being construed as the conjunctive term "and" in their analysis. They held that the court is "unable to construe § 365(c)(1) in such a fashion." (R. at 10). They applied the and/or analysis to the "assuming or assigning" language, (R. at 12), contained in § 365(c). 11 U.S.C. § 365(c) (2019). After limiting the scope of their analysis to this single phrase, the Thirteenth Circuit adopted the majority "hypothetical test." (R. at 11).

The hypothetical test states "if the debtor-in-possession lacks hypothetical authority to assign a contract, then it may not assume it -- even if the debtor-in-possession has no actual intention of assigning the contract to another." N.C.P. Mktg. Grp., Inc., 556 U.S. at 1146. The Third Circuit reached that conclusion by eliminating the non-relevant language from § 365 to reveal a more straightforward application. In re W. Elecs., Inc., 852 F.2d 79, 82-83 (3d Cir. 1988). The Thirteenth Circuit followed that example in their analysis by stating:

> (c) *Development* may not assume... *the Agreement*,... if –
>
> > (1)(A) *federal intellectual property law* excuses *Under My Thumb* from accepting performance from or rendering performance to an entity other than *Development*...

11 U.S.C. § 365(c)(1)(A) (*substitutions in italics*). (R. at 13). At this point, the Thirteenth Circuit concluded that to assume the Agreement, Debtors must be able to assign the Agreement. (R. at 13). It is the Debtor's belief that the Thirteenth Circuit stopped too soon.

The Thirteenth Circuit's holding failed to apply this same analysis on the dispositive conjunction in § 365(c)(1) which is the "and" connecting § 365(c)(1)(A) with § 365(c)(1)(B). In order for § 365(c) to trigger the limitation on the right to assume an executory contract, the requirements of both clauses found in § 365(c)(1) must be present. Summit Inv. & Dev. Corp. v. Leroux, 69 F.3d 608, 613 (1st Cir. 1995). The two clauses of § 365(c)(1) are connected by the conjunctive "and." which requires Debtors to comply with both clauses. Debtors seeking to assume an executive contract must satisfy the requirement of clause (A) which states, "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, " with clause (B) which states, "such party does not consent to such assumption or assignment." 11 U.S.C. § 365(c)(1) (2019). (see also RadLAX Gateway Hotel, L.L.C. v. Amalgamated Bank, 566 U.S. 639, 648 (2012)(where this Court applied identical logic to the disjunctive "or"). It is the Debtor's belief that § 365(c)(1)(A) does not apply to the assumption of a contract. If clause (A) does not apply, then § 365(c)(1) does not prevent the assumption of the Agreement which is permissive pursuant to § 365(a). Without the Thirteenth Circuit analyzing both clause A and clause B of § 365(c)(1) for compliance, the court rendered its conclusions prematurely.

B. The Applicable Law in § 365(c)(1)(A) is Triggered Only Upon an Assignment.

Viewing statutory language in an isolated context can result in a reasonable ambiguity. United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988). "Statutory construction, however, is a holistic endeavor." Id. (*citing* Sorenson v. Sec'y of Treasury, 475 U.S. 851, 860 (1986); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987); Weinberger v. Hynson, Westcott & Dunning, 412 U.S. 609, 631-32 (1973)*;* Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307-08 (1961)).

> A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme -- because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

United Sav. Ass'n of Tex., 484 U.S. at 371. Therefore, looking at § 365 as a whole, § 365(a) allows a debtor in possession to assume or reject any executory contract as long as the best interest of the estate is guiding the decision. Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp., 872 F.2d 36, 39 (3d Cir. 1989). Generally, § 365(f) governs the assignment of an executory contract. see Executory Contracts

and Unexpired Leases, 11 U.S.C. § 365(f)(2019). With § 365(c) providing limitations on the broad powers granted to a debtor in possession over an executory contract. 11 U.S.C. § 365(c) (2019)..

While the Thirteenth Circuit held to a literal reading of § 365(c) when it adopted the "hypothetical test," (R. at 14), it rejected a literal reading of § 365(f)(1). (R. at 13) (*see* App. 31). The Thirteenth Circuit noted that "subsection (f)(1) provides that... executory contracts may be assigned." (R. at 13). When applying a literal interpretation to both sections, "§ 365(c)(1), therefore, initially appears to render § 365(f)(1) inoperative." (R. at 13).

When two literal applications of the statutory language "results in an outcome that can truly be characterized as absurd" an exception exists to the application of a statute's plain language. RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.), 361 F.3d 257, 260 (4th Cir. 2004). This exception permits a court to "look beyond the plain language of an unambiguous statute." Id. . While this Court rarely invokes the "absurd results" test to override unambiguous legislation, this Court has held legislation ambiguous when "Congress had drafted a statute that produced an absurdity so gross as to shock the general moral or common sense." Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002).

A literal reading of § 365(c) and § 365(f) results in an absurdity that shocks common sense. Both § 365(c) and § 365(f) contain the term "applicable law." (App. at 31-32). It is widely held that § 365(f) contains language **granting** a debtor in possession the ability to assign executory contracts after the contract has been assumed in its entirety "even where legal or contractual provisions would otherwise prohibit assignment." RPD Holdings, L.L.C., 907 F.3d at 848. Section 365(c) contains language that **prevents** assumption of any executory contract where any applicable law would prohibit assignments. In re W. Elecs., Inc., 852 F.2d 79. The Thirteenth Circuit side steps this irreconcilable contradiction by labeling it "illusory" and holding § 365(f)(1) contains a broad rule and § 365(c)(1) contains an exception to the broad rule. (R. at 13-14). The Thirteenth Circuit concludes

that the exact same language contained within the exact same section actually has a "markedly different scope." (R. at 13) (*citations omitted*).

Courts have long recognized the absurd contradiction between § 365(c) and § 365(f). In attempts to reconcile the absurdity. Some courts confront the absurdity by narrowly construing "applicable law" in § 365(c) to apply only to personal service contracts. In re Taylor Mfg., Inc., 6 B.R. 370, 371 (Bankr. N.D. Ga. 1980), In re Varisco, 16 B.R. 634, 635 (Bankr. M.D. Fla. 1981). Recognizing that Congress "actually codified a much broader principle," the Fifth Circuit applied § 365(c) to any executory contract and any applicable law by simply ignoring § 365(f). Braniff Airways, Inc. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.), 29 B.R. 717 (Bankr. N.D. Tex. 1983).

Congress recognized the absurdity of these two sections. In 1984 and again in 1986 amendments were passed to "attempt to eliminate the confusion surrounding the meaning of 'applicable law.'" Brett W. King, Assuming and Assigning Executory Contracts: A History of Indeterminate "Applicable Law, " 70 Am. Bankr. L.J. 95, 108-09 (1996)(discussing the absurd history of assuming and assigning executory contracts). Both efforts failed to eliminate the confusion and absurdity among the courts continued. Id. at 111. So, Congress attempted to eliminate this absurdity in 2004 by adding "Except as provided in subsections (b) and (c) of this section" to § 365(f)(1). *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 109 Pub. L. 8, 119, Stat. 23, 24 (2005).

Despite all of these attempts to end the absurdity, the circuit courts have created two tests to determine assignability of executory contracts under § 365(c)(1). King, supra, at 112. Currently, the courts are split between the "hypothetical test" and the "actual test" for § 365(c)(1). N.C.P. Mktg. Grp., Inc., 556 U.S. at 1147. Neither test ends the absurdity but compounds it. Under the hypothetical test debtors in possession may only assume executory contract that it may assign. RCI Tech. Corp., 361 F.3d at 260. The hypothetical approach prevents a debtor in possession from assuming the

contract for itself. The absurdity of the 'hypothetical test' becomes apparent when the term 'trustee' in § 365(c) is substituted with the term 'debtor in possession.'" (R. at 23). The statute would read, "the *debtor in possession* may not assume … any contract if… applicable law excuses [the counterparty] … from accepting performance from or rendering performance to an entity other than the *debtor in possession*...." (R. at 23) (*emphasis added*). Additionally, the hypothetical approach "engenders unwise policy" by sacrificing sound bankruptcy policy. N.C.P. Mktg. Grp., Inc., 556 U.S. at 1147. Other courts hold to an actual test `where assumption of the executory contract is permitted unless a licensee is actually being "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 (1st Cir. 1997). The actual test departs from "interpretation of the plain text of the law." N.C.P. Mktg. Grp., Inc., 556 U.S. at 1147.

The result of the hypothetical test for the Debtors is the prevention of continuing to exercise their rights under the Agreement and a forced surrender of the Software to Under My Thumb. (R. at 15). Outside of bankruptcy, Development has not breached the Agreement (R. at 6) and Under My Thumb has no power to reclaim the Id. . All of these shocks to common sense allow for the absurd results test exception to apply so that this Court may "refer to a statute's legislative history to resolve statutory ambiguity," Toibb v. Radloff, 501 U.S. at 162.

Congress envisioned a case by case analysis by the court when the Code was initially enacted in 1978. (R. at 24-25). In the original statute, § 365(c)(1) provided that the trustee could not "assume or assign an executory contract" if "applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee…." (R. at 24-25) (*citing* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, § 365(c)(1) (1978)) (*emphasis added*). Further, "the legislative history for § 365(e) indicates that Congress was concerned

with preserving the parties' benefit of their bargain." (R. at 25) (citing Institut Pasteur, 104 F.3d at 493 (1978)) (*as reprinted in* 1978 U.S.C.C.A.N. 5787, 5845).

In 1984, Congress revised § 365(c)(1) to replace "the trustee" with "an entity other than the debtor or the debtor in possession." (R. at 25) (*citing* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, § 362(a) (1984)). The Committee on the Judiciary reported that:

> This amendment makes clear that the prohibition against a trustee's power to assume an executory contract does not apply where it is the debtor that is in possession and the performance to be given or received under a personal service contract will be the same as if no petition had been filed because of the personal service nature of the contract.

(R. at 25) (*citing* Bankruptcy Technical Correction Act of 1980. H.R. Rep. No. 96-1195, at 12 (1980)). Clearly, Congress intended to allow a debtor in possession to assume an executory contract, notwithstanding applicable law or the lack of consent from the non-debtor party.

Looking at § 365(c)(1)(A) under the clear light of legislation history, Congress did not intend for the debtor in possession to lose the benefit of the bargain when it assumes an executory contract. "Where the debtor in possession seeks to assume, but not assign, an executory contract, the applicable law referenced in § 365(c)(1) is not triggered." (R. at 23) (*citing* Summit Inv. & Dev. Corp. v. Leroux, 69 F.3d 608, 613 (1st Cir. 1995). Therefore, the Debtors have the right to assume the executory contract with Under My Thumb so that both parties may continue to receive the benefit of their bargain.

II. WHERE A CLASS OF CLAIMS IS PROPOSED TO BE IMPAIRED UNDER A JOINT, MULTI-DEBTOR PLAN, § 1129(a)(10) SHOULD ONLY REQUIRE ACCEPTANCE FROM ONE IMPAIRED CLASS OF CLAIMS OF ANY ONE DEBTOR IN THE PLAN, AND THE "PER PLAN" MAJORITY INTERPRETATION SHOULD BE MAINTAINED.

Section 1129(a)(10) of chapter 11 of the United States Code provides that "[i]f 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 any acceptance of the plan by any insider." Confirmation of Plan, 11 U.S.C. § 1129(a)(10) (2019). The majority view of courts has been to hold that § 1129(a)(10) applies on a "per plan" basis, where only one accepting class of impaired creditors of any one debtor in the plan need accept the plan before a reorganization plan can be confirmed. *See* JPMCC 2007-C1 Grasslawn Lodging, L.L.C. v. Transwest Resort Props. (In re Transwest Resort Props.), 881 F.3d 724, 729-30 (9th Cir. 2018). However, the District of Delaware Bankruptcy Court, the only court to adopt the minority view, states that § 1129(a)(10) applies on a "per debtor" basis instead of a "per plan" basis, meaning that each debtor must have acceptance from an impaired class of claims from one of its own creditors for § 1129(a)(10) to be satisfied. *See* In re Tribune Co., 464 B.R. 126 (Bankr. D. Del. 2011).

A. Nothing in the Unambiguous, Plain Language of § 1129(a)(10) Vests Any Court with Discretion to Alter the Statute's Language from the "Per Plan" Approach to the "Per Debtor" Approach.

"[T]he is starting point for interpreting a statute is the language of the statute itself." Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). "Absent a clearly expressed legislative intention to the contrary," the "language" of the statute "must ordinarily be regarded as conclusive." Id. When it comes to statutory interpretation, the Court said, "Our task is to give effect to the will of Congress,... where its will has been expressed in reasonably plain terms...." Griffin v. Oceanic Contractors, 458 U.S. 564, 570 (1982).

"The words chosen by Congress, given their plain meaning, leave no room for the exercise of discretion..." and "[t]his is not the type of case where literal application of a statute would thwart its obvious purpose". Id. at 564. The obvious purpose of § 1129(a)(10) is to show some indication of support for the plan by at least one class of impaired creditor. Section 1129(a)(10) serves its purpose by providing that "[i]f 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 any acceptance of the plan by any

insider." 11 U.S.C. § 1129(a)(10) (2019). The Court in Lamie affirmed the lower court regarding a bankruptcy statute with a "plain, nonabsurd meaning" not be read to enlarge the scope of the statute because of the long-standing "Court's unwillingness to soften the import of Congress' chosen words even if it believes the words lead to a harsh outcome...." Lamie, 540 U.S. at 528. "[T]he sole function of the courts—at least where the disposition required is not absurd—is to enforce it according to its terms." Id. at 534. The "plain meaning" that § 1129(a)(10) "sets forth does not lead to absurd results requiring [courts] to treat the text as if it were ambiguous." Lamie, 540 U.S. at 536.

The Thirteenth Circuit inserted additional language modifying and expanding the language of § 1129(a)(10), adding the words "of each debtor." (R. at 19.) This is an erroneous addition because this is inconsistent with the Court's decisions in observing and upholding the plain meaning of a statute. Unless the statute is inconsistent with Congressional intent where "the statute will produce a result demonstrably at odds with the intentions of its drafters..." the additional language added by a court must be disallowed. Griffin, 458 U.S. at 571. This case is not one of those "exceptional case[s]" because the per plan approach will not "produce a result demonstrably at odds" with the intent of Congress which was to have at least some creditor support for the plan. Id. In fact, the per debtor approach creates an absurd reading of § 1129(a)(10), which gives a single, impaired creditor of just one of the debtors a "veto power... so they could defeat confirmation simply by causing the plan to fail to satisfy § 1129(a)(10) " which is the opposite of Congress' intent, especially in a case where there is overwhelming creditor support for plan as there is in this case. In re Loop 76, L.L.C., 442 B.R. 713 (Bankr. D. Ariz. 2010). Additionally, "[a court] cannot adopt [such interpretation] as [its] own without trespassing on a function reserved for the legislative branch...." which the Thirteenth Circuit ignores by adding the words "of each debtor" to the language of the statute in the Tumbling Dice case. Sigmon Coal Co. v. Apfel, 226 F.3d 291, 308 (4th Cir. 2000). The Thirteenth Circuit, in supporting

the creation of a per debtor approach, goes against its own statement that "Our job is to interpret the statute as it is written, not as it perhaps should be written." (R. at 15.)

The text of § 1129(a)(10) is not ambiguous, and the result of enforcement of the statute is not absurd because support for the Debtors' plan does have support from at least one impaired class, as Congress expressly stated. Since there is no "indication that Congress intended such a departure" to modify the statute to the per debtor approach to plan approval, the Court should not allow courts to depart from the per plan approach to § 1129(a)(10) as provided by Congress, and the Court's inquiry should end here. Sigmon Coal Co., 226 F.3d at 539 (*quoting* Cf. Cohen, 523 U.S. at 221).

B. Substantive Consolidation or Joint Administration of Corporate Debtors' Cases has No Bearing on § 1129(a)(10) Because § 1129(a)(10) is Only a Technical Requirement and Provides Only for a "Per Plan" Approach.

The "[o]nly purpose of 11 U.S.C. § 1129(a)(10), which had no predecessor or counterpart under the prior Bankruptcy Act, was to require some indicia of creditor support for the debtor's schemes." In re Bataa/Kierland, L.L.C., 476 B.R. 558, 570 (Bankr. D. Ariz. 2012). Section 1129(a)(10) provides that "[i]f 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 any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(10) (2019).

Section 1129(a)(10) makes absolutely no mention about whether a plan consist of substantive consolidation of debts from all the debtors, or whether the plan consists of unconsolidated debts of those debtors whose cases are being jointly administered, where each debtor is separately liable to its own creditors, for judicial efficiency. The only technical requirement of the statute is that "at least one class of claims that is impaired under the plan has accepted the plan" providing for no differentiation to either a substantively consolidated plan or jointly administered plan. It is immaterial whether the Debtors in this case are proceeding as a jointly administered case or a substantively consolidated case because the statute's requirement only concerns itself with "the plan" and there needing to be "at least

one" impaired class in acceptance of the plan, a technical requirement. The technical requirement of § 1129(a)(10) is met because there is a plan, and there is acceptance by at least one impaired class of creditor for the plan. In fact, "all but one of the Debtors' impaired classes accepted the plan." (R. at 30.)

Additionally, none of the creditors involved in the instant case objected to the joint administration of Debtors' cases with the knowledge that the cases of the Debtors were being jointly administered and not substantively consolidated at the beginning of the reorganization efforts under chapter 11 because there is no objection noted in the record. The time to object to joint administration in favor of substantive consolidation would have been early in the proceedings instead of a post hoc claim by the Thirteenth Circuit in support of the per debtor approach. Had Under My Thumb objected at the beginning of the proceedings to joint administration, the Debtors single-purpose entity [Development] would have defeated any request for substantive consolidation" which makes the matter of joint administration or substantive consolidation or de facto substantive consolidation moot. JPMCC 2007-C1 Grasslawn Lodging, L.L.C., 881 F.3d at 733.

Therefore, § 1129(a)(10) should remain the technical requirement that it is and not be blurred with a debate surrounding joint administration or substantive consolidation to make the per debtor approach argument when that debate is moot because a "debtors' single-purpose entity" can defeat substantive consolidation. Id.

C. The Court Should Adopt the "Per Plan" Meaning of § 1129(a)(10) Because the "Per Debtor" Meaning Will Cause Negative Effects in Future Bankruptcy Proceedings and Frustrate the Purpose of the Bankruptcy Code.

The "per plan" approach means that any one impaired class of creditor of any of the debtors in a multi-debtor plan votes in support of the restructuring plan, and the "per debtor" approach means that at least one class of claims of each debtor that is impaired has voted to accept the plan. *See* JPMCC 2007-C1 Grasslawn Lodging, L.L.C., 881 F.3d 724. Section 1129(a)(10) provides that "[i]f 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 any acceptance of the plan by any insider." Id. .

1. The "Per Debtor" Approach is a Pointless Exercise in Futility Because It Can Be Bypassed Legally or Illegally in an Undetectable Manner.

If the Court adopts the "per debtor" approach to § 1129(a)(10), future organizations, in anticipation of not being able to meet the "per debtor" standard, may resort to prohibited gerrymandering of classes to prevent restructuring plan denial by one impaired class of creditor of one of the debtors."[G]errymandering is neither defined nor mentioned in the Bankruptcy code...," but gerrymandering "[d]escribe[s] a very particular practice in the chapter 11 plan confirmation process... and is the placement of substantially similar claims in separate classes for the sole purpose of obtaining acceptance of the plan by at least one impaired class...." In re Bataa/Kierland, L.L.C., 476 B.R. at 563. Aside from gerrymandering, a debtor may contemplate taking on additional debt of the kind of class where it only has one debtor in that debt class. The debtor in the Bataa/Kierland case took on more pre-petition, secured debt by purchasing computer equipment for $5000, in which it was argued the debtor could have paid cash, but chose to finance with a security interest to the creditor, Annoreno. Id. at 561. With the addition of Annoreno's secured claim, the other secured creditor was no longer the sole vote for or against reorganization in that class of creditor for that debtor. The court in Bataa/Kierland held that a debtor can add a pre-petition creditor belonging to a type of class where it only has one creditor, whether unintentionally or intentionally for purposes of chapter 11 plan approval, thereby giving it a friendly voting creditor in the same class. Id. at 558. The court in Bataa/Kierland did not consider this bad faith on the part of Annoreno or the debtor because "[t]here [was] no evidence the vote was cast out of malice, for any improper purpose, or for any reason other than enlightened self-interest consistent with both the voter's and the plan proponent's capacities in the bankruptcy case." Id. at 560. The decision in Bataa/Kierland means that a debtor with only one impaired creditor or no impaired creditor for plan voting purposes can easily circumvent the

minority's "per debtor" approach to § 1129(a)(10) simply by adding a tiny debt of a friendly creditor in the same impaired class, or creating an impaired class as long as the creditor is not an insider. The legal ability of a debtor to add a creditor in the same impaired class renders the minority's "per debtor" approach pointless because it can be bypassed legally, and the "per debtor" approach will not achieve the minority's intended purpose.

Although it is permissible for a creditor to purchase debts of other voting classes of creditors to "protect his own existing claim, [it] does not demonstrate bad faith or ulterior motive" when it is in the "creditor's self-interest as a creditor..." unless it is found that the creditor has a "[m]otive which is ulterior to the purpose of protecting [the] creditor's interest." Id. at 565. However, a creditor may buy other debts of the debtor in bad faith to have the veto power to prevent plan confirmation for reasons other than a creditor's own self-interest, for example, "malice, blackmail, competitive motive, or to obtain more than [the creditor] was entitled to receive on his claim. Id. at 567. Additionally, a creditor's vote would be found to be disqualifying if it were "to benefit some unrelated interest as opposed to his interest as a creditor." Id. at 566. The court in Bataa/Kierland found that creditor, Annoreno, did not have an ulterior motive for his vote, and his vote should not be disqualifying. Id. at 567. Bataa/Kierland is distinguishable from the Debtor's reorganization case before the Court because Development's only impaired class of creditor, when taken under the "per debtor" approach, voted against the plan for reorganization for an express, ulterior motive—unrelated to its interest as a creditor, which was the preservation of its non-exclusive Software, a competitive motive. Therefore, under Bataa/Kierland, Under My Thumb's vote would be disqualified, and the "per debtor" approach again fails because the only vote against the Plan would be disqualified.

2. The "Per Debtor" Approach is Not Fair and Equitable to the Creditors Who Support the Plan or the Debtors who Negotiate in Good Faith.

As a matter of policy, bankruptcy proceedings are to be as fair and equitable as possible to both debtors and creditors. The minority view, the "per debtor" approach, is not an effective or

accurate interpretation of §1129(a)(10), and the "per debtor" approach will serve to regularly defeat joint, multi-debtor, chapter 11 reorganization. The "per debtor" approach halts the entire reorganization proceeding, to the detriment of all the other creditors in the plan who support the plan, when a debtor only has one creditor in an impaired class who votes against the plan, or no creditor in an impaired class. In the case of In re Tribune Co., the court reasoned that in both plans presented to the court in the jointly administered restructuring process, § 1129(a)(10) would require that an impaired class of each debtor vote to accept in order for the plan to be confirmed. In re Tribune Co., 464 B.R. at 201, 206. Both plans presented in the Tribune case were denied confirmation because, in the first plan, there was not an impaired class voting acceptance for each debtor, and, in the second plan, it failed under the "per debtor" standard because one debtor had no impaired class to cast a vote for approval. Id. at 180. The "per debtor" approach blocked, not just one plan, but both plans causing a stalemate.

The Debtors in the instant case have come together in good faith, even though only jointly administered, to provide a fair plan for all creditors who benefit by the Debtors' willingness to pull its monies together to afford a better settlement for their respective creditors. This is true because there was overwhelming support for the plan by all the creditors, and even by Under My Thumb initially. It wasn't until Under My Thumb learned of the cash infusion from SFD that it withdrew its support for the plan. Under My Thumb was set to receive more from this jointly administered plan than it could have received from a separate bankruptcy action with Development. Under My Thumb exhibited bad faith by withdrawing its support from the plan, and it is neither fair nor equitable for a court to allow a creditor, acting in bad faith, to disrupt a bankruptcy action by way of the "per debtor" approach to serve the creditor's unrelated, express, ulterior motive.

Therefore, the Court should maintain the majority's view that § 1129(a)(10) should remain a "per plan" standard to plan acceptance, as it is written, overruling the District of Delaware's minority

view, the "per debtor" standard, and reversing the decision of the Court of Appeals for the Thirteenth Circuit's decision in the instant case.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Thirteenth Circuit and remand the case to the Thirteenth Circuit with instructions to confirm the Debtors' *Joint Plan of Reorganization.*

Dated this 21st day of January 2020.

Respectfully submitted,

TEAM # 42 P
Counsel for Petitioner

APPENDIX

I. SECTION 365 – EXECUTORY CONTRACTS AND UNEXPIRED LEASES

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)

(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title;

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or

(D) the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance—

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.
(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.
(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—
(1)
(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and
(B) such party does not consent to such assumption or assignment; or
(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or
(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.
(d)
(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.
(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.
(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.
(4)
(A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of—

(i) the date that is 120 days after the date of the order for relief; or
(ii) the date of the entry of an order confirming a plan.
(B)
(i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.
(ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.
(5) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.
(e)
(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—
(A) the insolvency or financial condition of the debtor at any time before the closing of the case;
(B) the commencement of a case under this title; or
(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.
(2) Paragraph (1) of this subsection does not apply to an 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—
(A)
(i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and
(ii) such party does not consent to such assumption or assignment; or
(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.
(f)
(1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if—
(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and
(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.
(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.
(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—
(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or
(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title—
(A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or
(B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title—
(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or
(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.
(h)
(1)
(A) If the trustee rejects an unexpired lease of real property under which the debtor is the lessor and—
(i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or
(ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.
(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease and for the term of any renewal or extension of such lease, the value of any damage caused by the nonperformance after the date of such rejection,

of any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.
(C) The rejection of a lease of real property in a shopping center with respect to which the lessee elects to retain its rights under subparagraph (A)(ii) does not affect the enforceability under applicable nonbankruptcy law of any provision in the lease pertaining to radius, location, use, exclusivity, or tenant mix or balance.
(D) In this paragraph, "lessee" includes any successor, assign, or mortgagee permitted under the terms of such lease.
(2)
(A) If the trustee rejects a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller and—
(i) if the rejection amounts to such a breach as would entitle the timeshare interest purchaser to treat the timeshare plan as terminated under its terms, applicable nonbankruptcy law, or any agreement made by timeshare interest purchaser, the timeshare interest purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection; or
(ii) if the term of such timeshare interest has commenced, then the timeshare interest purchaser may retain its rights in such timeshare interest for the balance of such term and for any term of renewal or extension of such timeshare interest to the extent that such rights are enforceable under applicable nonbankruptcy law.
(B) If the timeshare interest purchaser retains its rights under subparagraph (A), such timeshare interest purchaser may offset against the moneys due for such timeshare interest for the balance of the term after the date of the rejection of such timeshare interest, and the term of any renewal or extension of such timeshare interest, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such timeshare plan, but the timeshare interest purchaser shall not have any right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.
(i)
(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.
(2) If such purchaser remains in possession—
(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and
(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.
(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.
(l) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.
(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.
(n)
(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—
(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or
(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for—
(i) the duration of such contract; and
(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.
(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract—
(A) the trustee shall allow the licensee to exercise such rights;
(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and
(C) the licensee shall be deemed to waive—
(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and
(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.
(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall—
(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and
(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.
(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract or any agreement supplementary to such contract—
(i) perform such contract; or
(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and
(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.
(o) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.
(p)
(1) If a lease of personal property is rejected or not timely assumed by the trustee under subsection (d), the leased property is no longer property of the estate and the stay under section 362(a) is automatically terminated.
(2)
(A) If the debtor in a case under chapter 7 is an individual, the debtor may notify the creditor in writing that the debtor desires to assume the lease. Upon being so notified, the creditor may, at its option, notify the debtor that it is willing to have the lease assumed by the debtor and may condition such assumption on cure of any outstanding default on terms set by the contract.
(B) If, not later than 30 days after notice is provided under subparagraph (A), the debtor notifies the lessor in writing that the lease is assumed, the liability under the lease will be assumed by the debtor and not by the estate.
(C) The stay under section 362 and the injunction under section 524(a)(2) shall not be violated by notification of the debtor and negotiation of cure under this subsection.
(3) In a case under chapter 11 in which the debtor is an individual and in a case under chapter 13, if the debtor is the lessee with respect to personal property and the lease is not assumed in the plan confirmed by the court, the lease is deemed rejected as of the conclusion of the hearing on confirmation. If the lease is rejected, the stay under section 362 and any stay under section 1301 is automatically terminated with respect to the property subject to the lease.

Executory Contracts and Unexpired Leases, 11 U.S.C. § 365 (2019).

No. 19-1004

IN THE

Supreme Court of the United States

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

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

V.

UNDER MY THUMB, INC., RESPONDENT.

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

CERTIFICATE OF COMPLIANCE

Team # 42 P
Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the word count of the Brief for Petitioners is 9,615 which is in compliance with Supreme Court Fed. R. Bankr. P. 33.1(g).

Dated this 21st day of January 2020.

Respectfully submitted,

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I, TEAM #42, counsel for the Petitioners, Tumbling Dice, Inc., Tumbling Dice Atlantic City, L.L.C., Tumbling Dice Chicagoland, L.L.C., Tumbling Dice Detroit, L.L.C., Tumbling Dice Lake Tahoe, L.L.C., Tumbling Dice Las Vegas, L.L.C., Tumbling Dice New Orleans, L.L.C., Tumbling Dice Palm Springs, L.L.C., Tumbling Dice Tunica, L.L.C., and Tumbling Dice Development, L.L.C., hereby certify that on this 21st day of January, 2020, I caused a copy of the Brief for Petitioners to be served by posting on the Competition website located at www.stjohns.edu/law/duberstein in compliance with the Official Rules of the 28th Annual Duberstein Bankruptcy Moot Court Competition § X(b).

I further certify that all parties required to be served have been served.

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