Team # 43 R

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 THIRTEENTH CIRCUIT

BRIEF FOR THE RESPONDENT

Team # 43 R
Counsel for Respondent

QUESTIONS PRESENTED

1. Whether 11 U.S.C. § 365(c)(1) 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, 11 U.S.C. § 1129(a)(10) 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?

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The opinion for the United States Court of Appeals for the Thirteenth Circuit is currently unreported but is recommended for full text publication and can be found at *Under My Thumb, Inc. v. Tumbling Dice, Inc. et al. (In re Tumbling Dice, Inc.)*, Case No. 18-0805 (13th Cir. 2019).

STATEMENT OF JURISDICTION

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

STATEMENT OF THE CASE

I. Factual Background

The issues in this case arise out of the jointly administered chapter 11 bankruptcy cases of Tumbling Dice, Inc. and its affiliated debtors (collectively, the "Debtors"). The Debtors are the owners and operators of eight casino and resort properties scattered throughout the United States. R. at *2-3.

On January 11, 2016, the Debtors commenced voluntary cases under chapter 11 of the Bankruptcy Code. R. at *3. The Debtors' cases were jointly administered for the convenience of the parties and the court pursuant to Bankruptcy Rule 1015(b). The lead bankruptcy case was filed by Tumbling Dice, Inc. ("TDI"), a holding company formed to own the membership interests of its nine wholly-owned debtor-subsidiaries. *Id.* at *4. Eight of the debtor-subsidiaries each operate a luxury casino and resort (each an "Operating Debtor" and collectively, the "Operating Debtors"). The remaining debtor-subsidiary, Tumbling Dice Development, LLC ("Development"), acts as the licensee under a non-exclusive software license agreement with Under My Thumb, Inc. ("Under My Thumb"). *Id.* The Debtors altogether constitute one of the largest gaming operations in the United States. *Id.*

Approximately thirty years ago, the Debtors launched their casino loyalty program, Club Satisfaction, to incentivize and reward members who frequently engage in gaming and other activities at their properties. *Id.* Some incentives and rewards that the Debtors offered to members include the following: free and discounted nights at their hotels; complimentary meals and drinks at their in-house chain of steakhouses, Beggars Banquet; VIP seating for concerts at their in-house concert venue, The Voodoo Lounge; private chefs' table dinners; and a variety of other perks. *Id.*

In 2008, Development contracted with Under my Thumb, a leading software designer that specializes in customer loyalty and reservation programs for the hospitality industry, to create an inclusive, cohesive software system that would modernize Club Satisfaction. *Id.* Pursuant to a Research and Development Agreement between both parties, Under My Thumb incurred approximately $10 million in costs to create the Club Satisfaction software (the "Software"). *Id.* This development process took nearly a year, and Development agreed to reimburse Under My Thumb for a portion of these costs pursuant to an unsecured $7 million promissory note (the "R&D Note"). *Id.*

Once the Software was completed, Under My Thumb and Development entered into a license agreement (the "Agreement") that granted Development a non-exclusive license to use Under My Thumb's copyrighted and patented Software and permitted Development to "extend the benefits of the Agreement to its affiliated entities only[,]" even though such affiliated entities were technically not parties to the Agreement. *Id.* at *5. The Agreement largely prohibited the Debtors from assigning or sublicensing their rights to other without Under My Thumb's express written consent. *Id.* Development agreed to pay Under My Thumb a monthly fee that was calculated based on the amount of spending activity by Club Satisfaction members in exchange for the non-exclusive license. *Id.*

The new and improved modernized version of Club Satisfaction was a huge success for both Debtors and Under My Thumb—so much that membership in Club Satisfaction tripled and members started spending more money at the Debtors' properties, and Under My Thumb received higher than expected payments under the Agreement each month due to the rising popularity of the new and improved version of Club Satisfaction. *Id.* at *5-6. The Debtors religiously paid the monthly fee under the R&D Note until June 2015 when they abruptly ceased making payments. *Id.* at 6.

Tracing back to December 2011, the stock of TDI was acquired by a hedge fund, Start Me Up. Inc., through a leveraged buy-out. *Id.* As part of the transaction, TDI and the eight Operating Debtors granted first priority liens on their assets to a syndicated group of lenders (the "Lenders") in exchange for a loan in the amount of $3 billion. *Id.* Because of the non-exclusive nature of the Software license and certain restrictive covenants in the loan agreement, the Lenders did not require Development to act as a borrower or guarantor under the credit facility. *Id.*

The leveraged buy-out transaction generated a massive and unserviceable debt, and the Debtors commenced these chapter 11 cases in January of 2016. *Id.* As of the petition date to the United States Court of Appeals for the Thirteenth Circuit, TDI and each of the Operating Debtors jointly and severally owed the Lenders approximately $2.8 billion. *Id.* The Debtors acknowledged in their first day filings that a primary goal in these bankruptcy cases was to negotiate a deal with the Lenders to either restructure or refinance their debt load. *Id.* In addition, the Debtors also owed an estimated $120 million more to their unsecured creditors, including Under My Thumb, who was still owed over $6 million under the R&D Note. *Id.*

The bankruptcy court ordered non-binding mediation involving the Debtors, Start Me Up, the Lenders, the unsecured creditors' committee, and other stakeholders, and after negotiations, the Debtors announced that a deal had been reached, the terms of which were memorialized in a plan support agreement. *Id.* at *6-7. However, Under My Thumb was notably left out of these lengthy negotiations. *Id.* The plan support agreement contemplated that the Debtors would restructure substantially all of the secured indebtedness owed to the Lenders by agreeing to a lower interest rate and extending payments over a period of twenty years. *Id.* at *7. Furthermore, Start

Me Up was required to inject new capital in order to fund a 55% distribution to unsecured creditors. *Id.*

In August of 2016, the Debtors filed the Plan and disclosure statement. *Id.* The Plan was a joint plan—one plan was filed on behalf of all of the Debtors. *Id.* Importantly, the plan expressly stated that "the Debtors' estates are not being substantively consolidated [sic] and no Debtor is to become liable for the obligations of another." *Id.* With respect to Under My Thumb, the Plan proposed to assume the Agreement under §§ 365 and 1123(b)(2), and Under My Thumb would continue to receive the monthly payments for the use of the Software under the Agreement. *Id.* Although the Plan provided for a pro rata distribution of $66 million to the Debtor's unsecured creditors, including the $6 million plus obligation owed by Development to Under My Thumb, Under My Thumb's perception of the Plan quickly changed from favorably to very suspicious. *Id.*

Under My Thumb discovered upon careful review of the disclosure statement that Start Me Up was only directly funding $31 million of the $66 million unsecured distribution, and the remaining $35 million was being invested by Sympathy for the Devil, LP ("SFD"), a private equity group. *Id.* at *7-8. In return of the $35 million investment, SFD would receive 51% of the voting shares of the reorganized TDI and several seats on its reconstituted board of directors. *Id.* at *8. Moreover, SFD's portfolio of companies includes a direct competitor of Under My Thumb who had, for several years, tried to replicate the Software. *Id.*

The Plan received near universal support from creditor groups with each of TDI and the Operating Debtors had at least one impaired accepting class of creditors, except for Development. *Id.* Under My Thumb, who controlled Development's only class of creditors, was immediately concerned with SFD's potential access to the Software and voted to reject the Plan. *Id.* Development therefore had no impaired accepting class of creditors. *Id.*

II. Procedural History

Under My Thumb timely objected to the Plan on various grounds, only two of which it pursued on appeal. R. at *8. The first issue Under My Thumb argued was that the proposed assumption of the Agreement by the Debtors was prohibited under § 365(c)(1) of the Bankruptcy Code because applicable non-bankruptcy law excused performance by Under My Thumb in the absence of its consent, which it was not giving. *Id.* The second issue Under My Thumb argued was that the Plan was not confirmable under § 1129(a)(10) because no impaired class of creditors of Development had voted to accept it. *Id.*

The bankruptcy court overruled Under My Thumb's objections and confirmed the Plan. *Id.* The bankruptcy adopted the "actual test" and held that Development could assume the Agreement under §365(c)(1) concluding that Under My Thumb was being asked to do nothing more than honor its existing contractual obligation with Development. *Id.* at *8-9. Regarding the second objection, the bankruptcy court held that § 1129(a)(10) is satisfied where at least one impaired class in a joint, multi-debtor plan accepts the plan. *Id.* at *9. The bankruptcy court noted that all but one of the Debtors' impaired classes voted to accept the Plan, and the court rejected Under My Thumb's argument that the Plan was not confirmable because no impaired class of Development voted in favor of it. *Id.* On appeal, the Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the rulings of the bankruptcy court on both issues. *Id.*

Under My Thumb timely appealed the Bankruptcy Appellate Panel for the Thirteenth Circuit's decision to the United States Court of Appeals for the Thirteenth Circuit. The Thirteenth Circuit reviewed the bankruptcy court's decision directly, not the appellate panel's review of the bankruptcy court's decision, under a de novo standard of review. *Id.*

The Thirteenth Circuit reversed the bankruptcy court's determination on both issues. *Id.* at *15, *21. Regarding the first issue, the Thirteenth Circuit addressed the importance of federal law on intellectual property licenses and determined that the Agreement is a license of intellectual property that is not assignable under non-bankruptcy law. *Id.* at *11. In order to resolve the meaning of § 365(c)(1) as to whether the "hypothetical test" or "actual test" applies, the Thirteenth Circuit first looked at the language of § 365(c)(1) and concluded that the statutory language was unambiguous. *Id.* at *12. Further, the court adopted the "hypothetical test" because it found that § 365(c)(1) is drawn in the disjunctive and, by the statute's plain language, prohibits a licensee from "assuming *or* assigning," rather than from "assuming *and* assigning," the Agreement. *Id.* (emphasis in original).

Additionally, the court determined that §§ 365(c)(1) and (f)(1) do not conflict because federal intellectual property law is predicated on the rationale that the identity of the licensee is material to the agreement. *Id.* at *14. The court refused to accept the Debtors' argument that applying the statute's plain language is inconsistent the general bankruptcy policies of fostering a successful reorganization and maximizing the value of the debtor's assets because the court recognized that the Bankruptcy Code also contains many provisions preserving the rights of non-debtor parties, even though the Code is generally favorable to debtors. *Id.* Furthermore, the court addressed this Court's repeated emphasis that "[a]chieving a better policy outcome … is a task for Congress, not the courts." *Id.* (external citations omitted). Thus, the Thirteenth Circuit held that § 365(c)(1) precluded Development from assuming the Agreement absent the consent of Under My Thumb. *Id.* at *15.

As for reasoning its basis on reversing the bankruptcy court's decision regarding the second issue, the Thirteenth Circuit addressed that "section 1129(a)(10) represents a powerful and important safeguard for impaired, objecting creditors." *Id.* at *16. The court acknowledge that there is yet again a split of authority on the issue of whether §1129(a)(10) is a per debtor or per plan requirement, but ultimately held that § 1129(a)(10) must be analyzed on a *per debtor*, not a *per plan*, basis. *Id.* at *17 (emphasis in original). The court expanded on its reasoning that § 1129(a)(10) must be analyzed on a per debtor basis because the Debtors did not seek substantive consolidation but instead pursued one "joint" chapter 11 plan of reorganization for all ten debtors. *Id.* at *18.

The court again looked at the plain language of § 1129(a)(10) and determined that the Bankruptcy Code's statutory rules of construction include the rule that "the singular includes the plural." *Id.* at *19 (*citing* 11 U.S.C. § 102(7)). The court explained that "the fact that section 1129(a)(10) refers to 'the 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.* Moreover, the court emphasized that substantive consolidation is a judicially created equitable remedy in bankruptcy that is to be used sparingly given its extraordinary nature in ignoring corporate separateness, and the court refused to substantively consolidate the debtors. *Id.* at *18, *20. In sum, the court reversed the decision of the bankruptcy court and concluded that § 1129(a)(10) was intended to ensure that a debtor's plan for reorganization would give objecting impaired creditors, such as Under My Thumb, a substantive protection in their voting rights. *Id.* at *21.

TDI brings this timely appeal seeking to persuade this Court to overturn the Thirteenth Circuit's decisions that §365(c)(1) precludes assumption of a non-exclusive license of intellectual property over the objection of the licensor and that § 1129(a)(10) requires acceptance from an impaired class of claims of each debtor under a joint, multi-debtor plan.

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Thirteenth Circuit faithfully and correctly applied the plain meaning of the statutes at issue in its decision to accept Under My Thumb's objections to the Debtor's *Joint Plan of Reorganization*. As a result of that court's careful consideration and application of the Bankruptcy Code, its holding should be affirmed as to both issues. The plain language is the starting point in all statutory interpretation cases, and courts are to presume that congress said in a statute what it meant. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). Only where the language of a statute is ambiguous and unclear will the court be permitted to look beyond the plain text. *Id*. at 254.

First, under the plain language of § 365(c)(1), the Debtors should be prohibited from assuming the Agreement because federal patent law excuses Under My Thumb from accepting performance from or rendering performance to an entity other than TDI, with whom it contracted, and Under My Thumb has refused to give its consent to the assumption. The plain language of § 365(c)(1) neither conflicts with its neighboring provisions causing a surplusage, nor runs so contrary to general bankruptcy policy. Therefore, this Court should follow the Thirteenth Circuit's lead and faithfully apply the plain language of § 365(c)(1) to conclude that the Debtors are prohibited from assuming the Agreement with Under My Thumb.

Additionally, under § 1129(a)(10), the Debtors' Joint Plan requires a per debtor approach because the Plan was not substantively consolidated. The plain language of § 1129(a)(10) is ambiguous, rendering it insufficient on its own for a court to conclude that only one accepted impaired class is required for a chapter 11 plan involving multiple debtors. Although some courts have held that a per plan approach is more appropriate, those cases' determinations were not focused on whether § 1129(a)(10) requires a per debtor or per plan approach. Therefore, this Court should follow the Thirteenth Circuit's determination that § 1129(a)(10) should be interpreted as requiring one impaired approving class per debtor in a jointly administered estate so that the statutory voting rights of objecting creditors are protected.

For these reasons, this Court should affirm the Thirteenth Circuit's holding and accept both of Under My Thumb's objections regarding the confirmation of the Debtor's *Joint Plan of Reorganization*.

ARGUMENT

STANDARD OF REVIEW

Because both issues on appeal in this case concern the correct interpretation of the Bankruptcy Code as a matter of law, the standard of review is de novo. *See Highmark, Inc. v. Allcare Health Management System, Inc.,* 572 U.S. 559, 563 (2014) ("Traditionally, decisions on 'questions of law' are 'reviewable *de novo*[.]'" (quoting *Pierce v. Underwood*, 487 U.S. 552, 558 (1998))).

I. § 365(c)(1) PROHIBITS THE DEBTORS FROM ASSUMING THE NON-EXCLUSIVE LICENSE AGREEMENT OVER THE OBJECTION OF UNDER MY THUMB.

Under the plain language of § 365(c)(1), the Debtors should be prohibited from assuming the Agreement because federal patent law excuses Under My Thumb from accepting performance from or rendering performance to an entity other than TDI, with whom it contracted, and Under My Thumb has refused to give its consent to the assumption. In chapter 11 cases, business debtors are permitted to continue management and control of their business and its assets, taking on the role of debtor in possession. Subject to the limitations of the court, debtors in possession generally hold the same rights, powers, and duties as trustees under chapter 11 of the Bankruptcy Code. 11 U.S.C. § 1107. § 365(a) of the Bankruptcy Code gives a trustee (and thus, a debtor in possession) the power to "assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). However, this subsection (a), which gives the debtor in possession the power to assume the executory contracts of the debtor, is expressly limited by subsequent subsections (b), (c), and (d).

§ 365(c)(1), in particular, states in relevant part:

> (c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—
>
> > (1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and
> >
> > (B) such party does not consent to such assumption or assignment; …

11 U.S.C. § 365(c). Although there is a division among lower courts regarding the proper interpretation of § 365(c)(1), the plain language of the statute should always be the starting point and unless "there is some ambiguity in the language of a statute, a court's analysis must end with the statute's plain language." *Hillman v. IRS*, 263 F.3d 338, 342 (4th Cir. 2001). A plain reading of § 365(c)(1) clearly and unambiguously prohibits the debtor in possession from assuming an executory contract, absent the non-debtor's consent, where applicable non-bankruptcy law precludes assignment of the contract to a third party. *In re James Cable Partners*, L.P., 27 F.3d 534, 537 (11th Cir. 1994).

Here, the Debtors attempt to assume Development's Agreement with Under My Thumb (over their objection) for a non-exclusive license of patented and copyrighted software pursuant to their chapter 11 plan. In order to fall within the limited scope of § 365(c)(1), the contract to be assumed must be considered "executory," and applicable non-bankruptcy law must prohibit assignment of the executory contract. Under the widely recognized "Countryman test", a contract will be deemed executory if "the obligations of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete the performance would constitute a material breach excusing the performance of the other." *In re Sunterra Corp.*, 361 F.3d 257, 264 (4th Cir. 2004). Because both Development and Under My Thumb still owed continuing material duties and obligations under the Agreement when the bankruptcy petition was filed, the Agreement is an executory contract. Furthermore, "long standing federal rule of law with respect to the assignability of [intellectual property licenses] provides that these agreements are personal to the licensee and not assignable unless expressly made so in the agreement." *Unarco Indus., Inc. v. Kelley Co., Inc.*, 465 F.2d 1303, 1306 (7th Cir. 1972). Because the Agreement between Development and Under My Thumb is an executory contract and federal intellectual property law prohibits the assignment of intellectual property licenses without the consent of the licensor, this action falls under the scope of § 365(c)(1). Therefore, pursuant to the plain language of § 365(c)(1), the Debtors should be prohibited from assuming the Agreement with Under My Thumb, absent the latter's consent.

A. Federal Patent Law Excuses Under My Thumb from Accepting Performance From or Rendering Performance to an Entity Other than Development Under § 365(c)(1).

Under federal patent law, licensees are prohibited from assigning their license contracted rights absent clear language in the agreement or the express consent of the licensor. *Unarco Indus., Inc. v. Kelley Co., Inc.*, 465 F.2d 1303, 1306 (7th Cir. 1972). This federal common law developed as a direct reflection of the long-standing belief that at the core of the patent holder's rights is the ability to control access who has access to his property. *Herman v. Youngstown Car Mfg. Co.*, 191 F. 579, 584-85 (6th Cir. 1911) § 365(c)(1) prohibits a debtor in possession from assuming or assigning an executory contract when applicable law excuses the other contracting party from "accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession… and such party does not consent to the assumption or assignment…" 11 U.S.C. § 365(c)(1). Because federal patent law unquestionably excuses a licensor from rendering performance to accepting performance from any entity or individual other than its licensee, the Debtors should be prohibited from assuming or assigning the Agreement with Under My Thumb, absent consent.

The first question presented during the application of § 365(c)(1) is whether, under applicable law, the non-debtor is excused from accepting performance from a third party. To answer this question, the threshold inquiry is what constitutes "applicable law" within the meaning of the statute. In *In re James Cable*, the Eleventh Circuit Court of Appeals discussed the scope of the "applicable law" referenced in subsection (c) of § 365, explaining that it "must mean 'applicable law' other than general prohibitions barring assignment." 27 F.3d at 538. Subsection (c) focuses on the specific excuse prohibiting assignment, and only "anti-assignment law predicated on the rationale that the identity of the contracting party is material to the agreement" will be sufficient to restrict assumption § 365 (c). *In re Sunterra Corp.*, 361 F.3d at 266-67. This case involves the assumption of a non-exclusive license of patented and copyrighted software (intellectual property). As such, the "applicable law" to be applied in this case is federal intellectual property law, specifically federal patent law. Therefore, applying subsection (c) to this case presents the question whether federal patent law excuses Under My Thumb from accepting performance under the Agreement from an entity other than Development.

Property rights, which undoubtedly include intellectual property rights, have been a foundation of the American legal system and American society at large since its independence. In particular, the Founding Fathers made clear their intention to promote and protect strong patent rights by explicitly granting Congress the power "[t]o 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" in Article I § 8 of the Constitution. U.S. Constitution Art. I, § 8, c. 8. Congress implemented the "Patent Clause" Art. I § 8 through a series of federal acts and exclusive-use policies aimed at protecting the rights and ideas of inventors and innovators in order to encourage the advancement of knowledge and technology. Jennifer Ying, *The Plain Meaning of Section 365(c): The Tension Between Bankruptcy and Patent Law in Patent Licensing*, 158 U. Pa. L. Rev. 1235 (2010).

As the United States and the rest of the world increasingly shifted from industrial to data and technology-based economies, the importance of strong patent and other intellectual property rights has only increased. *Id*. at 1240. As a general rule, "[t]here is no federal general common law." *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938). This Court, however, has recognized federal common law where a federal rule is "necessary to protect uniquely federal interests." *Texas Indus., Inc. v. Radcliff Materials, Inc*., 451 U.S. 630, 640 (1981) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964)). In recognition of the importance of intellectual property law and congress's express intention to protect these rights, this Court has allowed the development of a federal common law to govern the transferability of intellectual property rights. *See Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150-51 (1989) (acknowledging that uniformity of federal patent protection is a high priority); *see also Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 645 (1999) ("The need for uniformity in the construction of patent law is undoubtedly important,"). If this federal common law prohibits the assignment of patent licenses absent the consent of the licensor, then the Debtors are precluded from assuming the Agreement with Under My Thumb.

Since as early as 1852, the default federal common law rule has been that agreements granting patent licenses are personal, and as such are nondelegable absent the express consent of the licensor. *See Troy Iron & Nail v. Corning*, 55 U.S. 193, 216 (1852) ("A mere license to a party, without having his assigns or equivalent words to them, showing that it was meant to be assignable, is only the grant of a personal power to the licensees, and is not transferable by him to another…"). Even after *Erie* established the general rule that there is no federal general common law, federal courts have not hesitated to apply this default common law rule of patent non-assignability. *See Unarco Indus., Inc. v. Kelley Co.*, 465 F.2d 1303, 1306 (7th Cir. 1972); *and PPG Industries, Inc. v. Guardian Industries Corp.*, 597 F.2d 1090, 1093 (6th Cir. 1979). Therefore, because federal patent law prohibits the assignment of a patent license absent the consent of the licensor, "applicable law," as required by § 365 (c)(1), excuses Under My Thumb from rendering performance to or accepting performance from an entity other than Development and as such the Debtors shall be prohibited from assuming the Agreement.

However, subsection (c)(1) does not restrict the debtor in possession's ability to assume executory contracts based on broad or general prohibition on assumption. It more specifically focuses on the reason *why* the applicable non-bankruptcy law bans assignment. *In re Catapult Entm't, Inc.*, 165 F.3d 747, 752 (9th Cir. 1999) (emphasis added). Under § 365, assumption is only prohibited when, under applicable non-bankruptcy law, "the contracting party is excused from accepting performance from a third party under circumstances where it is clear from the statute that the identity of the contracting party is crucial to the contract." *In re Trump Entm't Resorts, Inc.*, 525 B.R. 116, 123 (Bankr. D. Del. 2015). Here, it has been established that federal patent law is the "applicable law" under § 365(c)(1). This Court has recognized two main purposes of federal patent law: first, to promote the progress of science and useful arts; and second, to protect the patent holder form infringement for a period of years. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 478 (1974). The ability to exclude others from use or access to the patented product or technology is central to the second (and most important) purpose of federal patent law, the protection of the patent holder. Fundamental to this protection is the owner's ability to limit and control (therefore exclude) who has access to their patent. Thus, federal patent law, which prohibits the assignment of a license absent the express consent of the licensor, falls within the scope of the "applicable law" contemplated in § 365(c)(1) and should be applied to the statute in this case. Applying federal patent law to the plain language of § 365(c)(1), the Debtors should be prohibited from assuming the Agreement with Under My Thumb, absent consent.

B. A Plain Language Reading of § 365(c)(1) Clearly and Unambiguously Prohibits Debtors from Assuming the Agreement With Under My Thumb.

A literal application of § 365(c)(1) prohibits the Debtors from assuming the Agreement with Under My Thumb absent their consent. The plain language is the starting point in all statutory interpretation cases, and courts are to presume that congress said in a statute what it meant. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). Only where the language of a statute is ambiguous and unclear will the court be permitted to look beyond the plain text. *Id.* at 254. Ultimately, the plain language reading of § 365(c)(1) is unambiguous and requires the court to apply the "hypothetical test" which reads § 365(c)(1) literally to mean that a debtor in possession may assume an executory contract only if *hypothetically* it would be permitted to assign that contract to a third party. Critics of the hypothetical test reject the plain-meaning application of § 365(c)(1), arguing that it conflicts with its own subsequent provisions and general bankruptcy policy. However, the majority of circuit courts agree that the plain language of § 365(c)(1) neither conflicts with its neighboring provisions causing a surplusage, nor runs so contrary to general bankruptcy policy as to produce an absurd result. Therefore, this Court should faithfully apply the plain language of § 365(c)(1) and conclude that the Debtors are prohibited from assuming the Agreement with Under My Thumb.

1. The Plain Language Reading of § 365(c)(1) Requires the Court to Apply the Hypothetical Test to Determine Whether a Software License Agreement Can Be Assumed Over the Objection of a Licensor.

This Court should hold that a straightforward application of § 365(c)(1) prohibits the Debtors from assuming a license agreement without Under My Thumb's consent. As in all statutory interpretation cases, courts first begin with the statutory language. *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989). This Court has instructed lower courts to "presume that a legislature says in a statute what it means and means in a statute what it says there…. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Germain*, 503 U.S. at 253-54 (1992). Likewise, although there is a division among federal circuit courts regarding the proper interpretation of § 365(c)(1), the plain language of the statute should always be the starting point, and unless "there is some ambiguity in the language of a statute, a court's analysis must end with the statute's plain language." *Hillman v. I.R.S.*, 263 F.3d 338, 342 (4th Cir. 2001).

The plain-meaning rule of statutory interpretation requires that when the statutory language "is plain and admits of no more than one meaning," the court should not try to "interpret" the statute. Jennifer Ying, *The Plain Meaning of Section 365(c): The Tension Between Bankruptcy and Patent Law in Patent Licensing*, 158 U. Pa. L. Rev. 1225, 1258 (2010). A plain reading of § 365(c)(1) clearly and unambiguously prohibits the debtor in possession from assuming an executory contract, absent the non-debtor's consent, where applicable non-bankruptcy law precludes assignment of the contract to a third party. *In re James Cable Partners, L.P.*, 27 F.3d 534, 537 (11th Cir. 1994). The language of § 365(c) reads, in pertinent part, that "[t]he trustee may not assume *or* assign any executory contract . . . of the debtor. *Id.* (*citing* 11 U.S.C. § 365(c) (emphasis added)). Even though the statute clearly says "assume *or* assign," the dispute between the hypothetical and actual test focuses on whether the "or" in the phrase should be read as a disjunctive "or" or as a conjunctive "and." *Id.*

Reading the "or" literally as a disjunctive, § 365(c) states that the bankruptcy trustee or a debtor in possession[1] can *neither assume nor assign* an executory contract if "applicable law excuses a party, other than the debtor, … from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession … [and] such party does not consent to such assumption or assignment." *Id.* at 1258-59 (emphasis added). Thus, the act of assuming an executory contract is an event *separate and distinct* from assigning the executory contract. It follows that the conditions of § 365(c)(1) must apply equally to both the assumption and assignment prongs. *See* 1 David G. Epstein, Steve H. Nickles & James J. White, *Bankruptcy* § 5-15 at 474 (1992) ("link[s] nonassignability under 'applicable law' together with a prohibition on assumption in bankruptcy"). Accordingly, a debtor must reject the contract if applicable law forbids the debtor from assuming *or* assigning the contract.

The Third, Fourth, Ninth, and Eleventh Circuits have adopted the "hypothetical test" and interpreted § 365(c)(1) to mean that a debtor in possession may assume an executory contract only if *hypothetically* it would be permitted to assign that contract to a third party. *See In re West Elecs.*, 852 F.2d at 83 (characterizing § 365(c)(1)(A) as posing a "hypothetical question"); *In re Catron*, 158 B.R. 629, 633-38 (Bankr. E.D. Va. 1993) (same), *aff'd without op.*, 25 F.3d 1038 (4th Cir. 1994); *In re Catapult Entm't, Inc.*, 165 F.3d 747, 750 (9th Cir. 1999) (same); *In re James Cable Partners*, 27 F.3d at 537 (same). In other words, if the debtor in possession lacks hypothetical

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[1] The term "trustee" as used in the statute includes a chapter 11 debtor in possession. *In re Sunterra Corp.*, 361 F.3d 257, n. 5 (4th Cir. 2004).

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.

As stated above, the applicable law is federal intellectual property law because the dispute involves a license for copyrighted and patented software. Thus, in the context of patent licensing, the applicable law is the federal common law principle of patent nonassignability, which forbids the debtor from transferring the license without the licensor's explicit consent. *See, e.g., Unarco Indus., Inc. v. Kelley Co., Inc.*, 465 F.2d 1303, 1306 (7th Cir. 1972) ("[L]ong standing federal rule of law with respect to the nonassignability of [intellectual property licenses] provides that these agreements are personal to the licensee and not assignable unless expressly made so in the agreement."); *In re Trump Entm't Resorts, Inc.*, 526 B.R. 116, 123-25 (Bankr. D. Del. 2015). *See also Rhone Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 271 F.3d 1081 (Fed. Cir. 2001) (discussing the principle of nontransferability of patents found in federal common law), *vacated on other grounds en banc*, 284 F.3d 1323 (Fed. Cir. 2002)).

Furthermore, a debtor in possession *is a separate legal entity* from the original debtor, and the bankruptcy estate is considered to have a separate legal existence than that of the debtor who filed the case. *See* 11 U.S.C. § 541(a) (the Bankruptcy Code defines "property of the estate" as "all legal and equitable interest of the debtor in property as of the commencement of the case" thereby indicating that the bankruptcy estate is considered to have a separate legal existence than that of the debtor who filed the case). Likewise, courts have also interpreted a debtor's bankruptcy estate to include the debtor's contractual rights. *See, e.g., Quarles House Apartments v. Plunkett (In re Plunkett)*, 23 B.R. 392, 294 (Bankr. E.D. Wis. 1982) (noting that courts have interpreted § 541 as "protect[ing] a debtor's contractual right as an asset of the estate"). Therefore, if § 365(c)(1)(A) does not contain the language "debtor or debtor in possession," it is likely that the federal common law principle of patent nonassignability would also prohibit assumption of the license on the ground that the debtor is no longer the same legal entity as it was before it entered bankruptcy. *See In re West Elecs. Inc.*, 852 F.2d 79, 83 (3d Cir. 1988) ("[I]n the context of the assumption and assignment of executory contracts, a solvent contractor and an insolvent debtor in possession going through bankruptcy are materially distinct entities.").

In this case, the precise issue is whether the Debtors can assume the Agreement with Under My Thumb, so the focus is on the "assumption prong" of § 365(c). Ultimately, the plain language reading of § 365(c)(1) is unambiguous and prohibits the Debtors from assuming a license without Under My Thumb's consent. Applying the conditions of § 365(c)(1) to the assumption prong of § 365(c), the statute would read, "The trustee [or debtor in possession] may not assume … any executory contract … if applicable law excuses a party … from accepting performance from or rendering performance to an entity other than the debtor or debtor in possession." 11 U.S.C. § 365(c)(1)(A). Applying the statute to our facts is straightforward:

> (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* …; and
> >
> > (B) *Under My Thumb* does not consent to such assumption ….

Id. (substitutions in italics). Moreover, because a debtor in possession *is a separate legal entity* from the original debtor and because § 365(c)(1)(A) does not contain the language "debtor or debtor in possession," it is likely that patent nonassignability would also forbid assumption of the Agreement on the ground that the debtor-Development is no longer the same legal entity as it was before it entered bankruptcy. Therefore, Debtors may not assume the Agreement absent Under My Thumb's consent.

2. Applying the Plain Language of § 365(c)(1) Neither Conflicts With its Neighboring Provisions Causing a Surplusage, Nor Runs So Contrary to General Bankruptcy Policy.

Detractors from the hypothetical test argue that the plain language of § 365(c)(1) should be inapplicable because it conflicts with both the neighboring provisions in the section (namely subsection (f)) and the general debtor-friendly policy of the bankruptcy code. Courts which have followed this flawed logic generally apply what has become recognized as the "actual test," in which § 365(c)(1) is read to "bar assumption by the debtor in possession *only* where the reorganization in question results in the nondebtor[sic] *actually* having to accept performance from a third party." *In re Catapult Entm't, Inc.*, 165 F.3d 747, 751 (9th Cir. 1999) (emphasis added). As previously explained, however, this Court has clearly and explicitly ordered that all statutory interpretation begin with the plain language of the statute, and only in the rare instance where the words of the statute are ambiguous should the court look beyond those words. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). But even if the Court looks beyond the plain language of § 365(c)(1), there is insufficient evidence to prove a conflict or policy reasoning strong enough to overcome the clear and unambiguous language of the statute. *In re Catapult*, 165 F.3d at 754.

First, proponents of the actual test argue that the applying the plain language of § 365(c)(1) would lead to an absurd result in that it conflicts with its neighboring provision § 365(f)(1) and renders it inoperative and superfluous. *In re Sunterra Corp.*, 361 F.3d 257, 267 (4th Cir. 2004). This argument arises from the use of the phrase "applicable law" in each section. §365 (c)(1) bars *assumption* when applicable law would bar assignment. § 365(f)(1), on the other hand, provides that "contrary provisions in applicable law notwithstanding, executory contracts may be *assigned*." 11 U.S.C. § 365(f)(1). Initially these provisions appear to conflict, but as the Sixth Circuit explained in *In re Magness*, this conflict is illusory because "each subsection recognizes an 'applicable law' of a markedly different scope." 972 F.2d 689, 695 (6th Cir. 1992). The court continued, distinguishing the two subsections:

> First, § 365(f)(1) lays out the broad rule - "a law that, as a general matter, 'prohibits, restricts, or conditions the assignment' of executory contracts is trumped by the provisions of subsection (f)(1)." Section 365(c)(1), in contrast, creates a carefully crafted exception to the broad rule, under which "applicable law does not merely recite a general ban on assignment, but instead more specifically 'excuses a party ... from accepting performance from or rendering performance to an entity' different from the one with which the party originally contracted...." Therefore, under the broad rule of § 365(f)(1), the "applicable law" is the law prohibiting or restricting assignments as such; whereas the "applicable law" under § 365(c)(1) embraces "legal excuses for refusing to render or accept performance, regardless of the contract's status as 'assignable'...."

Id. at 695-699 (internal citations omitted). Viewing subsections (c)(1) and (f)(1) through this scope, it is clear that there is no internal conflict within § 365. Therefore, because the plain language of § 365(c)(1) is clear, unambiguous, and does not conflict with its own provisions, it does not create a surplusage and there is no need to look beyond this plain meaning.

Additionally, proponents of the actual test further argue that applying the language of § 365 literally produces an absurd result that is inconsistent with general bankruptcy policy. *In re Sunterra Corp.*, 361 F.3d at 267. In order to look past the plain language of a statute to the policy implications, the court must first conclude that the application of the plain language would lead to an *absurd* result.[2] *Id*. at 268. But if it is plausible that Congress actually did intend to achieve the result compelled by the Plain Meaning Rule, this Court must reject any claims that such an application is absurd. *Sigmon Coal Co., Inc. v. Apfel*, 226 F.3d 291, 308 (4th Cir. 2000). In response to this argument, the majority of the circuit courts agree that even though (c)(1) may not be a "debtor-friendly" provision, the "application of the Plain Meaning Rule does not produce a

[2] *See In re Sunterra Corp.*, 361 F.3d at 268 ("In assessing whether a plain reading of a statute implicates the absurdity exception, however, the issue is not whether the result would be "unreasonable," or even "quite unreasonable," but whether the result would be *absurd*.").

result so grossly inconsistent with bankruptcy policy as to be absurd." *In re Sunterra Corp.*, 361 F.3d at 268; *see also In re Catapult Entm't*, 165 F.3d at 754. The mere fact that a particular section of the Bankruptcy Code is unfavorable to a debtor does not mean that it was enacted in error and should be construed differently. *In re Sunterra Corp.*, 361 F.3d at 268. In fact, the Bankruptcy Code contains many provisions which may well be viewed as unfriendly to the debtor or preserving non-debtor rights. *Id*. Thus, the plain language of § 365(c)(1) does not conflict with the general policy of the Bankruptcy Code. But even if this Court finds that it does, this subtle divergence is insufficient to render the results of its application absurd.

For the foregoing reasons, applying the plain language of § 365(c)(1) neither conflicts with its neighboring provisions causing a surplusage, nor runs so contrary to general bankruptcy policy as to produce an absurd result. Therefore, this Court should faithfully apply the plain language of § 365(c)(1) and conclude that the Debtors are prohibited from assuming the Agreement with Under My Thumb.

II. UNDER § 1129(a)(10), THE DEBTORS' JOINT PLAN REQUIRES A "PER DEBTOR" APPROACH BECAUSE THE PLAN WAS NOT SUBSTANTIVELY CONSOLIDATED AND CONSISTS OF TEN DIFFERENT PLANS, ONE FOR EACH DEBTOR.

The United States Bankruptcy Code, also referred to as Title 11, governs the procedures that businesses and individuals must abide by when filing for bankruptcy in the United States Bankruptcy Court. The ultimate goal in chapter 11 bankruptcies is to confirm a plan of reorganization. 11 U.S.C § 1129(a) sets out the requirements to confirm a plan of reorganization. The statute sets forth relatively few requirements for chapter 11 plans, which ensures that chapter 11 would remain flexible. As stated in the Thirteenth Circuit's opinion, "[t]his flexibility is designed to foster meaningful negotiations between management, creditors and shareholders regarding the terms of any plan." R. at *15.

Chapter 11 plans place creditor claims into classes, and once the claims are placed into classes, a plan must specify which classes of claims are impaired and identify the treatment for such classes. 11 U.S.C §§ 1123(a)(2), (3). Impaired classes are classes of claims where the creditors' pre-bankruptcy legal, equitable or contractual rights are to be altered under the plan. 11 U.S.C. § 1124(1). Additionally, § 1129(a) contains a checklist of sixteen different requirements that must be satisfied in order for a plan to be confirmed. *See, e.g., Buffalo Sav. Bank v. Marston Enter., Inc.* (*In re Marston Enter., Inc.*), 13 B.R. 514, 516-18 (Bankr. E.D.N.Y. 1981). In pertinent part, § 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 including any acceptance of the plan by an insider." 11 U.S.C § 1129(a)(10) (emphasis added).

This Court has noted the critical importance of § 1129(a)(10)'s safeguard provision to creditors, stating that "Section 1129 of Title 11 contains a number of safeguards for secured creditors who could be negatively impacted by a debtor's reorganization plan … [including that][] at least one class of impaired creditors has accepted the plan (and no insider can vote)[.]" *U.S. Bank N.A. v. Vill. at Lakeridge, LLC (In re Vill. at Lakeridge, LLC)*, 814 F.3d 993, 1000 (9th Cir. 2016). Indeed, impairment triggers very important rights in chapter 11 cases, such as the right to vote on the plan. 11 U.S.C. §§ 1126(a), (f). And as recognized in the Thirteenth Circuit's opinion, "[a]n impaired creditor's right to vote is one of the most powerful tools in the bankruptcy process. It is, in effect, its bargaining chip at the negotiating table." R. at *16.

As a general rule, a debtor may reorganize only the assets and liabilities of its own bankruptcy estate. R. at *18. However, the exception to this rule applies if the bankruptcy court substantively consolidates the bankruptcy estates of multiple debtors. *See Alexander v. Compton,* *(In re Bonham)*, 229 F.3d 750, 764 (9th Cir. 2000). In *In re Bonham*, the Ninth Circuit adopted the Second Circuit's test for substantive consolidation which requires the consideration of two factors:

> (1) whether creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit; or (2) whether the affairs of the debtor are so entangled that consolidation will benefit all creditors.

Id. at 766 (external citations omitted). However, because of the controversial nature of substantive consolidation—such that it violates one of the cornerstones of American corporate law, namely, that separate legal entities are to be treated separately—courts seemingly unanimously agree that this doctrine should be applied sparingly. *See Id.* at 767 ("[B]ut as almost every other court has noted, [substantive consolidation] should be used 'sparingly[.]'" (*quoting Flora Mir Candy Corp. v. R.S. Dickson & Co. (In re Flora Mir Candy Corp.)*, 432 F.2d 1060, 1062-63 (2d Cir. 1970)).

In this case, the Debtors did not seek substantive consolidation, but rather pursued a "joint" chapter 11 plan of reorganization for all ten debtors. *See* R. at *7 ("The Plan was a joint plan, meaning that one plan was filed on behalf of all the Debtors. The Plan expressly stated that 'the Debtors' estates *are not being substantively consolidated*[,] and no Debtor is to become liable for the obligations of another." (emphasis added)). Because the Debtors did not seek substantive consolidation, the Plan actually consists of ten different plans, one for each debtor. Thus, a per debtor analysis of § 1129(a)(10) must be applied. Additionally, when looking at the plain language of § 1129(a)(10) there are multiple sections interpreting the word "plan" in the plural. Although § 1129(a)(10) is understood to promote reorganization, it is also to safeguard unsecured creditors, such as Under My Thumb. Although some courts have rejected the per debtor approach, § 1129(a)(10) was not a central issue to those courts' decisions, unlike the present case here.

A. A Per-Debtor Approach Must Be Applied to Debtors' Joint Plan, Absent Substantive Consolidation, to Protect the Voting Rights of Under My Thumb.

This Court should apply a per-debtor approach to Debtors' Joint Plan because there is no substantively consolidated. Substantive consolidation is a judicially created equitable remedy in bankruptcy where the assets and liabilities of technically distinct corporate entities are pooled together and such entities are treated as if they were, in fact, one single entity. R. at *18. The Second Circuit created a two-factored test for substantive consolidation. The Second Circuit required the proponent to demonstrate that either (1) creditors dealt with debtors as a single economic unit and did not rely on their separate identity in extending credit; or (2) the affairs of the debtors are so entangled that consolidation will benefit all creditors. *Union Sav. Bank v. Augie/Restivo Baking Co. (In re Augie/Restivo Baking Co.)*, 860 F.2d 515 (2d Cir. 1988) (internal and external citations omitted). Thus, debtors generally must meet one of these prongs to reorganize the assets and liabilities of multiple bankruptcy estates through one chapter 11 plan.

Substantive consolidation is a controversial practice because it violates one of the cornerstones of American Corporate law, namely, that separate legal entities are to be treated separately, with each responsible for their own assets and liabilities. *See, e.g., Skidmore, Owings & Merrill v. Canada Life Assur. Co.*, 907 F.2d 1026, 1027 (10th Cir. 1990) (citations omitted). The Third Circuit had addressed that there is an extensive body of case law has developed that recognizes that a bankruptcy court can, in certain circumstances, substantively consolidate the assets and liabilities of two of more entities. *In re Owen Corning*, 419 F.3d 195, 206-211. (3d Cir. 2005). Yet because of the extraordinary requirements to satisfy substantive consolidation, courts agree that the doctrine should be applied frugally. *In re Bonham*, 229 F.3d at 767.

There are two leading Delaware Bankruptcy Court decisions that have addressed the per debtor versus the per plan application of § 1129(a)(10), which both held that § 1129(a)(10) requires a per debtor application, absent substantive consolidation. *In re Tribune Co., 464 B.R. 126 (Bankr. D. Del. 2011); In re JER/Jameson Mezz Bowrrower II, LLC*, 461 B.R. 293 (Bankr. D. Del. 2011).

In *In re Tribune Co*., two competing joint plans were proposed, neither of which received the affirmative vote of an impaired class for each debtor entity included in the joint plan. *Id*. at 180. Because the parties had agreed only to joint administration and not substantive consolidation the bankruptcy court was face with the question as to whether § 1129(a)(10) required each debtor that was part of a joint plan to have at least one class of impaired creditors vote to accept the plan, or only one impaired accepting class for all of the debtors subject to the joint plan of reorganization. *Id*. The Delaware Bankruptcy court ultimately determined that because both plans failed to provide for substantive consolidation of the debtors, each joint plan actually "consist[ed] of a separate plan for each Debtor." *Id*. at 182. In fact, each of the proposed joint plans in *In re Tribune Co.* specifically stated that it was not substantively consolidating the debtors' bankruptcy estates, explaining that the "practical effect" of such a provision means that the joint plan actually consists of a separate plan for each debtor. *Id*. Moreover, the court noted that all debtors in a joint plan must satisfy other plan confirmation requirements in § 1129(a), such as § 1129(a)(3) which requires that the "plan"…be proposed in good faith and not by any means forbidden by law, and importantly, § 1129(a)(7) which embodies the "best interest of creditors" test, leaves no room for joint debtors to maneuver around the requirement of obtaining an accepting class in § 1129(a)(10). *Id.* at 183. Although many large, complex, multiple-debtor chapter 11 proceedings are often jointly administered for the convenience of the parties and the court, this "convenience alone is not sufficient reason to disturb the rights of impaired classes of creditors of a debtor not meeting confirmation standards." *Id*.

Additionally, in *In re JER/Jameson Mezz Borrower II, LLC*, the court dismissed a chapter 11 filing by numerous related to mezzanine debtors, holding that no chapter plan could be confirmed because the debtors could not obtain an accepting impaired class for each debtor as required under § 1129(a)(10). *In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. at 303. In this case, there was only one creditor that objected to the chapter 11 plan of reorganization. Id. at 302-303. Due to the lack of approval from the one creditor, the court reasoned:

> Although the Debtors collectively have 103 Inns and related assets and many creditors, Mezz II has only one creditor and one asset. Mezz II cannot confirm a plan over [Mezz II's lender]'s objection because it could get no accepting class. Therefore, in the absence of substantive consolidation, Mezz II does not have any chance of confirming a plan.

Id. at 302-03 (external citations omitted).

In this case, a per debtor approach must be applied to the Debtors' Joint Plan because the Debtors' did not seek substantive consolidation, but rather pursued one "joint" chapter 11 plan of reorganization for all ten debtors. R. at *7. As mentioned previously, the Plan was a "joint plan," meaning that one plan was filed on behalf of all Debtors. *Id.* The Plan expressly stated that "the Debtors' estates are *not* being substantively consolidated[,] and no Debtor is to become liable for the obligations of another." *Id.* (emphasis added). Our facts are comparable to *In re Tribune Co.* There, each of the debtors were required to reorganize their individual bankruptcy estate separately under the joint plan, and the court ultimately found that each joint plan actually "consist[ed] of a separate plan for each Debtor." *In re Tribune Co.*, 464 B.R. at 182-83. Similarly, in our case there are ten *separate and distinct* plans within the Joint Plan that need to be approved—each Plan meeting all sixteen requirements listed in § 1129(a), including § 1129(a)(10). Since Under My Thumb controlled Development's only class of creditors, and voted to reject the plan, The Plan did not meet § 1129(a)(10)'s one impaired class acceptance requirement. Again, there was no substantive consolidation, and the per-debtor application of § 1129(a)(10) will allow for proper enforcement of the requirements as a joint plan possesses multiple plans and not a single one. Therefore, this Court should hold, that the Debtors must satisfy § 1129(a)(10) under the per debtor approach because the Plan expressly stated that "*the Debtors' estates are not being substantively consolidated[,]* and no Debtor is to become liable for the obligations of another." R. at *7 (emphasis added).

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B. The Plain Language of § 1129(a)(10) Requires More Than One Approving Impaired Class for a Joint Plan Involving Multiple Debtors.

As previously discussed, "[t]here exists little decisional authority on whether § 1129(a)(10) is to be applied 'per debtor' or 'per plan.'" *In re Tribune Co.,* 464 B.R. at 181. The court in *In re Tribune Co.* began its analysis of § 1129(a)(10) by looking at the plain meaning of the statute. A "cardinal rule" of statutory construction is that "a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hospital,* 502 U.S. 215, 221 (1991) (citations omitted). This Court has also considered the Bankruptcy Code's own statutory rules of construction and specifically looked at § 102(7) of the Bankruptcy Code, which states that "the singular includes the plural." *In re Tribune Co.*, 464 B.R. at 182. Under this rule, the court concluded that § 1129(a)(10)'s reference to "plan" in the singular was not, on its own, a sufficient basis upon which to conclude that less than all debtors must satisfy the requirements of

§ 1129(a) in a multi-debtor case. *Id*. An interesting conclusion the *Tribune* court made was the correlation between the separate § 1129(a) provisions and how each provision requires adherence by each debtor.

Although *In re Tribune Co.* made a ripple in the per-debtor, per-plan sea, Congressional intent helped create a larger splash. § 1129(a)(10) is derived from § 1130(a)(12) of the Senate amendment. 124 Cong. Rec. H 11102–H 11105, H 11114–H 11115 (Sept. 28, 1978). Congress specifically added § 1129(a)(10) in 1978 when it overhauled the Bankruptcy Code, in part to encourage consensus in the reorganization process among interested parties. *See* Peter E. Meltzer, *Disenfranchising the Dissenting Creditor Through Artificial Classification or Artificial Impairment*, 66 AM. BANKR. L.J. 281, 311–13 (1992) (explaining that 11 U.S.C. § 1129(a)(10) was added in 1978, and that Congress, in 1984, made explicit the requirement that the accepting class be an impaired class). This change caused disagreements amongst courts as to whether the accepting class was required to be impaired or unimpaired to satisfy § 1129(a)(10). Congress acted again in 1984 with an answer to this debate, stating that only an *impaired* accepting class would satisfy the § 1129(a)(10) requirement. *Id*.

But § 1129(a)(10) has still been a topic of debate in a number of Bankruptcy Courts, including New York, Wisconsin, and Utah among others. In 1995, the Southern District of New York Bankruptcy Court stated:

> 11 U.S.C. § 1129(a)(10) serves as Congressional reminder that, notwithstanding social benefits that are derived from rehabilitating troubled businesses, plans of reorganization should not be confirmed solely because debtor will not otherwise survive; accordingly, since allowing "artificially impaired" class to satisfy (a)(10) requirement would nullify protection it was designed to provide and would promote "side dealing" between debtor and selected creditors, there must be a showing that proposed impairment is necessary for economical or other justifiable reasons and not just to achieve "cram down."

In re Fur Creations by Varriale, Ltd., 188 B.R. 754 (Bankr. S.D.N.Y. 1995). The Tenth Circuit further stated that "although actual acceptance of Chapter 11 plan by at least one class of impaired claims is necessary for confirmation under 11 U.S.C. § 1129(a)(10), not every creditor is obligated to vote on plan." *In re Ruti-Sweetwater, Inc.*, 836 F.2d 1263 (10th Cir. 1988). *See In re 266 Wash. Assocs.*, 141 B.R. 275, 287 (Bankr. E.D.N.Y. 1992) ("Section 1129(a)(10) operates as a statutory gatekeeper barring access to cram down where there is absent even one impaired class accepting the plan."), *aff'd sub nom. In re Washington Assocs.*, 147 B.R. 827 (E.D.N.Y. 1992)).

This Court has been reluctant to declare provisions of the Bankruptcy Code ambiguous. *See Kelly v. Robinson,* 479 U.S. 36, 43 (1986). Courts should not "be guided by a single sentence…but look to the provision of the whole law and to its object and policy." *In re Am. Home Mortg. Holdings, Inc.*, 637 F.3d 246 (3d Cir. 2011). Again, under the *In re Tribune Co.* approach, when we compare the § 1129(a) provisions, the word "plan" stated in the singular sense is applied to meet the requirement of one or more debtors. Judge Kevin J. Carey, the Bankruptcy judge sitting for the *Tribune* case stated, "I find nothing ambiguous in the language of §1129(a)(10), which absent substantive consolidation or consent, must be satisfied by *each debtor* in a joint plan." *In re Tribune Co.*, 464 B.R. at 183 (emphasis added).

When Congress enacted § 1129(a)(10), its intention was to provide creditors a safeguard and some protection against debtors. Here, Under My Thumb's rejection of The Plan falls squarely within the scope of protections envisioned for creditor by Congress under § 1129(a)(10).

C. The Interpretation of Whether § 1129(a)(10) Requires a Per Debtor or Per Plan Approach is Directly At Issue In This Case, and The Only Courts That Have Addressed This Issue are the Delaware Bankruptcy Courts.

Although applying § 1129(a)(10) is relatively simple in bankruptcy proceedings involving a single debtor, its application is much more complicated in bankruptcy proceedings involving multiple debtors. For example, the Ninth Circuit recently rejected the per debtor approach, finding based upon the plain language of the statute that § 1129(a)(10) requires only that at least one impaired class "under the plan has accepted the plan." *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (In re Transwest Resort Props., Inc.)*, 881 F.3d 724, 729 (9th Cir. 2018). This is one of the Circuits that follow the per plan approach; however, it is noteworthy that the Delaware Bankruptcy Courts, which are known to be the most influential in the Bankruptcy world, take the per debtor approach.

The Delaware Courts adopting the *per debtor* approach have explained that a plan filed in jointly administered cases logically consists of separate plans for each debtor. Absent substantive consolidation, "entity separateness" remains fundamental. *See In re Tribune Co.*, 464 B.R. at 182 (applying per debtor rule for purposes of § 1129(a)(10)). In fact, *In re Tribune Co.* distinguished three opinions reaching a contrary conclusion, concluding that "none of the three courts considered the § 1129(a)(10) issue central to its decision in the matter before it." *Id.* at 181-82 (*citing In re Charter Commun.*, 419 B.R. 221 (Bankr. S.D.N.Y. 2009); *In re Enron Corp.*, Ch. 11 Case No. 01-16034 (AJG), 2004 WL 6075307, slip op. (Bankr. S.D.N.Y. July 15, 2004); *and In re SGPA, Inc.*, No. 01-02609, 2001 Bankr. LEXIS 2291 (Bankr. M.D. Pa. Sept. 28, 2001)).

Both *In re Tribune Co.* and *In re JER/Jameson Mezz Borrower II, LLC* considered the per debtor v. per plan dispute in § 1129(a)(10) as a central component to its decisions. Because the § 1129(a)(10) issue is central to this decision, this Court should adopt the *In re Tribune Co.* approach and apply § 1129(a)(10) on a per-debtor basis.

CONCLUSION

The judgment of the United States Court of Appeals for the Thirteenth Circuit should be affirmed as to both issues presented. First, § 365(c)(1) prohibits the Debtors from assuming the non-exclusive license Agreement of intellectual property over the objection of Under My Thumb. Second, under § 1129(a)(10), the Debtors' joint plan requires a "per debtor" approach because the Plan was not substantively consolidated and consists of ten separate and distinct plans.

Respectfully submitted,

/s/ Team # 43 R
Counsel for Respondent

Dated: January 21, 2020

CERTIFICATE OF SERVICE

We hereby certify that on January 21, 2020, we electronically filed the foregoing papers with the Clerk of the Court using CM/ECF system which will send notification of such filing to Petitioner and its counsel.

We certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Team # 43 R
Counsel for Respondent

Dated: January 21, 2020