#45R

No. 19-1004

IN THE

Supreme Court of the United States

OCTOBER TERM 2019

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

PETITIONER,

V.

UNDER MY THUMB, INC.

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

BRIEF FOR RESPONDENT
UNDER MY THUMB, INC.

#45R
COUNSEL FOR RESPONDENT
UNDER MY THUMB, INC.

JANUARY 20, 2020

QUESTIONS FOR REVIEW

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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STATEMENT OF JURISDICTION

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

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STATEMENT OF THE CASE

The Respondent Under My Thumb, Inc. respectfully requests that this Court affirm the decision of the Court of Appeals for the Thirteenth Circuit. This is a jointly-administered Chapter 11 bankruptcy case commenced by a holding company, Tumbling Dice, Inc. ("TDI"), which holds the membership interests of its nine wholly-owned debtor subsidiaries. *See* Record ("R.") at 4. Each of the debtor-subsidiaries operate a luxury resort and casino (each an "Operating Debtor" and collectively "Operating Debtors"), save for one: Tumbling Dice Development, LLC ("Development"), which entity's sole role in the overall corporate structure is to act as the licensee under a software agreement with the Respondent, Under My Thumb, Inc. ("Respondent"). R. at 4. Respondent's business with the nine (9) Debtors in this jointly-administered Chapter 11 bankruptcy case starts and ends with its non-exclusive license agreement with a single one of those entities, Development, the role of which is solely to act as the licensee under a software agreement with the Respondent.

Prior to the commencement of the instant bankruptcy case, in 2008, Respondent and Development entered into a non-exclusive licensing agreement (the "Agreement") in which Respondent created a comprehensive and integrated software system that supports the Operating Debtors' casino loyalty program, Club Satisfaction (the "Software" or the "Club Satisfaction Software"). R. at 4. In addition, the parties agreed that Development would be indebted to the Respondent pursuant to an unsecured $7 million promissory note (the "R&D Note") to finance the making of the Software itself. R. at 4. The Debtors made their monthly installments as required until they abruptly ceased making payments in June 2015. R. at 6.

In December 2011, a hedge fund called Start Me Up, Inc. acquired the stock of TDI through a leveraged buy-out. R. at 6. This deal proved financially ruinous for the Debtors. The Debtors

commenced their Chapter 11 jointly-administered bankruptcy cases in January 2016. R. at 6.

The Debtors proposed a joint plan, which included *inter alia* a proposal that Start Me Up, Inc. would finance new capital to fund a 55% distribution, amounting to a pro rata distribution of $66 million, to the unsecured creditors. In exchange for the new capital, Start Me Up would be entitled to retain its equity interest in the Debtors. However, Start Me Up had no plans to directly financing by itself the full $66 million of the proposed unsecured distribution. R. at 7. Rather, $35 million of that amount was being invested by Sympathy for the Devil, LP ("SFD"), a private equity group. R. at 7-8. SFD is a direct competitor of the Respondent. R. at 8. In fact, for several years, SFD has attempted to replicate the very Software that is the basis of Respondent's Agreement with Development. R. at 8.

The Respondent – who was left out of negotiations to formulate a reorganization plan (R. at 6) – declined to vote in favor of the Plan and objected on numerous grounds, two (2) of which are presently at issue on appeal. R. at 8. Respondent's first objection was that the proposed assumption of the Agreement by the Debtors – the majority stock of which would now be owned by SFD, Respondent's competitor – was impermissible pursuant to 11 U.S.C. § 365(c)(1) because applicable intellectual property law, as well as the terms of the Agreement itself, excused performance by Respondent in the absence of its consent, which it refuses to give. R. at 8. The second objection was that the Debtors cannot comply with the requirements of cramdown confirmation – specifically, 11 U.S.C. § 1129(a)(10) – because no impaired class of creditors of Development had voted to accept the Plan. R. at 8.

The creditors of the other entities of TDI generally supported the plan. R. at 8. The Bankruptcy Court overruled Respondent's objections on this basis, and confirmed the plan. R. at 9. More specifically, as to Respondent's first objection, the Bankruptcy Court erroneously applied

the "actual test" to § 365(c)(1) and found that because Respondent was not actually being forced to accept performance under its executory contract from someone other than Development, and was simply being asked to honor its existing contract. R. at 8-9. As to the second objection, the Bankruptcy Court likewise erroneously determined that § 1129(a)(10) is satisfied when at least one impaired class in a jointly administered proceeding accepts a single plan on behalf of all creditors of each debtor. R. at 9.

Respondent appealed to the Bankruptcy Appellate Panel for the Thirteenth Circuit, which affirmed the Bankruptcy Court on both issues. R. at 9. Respondent timely appealed to the Thirteenth Circuit, which affirmed the Bankruptcy Appellate Panel as to both issues. R. at 9. Respondent timely appealed to the Court of Appeals for the Thirteenth Circuit. R. at 9.

In an eloquent and well-reasoned opinion dated March 4, 2019, the Thirteenth Circuit reversed the decision of the Bankruptcy Court. It reasoned, *inter alia,* that § 365(c)(1) precludes assumption of a non-exclusive license of intellectual property absent consent of the licensor. R. at 9. The Thirteenth Circuit held that not only does the language of the statute render this result (R. at 12-13), but that the "hypothetical test", rather than the "actual test" that the Bankruptcy Court applied, is the correct test to use to determine whether a debtor in possession may assume an executory contract. R. at 11. As to the Respondent's second objection to the Plan, the Thirteenth Circuit held that § 1129(a)(10) requires acceptance from an impaired class of claims of each debtor under a jointly-administered proceeding. R. at 15. Noting that the Debtors are separate and operate as such (R. at 18), the Thirteenth Circuit held that as the Debtors failed to substantively consolidate their estates, they were required to have a vote from each impaired creditor of each of the nine Debtors. R. at 18. Moreover, the Thirteenth Circuit determined that the term "plan" should be read plural where appropriate per the Bankruptcy Code, and that the "per-plan" approach is more

consistent with the Code as a whole. R. at 19.

The Debtors appealed to this Court.

SUMMARY OF THE ARGUMENT

The Court of Appeals for the Thirteenth Circuit correctly held that the interpretation of § 365(c) requires application of the hypothetical test for whether an executory contract can be assumed or assigned. In this case, the language of § 365(c) unambiguously prohibits assumption or assignment without the consent of Under My Thumb. Because the plain words of the statute say *assume or assign,* only one of those events must occur for Under My Thumb to be able to reject. The petitioner sought to assume the Agreement and Under My Thumb rejected it. The Circuit Court erred by not interpreting § 365(c) the way it was plainly written by Congress. In the event this Court adopts either the hypothetical test or actual test, the hypothetical test is the proper standard. It construes § 365(c) by its plain meaning. Under the hypothetical test, the executory contract – the Software Agreement – cannot be assumed by the bankruptcy estate.

The Court of Appeals was correct in holding that § 365(c) is not rendered superfluous by § 365(f) because the term "applicable law" has a different meaning as applied to each of the subsections. 365(c) grants Under My Thumb the right to reject assumption or assignment of the licensing Agreement because applicable patent law bars such action without the consent of the licensor. Under My Thumb did not and does not consent, and the licensed software may not be assigned under § 365(c). Where the Court believes that the actual test is the proper standard, Under My Thumb can still refuse to consent to assumption because the assumption renders inoperative a material term of the Agreement. Assumption will materially impact the identity of Under My Thumb. Ruling otherwise would be contrary to the policy rationale behind patent law that protects a licensor's autonomy to transfer the rights of its creation. Allowing a third party to step in and get

the rights to the licensor's creation would defeat the purpose of even providing patent protections in the first place. Under My Thumb's identity is a material part of the Agreement: it is licensing its own creation that it otherwise would not freely grant rights to without its consent. This bars SFD from getting rights in the Agreement transferred to it.

Likewise, the Court of Appeals for the Thirteenth Circuit correctly found that Chapter 11 plan confirmation requires a vote from an impaired creditor of each debtor (the "per-debtor approach"), as opposed to each plan (the "per-plan approach"). The cramdown provisions set forth in 11 U.S.C. § 1129(b) allow courts, despite objections, to confirm a reorganization plan if "all of the applicable requirements of subsection (a) of this section . . . are met with respect to a plan . . . the court . . . shall confirm the plan if . . . the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." Here however, the Petitioner here cannot establish compliance with requirements to cram down[1] because it cannot establish that at least one impaired class of claims has accepted the plan. To the contrary, not only do a number of bankruptcy court recognize that the per-debtor, as opposed to the per-plan approach is the correct one as the Thirteenth Circuit noted,[2] it is also consistent with correct statutory interpretation and intent, and preserves creditors' stated rights under the Bankruptcy Code while undermining improper use of the Chapter 11 bankruptcy process.

Correct statutory construction supports the "per debtor" approach that the Thirteenth Circuit undertook. 11 U.S.C. § 102(7) provides that "the singular includes the plural." Thus, the word "plan" in § 1129(a)(10) is to be read with the plural in cases where, as here, it is appropriate.

[1] It is the Petitioner's burden to establish its compliance with each of the thirteen requirements of § 1129(a) to confirm its plan. *See e.g., In re Genesis Health Ventures, Inc*., 266 B.R. 591, 598-99 (Bankr. D. Del. 2000), *citing In re Gulfstar Indus., Inc.,* 236 B.R. 75, 77 (M.D. Fla. 1999).
[2] R. at 17.

This case involved multiple, separately operating debtors; as a result, "plans" should be read into § 1129(a)(10) and, as Development did not have any impaired class accept the plan, the Plan to reorganize the Operating Debtors cannot be confirmed.

Second, the filing of a joint petition, as the Operating Debtors did here, does not automatically carry with it an assumption that each of the debtors' estates are and should be treated as one and the same. *See e.g.,* Bankruptcy Rule 1015; 11 U.S.C. § 302(b). Development's sole role in the overall corporate structure is to act as the licensee for the Agreement at issue. It operates and is profoundly different from the other Operating Debtors; yet, the Petitioner would have the Court determine that since they are all part of the same holding company, this fact is irrelevant. In this vein, to allow a number of separately-operating debtors to bypass any effort to substantively consolidate the multiple estates would be to impermissibly elevate convenience for the Debtors over the rights of the Respondent – namely, a meaningful vote in the negotiation and confirmation process. Substituting joint administration for substantive consolidation bypasses the cramdown requirements in 11 U.S.C. § 1129(a) by eliminating secured creditors' right to vote on a plan. Here, Respondent's rights are greatly altered with the Petitioner's "per plan" approach. If the "per debtor" approach is not adopted, this means that a creditor's vote is rendered vestigial. Here, Petitioner argues that since other creditors of the other operating entities are in favor of the Plan, Respondent's vote is irrelevant. This is an absurd result, and vitiates the purpose of § 1129(a)(10).

Finally, even if the Petitioner did pursue the proper channels and take steps towards substantively consolidating the estates of all debtors, the equities of this case weigh in favor of disallowing such consolidation. The purpose of substantive consolidation is to ensure the equitable treatment of all creditors. This cannot be done in this case. Creditors did not deal with the nine operating subsidiaries as a single economic unit. Particularly with respect to the Respondent, its

sole involvement with the Petitioner is with Development, which – unlike the other debtors – is not a luxury resort and casino. It is simply an LLC designed to act as the licensee under the Software Agreement. Further, there is relatively little, if any, harm to the Petitioner by not substantively consolidating the estates. The only "harm" to the Petitioner is that it does not have the benefit of convenience of confirming a single plan through joint administration. Since the Court should not elevate form over substance, this fails to provide an equitable reason to allow the Petitioner to proceed with a single plan, without the required votes from each debtors' creditors.

STATEMENT OF FACTS

What should have been a successful and low-risk business venture resulted in a bankruptcy case in which the Respondent found itself an unsecured, impaired creditor, subject to cramdown of a single reorganization plan on behalf of nine Operating Debtors. As more fully set forth below, the facts of this case show that the Plan not only would require the Respondent to allow a direct competitor to assume its contract, but allowing cramdown of the Plan violates 11 U.S.C. § 1129(a) because Development does not have a single impaired creditor's vote in favor of the Plan.

A. The Agreement

In 2008, Respondent and Development entered into a non-exclusive licensing agreement (the "Agreement") in which Respondent created a comprehensive and integrated software system that supports the Operating Debtors' casino loyalty program, Club Satisfaction (the "Software" or the "Club Satisfaction Software"). R. at 4. The licensee under this agreement is Tumbling Dice Development, LLC. R. at 4. Development's sole purpose in the overall corporate structure of the Debtors is to act as the licensee under the non-exclusive software license agreement with Respondent, and Respondent's sole role with TDI is this very license agreement. R. at 4. To fund the very creation of the Software itself, Respondent incurred approximately $10 million in costs to create the Club Satisfaction Software. R. at 4. Thus, Development agreed to reimburse Respondent for a significant portion of these costs, pursuant to an unsecured $7 million promissory note (the "R&D Note"). R. at 4. Upon creation of the Software, the parties entered into the Agreement, which grants Development a non-exclusive license to use its copyrighted and patented Software. R. at 5. The Agreement permits Development to "extend the benefits of the Agreement to its affiliated entities only". R. at 5. Furthermore, the Agreement prohibits any of the Debtors from assigning or sublicensing their rights without Respondent's consent. R. at 5. The parties

agreed that Development would pay Respondent a monthly fee, calculated based on the amount of spending by Club Satisfaction members. R. at 5.

Since the parties entered into the Agreement in 2008, the Operating Debtors have seen giant success. R. at 4-5. Membership in Club Satisfaction tripled after the launch of the Software. R. at 5. As a result, the Debtors concede that the Software has become an integral part to the Debtors' ongoing business. R. at 5. Respondent, moreover, benefitted from the Agreement as it was permitted to, and did, license similar versions of the Software to other parties. R. at 5. The Debtors, furthermore, remained current under the R&D Note until June 2015, when payments ceased. R. at 6.

B. The Leveraged Buy-Out

In December 2011, a hedge fund called Start Me Up, Inc. acquired the stock of TDI through a leveraged buy-out. R. at 6. To fund this transaction, TDI and the Operating Debtors granted first priority liens on their assets to a group of lenders (the "Lenders") for a loan of $3 billion. As Development serves an extremely limited purpose in the overall corporate structure of TDI, the Lenders did not require Development to act as a borrower or guarantor. R. at 6.

The leveraged buy-out proved catastrophic for the Debtors. The Debtors commenced their Chapter 11 bankruptcy cases in January 2016. R. at 6.

C. The Bankruptcy and the Debtors' Proposed Plan of Reorganization

As the Debtors' petition shows, TDI – and each of the Operating Debtors – owe the Lenders $2.8 billion. In addition, the Debtors owe $120 million to their unsecured creditors, $6 million of which is owed to the Respondent on the R&D Note. R. at 6. The Debtors chose to proceed with a jointly administered case. R. at 3. The Debtors never at any time attempted to move to substantively consolidate their bankruptcy cases.

Notably, during the case, Respondent was left out of negotiations to come to a resolution, including the court-ordered forum of mediation. R. at 6. After these negotiations in which Respondent did not partake, the Debtors announced a plan to reorganize (the "Plan"). The terms are summarized as, but are not limited to, the following:

1. The Debtors would restructure most of the indebtedness owed to the Lenders by agreeing to a lower interest rate and extending payments by twenty (20) years.
2. Start Me Up would finance new capital to fund a 55% distribution, amounting to a pro rata distribution of $66 million, to the unsecured creditors. In exchange for the new capital, Start Me Up would be entitled to retain its equity interest in the Debtors.
3. The existing shares and membership interests in the Debtors would be cancelled, and the issuance of new shares and membership interests in the reorganized Debtors, with the intent to not change the overall structure.
4. The Agreement under which Respondent is the licensor would be assumed pursuant to 11 U.S.C. §§ 365 and § 1123(b)(2).

See R. at 7. The Debtors announced this plan as a joint plan, which would be the same for each of the Operating Debtors and Development. R. at 7.

The Respondent learned that Start Me Up was not directly financing by itself the full $66 million of the proposed unsecured distribution. R. at 7. Rather, $35 million of that amount was being invested by Sympathy for the Devil, LP ("SFD"), a private equity group. R. at 7-8. In return for its $35 million investment in the Operating Debtors, SFD would receive 51% of the voting shares of the reorganized TDI, and several seats on the reconstituted board of directors. R. at 8. In other words, SFD would have rights and ownership interests in a majority of the reorganized TDI.

SFD is a direct competitor of the Respondent. R. at 8. In fact, for several years, SFD has

attempted to replicate the very Software that is the basis of Respondent's Agreement with Development. R. at 8. Thus, as a result of the Petitioner's proposed Plan, SFD – a direct competitor of the Respondent – will own a majority of TDI.

ARGUMENT

The Respondent respectfully requests that this Court affirm the decision of the Court of Appeals for the Thirteenth Circuit. The Supreme Court of the United States reviews questions of law de novo.

The Thirteenth Circuit's finding that 11 U.S.C. § 365 bars Development from assuming the Agreement without Under My Thumb's consent is an issue of statutory interpretation, a question of law that should be reviewed de novo. *Mitchell v. United States (In re Mitchell)*, 977 F.2d 1318, 1320 (9th Cir. 1992). Similarly the Thirteenth Circuit's finding that 11 U.S.C. § 1129(a)(10) requires that jointly administered plans be analyzed under a per debtor approach is a conclusion of law subject to de novo review. *In re Frontier Props., Inc.*, 979 F.2d 1358, 1362 (9th Cir. 1992).

I. 11 U.S.C. § 365(C)(1) DOES NOT PERMIT A DEBTOR IN POSSESSION TO ASSUME AN EXECUTORY CONTRACT OVER THE OBJECTION OF THE NON-DEBTOR PARTY AS APPLICABLE NON-BANKRUPTCY LAW EXCUSES THE RESPONDENT FROM ACCEPTING PERFORMANCE FROM, AND RENDERING PERFORMANCE, TO AN ENTITY OTHER THAN TUMBLING DICE DEVELOPMENT, LLC.

The decision of the Court of Appeals for the Thirteenth Circuit should be affirmed because a debtor in possession – the Petitioner in this case – may not assume an executory contract absent the non-debtor party's – the Respondent's – consent. Federal patent law excuses Respondent from performing the contract to any other party besides Development, and as the proposed Plan of reorganization in this case will substantially alter the identity of the licensee with whom Respondent originally contracted with. The Court of Appeals for the Thirteenth Circuit thus

correctly applied 11 U.S.C. § 365 and determined that the Agreement between Respondent and Development cannot be assumed nor assigned under applicable law. Not only does the plain language of the statute bar assumption and assignment of the Agreement by the debtor in possession, but the hypothetical test, if any test is to be applied at all, is the correct one to determine that the Agreement cannot be assumed by the reorganized Debtor.

A. Section 365 provides that the Agreement cannot be assumed or assigned.

First, the Respondent submits that the Court need not apply any test to 11 U.S.C. § 365 at all because the language of the statute is clear. A bankruptcy trustee, or a debtor in possession, may assume an executory contract upon the court's approval. 11 U.S.C. §§ 365(a); 1107.[3] This power is not without limitation. "The trustee's power, however, is not absolute, and both § 365(a), which authorizes assumption, and § 365(f), which authorizes assignment, are expressly subject to an exception provided in § 365(c)." *Everex Sys. v. Cadtrak Corp. (In re CFLC, Inc.)*, 89 F.3d 673, 676 (9th Cir. 1996). Section 365(c) provides that a "trustee may not assume or assign an executory contract." Specifically, assumption or assignment is barred when:

> (1) (A) Applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance 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) (emphasis added). Section 365(c)'s interpretation does not and should not require any test to be applied because it is unambiguous. Without the consent of Under My Thumb,

[3] Here, it is not disputed § 365(a) applies because this is an executory contract as the Court of Appeals for the Thirteenth Circuit noted. "In executory contracts the obligations of both parties are so far unperformed that the failure of either party to complete performance would constitute a material breach and thus excuse the performance of the other." *In re Wegner*, 839 F.2d 533, 536 (9th Cir. 1988). Development entered into an Agreement with Under My Thumb to develop a Software for the Club Satisfaction program. Under My Thumb incurred $10 million in costs to create the software, and Development signed a note (referred hereafter as "R&D Note") which promised to reimburse Under My Thumb for $7 million. R. at 4. At present date, over $6 million is still owed to Under My Thumb. R. at 6. Failure of Development to pay pursuant to the R&D Note constitutes a material breach of the Agreement.

Development can neither assume nor assign the executory contract. When interpreting a statute, the plain language of the statute itself prevails. *United States v. Ron Pair Enters.*, 489 U.S. 235, 241, 109 S. Ct. 1026, 1030 (1989). Judicial inquiry to interpretation ends "when the words of a statute are unambiguous." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254, 112 S. Ct. 1146, 1149 (1992). The legislative history of a statute requires an inquiry *only when* its language is unclear. *Blum v. Stenson*, 465 U.S. 886, 896, 104 S. Ct. 1541, 1548 (1984); *see also United States v. Lewis*, 67 F.3d 225, 229 (9th Cir. 1995). It is only in the rare case that a statute's legislative history will govern because its plain meaning "will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling." *Griffin v. Oceanic Contractors*, 458 U.S. 564, 571, 102 S. Ct. 3245, 3250 (1982). However, "if the intent of Congress is clear, that is the end of the matter; for the court...must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2781 (1984).

Thus, under the plain language of § 365(c), if *applicable law* governing intellectual property patent licenses excuses Under My Thumb from accepting performance from an entity other than the debtor, the debtor may not *assume or assign* the software licenses if applicable law bars assignment, and without Under My Thumb's consent.

Applicable law makes assignment of the Agreement impermissible. Federal patent law "makes nonexclusive patent licenses personal and nondelegable" and is therefore "applicable law" within the meaning of subsection (c)(1)(A). *Everex Sys.* at 680; *see also Perlman v. Catapult Entertainment (In re Catapult Entm't)*, 165 F.3d 747, 750 (9th Cir. 1999); *see also RCC Tech. Corp. v. Sunterra Corp.*, 287 B.R. 864, 865 (D. Md. 2003). Therefore, without Under My Thumb's consent, Development may not assume or assign the software licenses.

In *Perlman v. Catapult Entertainment,* supra, the United States Court of Appeals for the Ninth Circuit properly disallowed the licensee from assuming a non-exclusive software license when the licensor withheld its consent. In that case, the licensor gave the licensee the right to use some of its patented technologies. When the licensee filed for Chapter 11 Bankruptcy, the trustee sought to assume the licenses. The Court held in part that because federal patent law barred the delegation of patent licenses and that the licensor withheld his consent, the licensee could not assume or assign the contract.

Here, similarly, Development has a license to use Respondent's patented software. Development is one of nine debtors attempting to reorganize in Chapter 11 bankruptcy. The Operating Debtors seek to assume or assign the nonexclusive license Agreement. Respondent does not consent to the assumption or assignment of the software license, fully allowed by subsection (c)(1)(B). Under My Thumb withholds its consent to assume or assign the nonexclusive. This, just like in *Perlman*, prevents the licensee (Development) from assuming or assigning the patented license. Since the requirements of subsection (c)(1)(A) and (c)(1)(B) are satisfied, the debtor "may not assume or assign" the Agreement.

11 U.S.C. § 365(c) states that an executory contract may not be assumed when a licensor does not consent to its assignment *or* assumption. It clearly contemplates assumption and assignment to be mutually exclusive possibilities. Equally important, the statue states in plain language that the licensor has the autonomy to withhold consent. Accordingly, the licensor independently may reject the assignment of the contract *and* may independently reject an assumption of the contract. The United States Court of Appeals for the Thirteenth Circuit correctly applied this interpretation on appeal. There is no other interpretation necessary of § 365(c) because the words are plain, clear, and unambiguous; ruling otherwise would render the statutory language

in contrast to this Court's standing jurisprudence.

The Petitioner may contend that the plain language of § 365 of the Bankruptcy Code is ambiguous because the use of the term "applicable law" in subsection 365(f) makes Section 365(c) inoperative and superfluous. This is incorrect. The use of "applicable law" has an entirely different meaning in each subsection. "A careful reading reveals that each subsection recognizes an 'applicable law' of markedly different scope." *In re Magness*, 972 F.2d 689, 695 (6th Cir. 1992). The Court of Appeals for the Fourth Circuit distinguished the difference between the subsections:

> [Section] 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 ....

RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.), 361 F.3d 257, 266 (4th Cir. 2004); *see also Perlman* at 752 (9th Cir. 1999); *see also City of Jamestown v. James Cable Partners, L.P. (In re James Cable Partners)*, 27 F.3d 534, 538 (11th Cir. 1994).

Therefore, an executory contract that falls under subsection (f) may be assumed and assigned *unless* the exception in subsection (c) applies. Subsection (c) only excuses performance to be made if the nondebtor can "point to applicable law...that renders performance under the...agreement nondelegable." *City of Jamestown* at 538. Respondent submits that the identity of the licensee under the Agreement is a material term which renders performance nondelegable.[4] Although the Agreement is not a personal service contract, it is still nondelegable because, similar to a personal service contract, the identity of the licensee is a material term of the Agreement.

Contracts which involve the rights and obligations that the parties would expect

[4] For example, "[a] classic example under which performance is nondelegable is a personal service contract." *Id*. at 538.

performance to be done by the parties exclusively and not by some third party are nondelegable in nature.

> Certain classes of contracts are inherently nonassignable in their character, such as . . . engagements for personal services, requiring skill, science, or peculiar qualifications. When rights arising out of contract are coupled with obligations to be performed by the contractor, and involve such a relation of personal confidence that it must have been intended that the rights should be exercised and the obligations performed by him alone, the contract, including both his rights and his obligations, cannot be assigned without the consent of the other party to such contract."

In re Terry, 245 B.R. 422, 426 (Bankr. N.D. Ga. 2000) (quoting *Cowart v. Singletary*, 140 Ga. 435, 446, 79 S.E. 196, 201 (1913)). "That certain contractual rights and duties, such as those typically found in personal services contracts, cannot be assigned without the consent of the other party is a well-established rule of law." *In re Terry* at 426.

The identity of the licensee – Development – is material to the Agreement. The Agreement is for the use of a Software that was created for the business needs of the Operating Debtors. R. at 4. Respondent did not intend for the Agreement to be made by or be assigned to another party. The United States Court of Appeals for the Eleventh Circuit held in *City of Jamestown*, supra, that the 11 U.S.C. § 365(c)(1) exception did not apply because a general prohibition against assignment did not excuse the Plaintiff from accepting performance from an entity other than the licensee. In that case, the Plaintiff non-debtor had granted a cable franchise agreement to the defendant debtor. The debtor-in-possession sought to assume the agreement on the grounds that 11 U.S.C.S. § 365(f) permitted assignment of executory contracts to a third party. At issue was whether a city ordinance barring assignment via Bankruptcy was "applicable law" that barred assignment under subsection 365(c)(1). The Court held that the contract could be assigned because it was not "applicable law" under subsection 365(c). Instead, the city ordinance was under the category of "applicable law" in subsection 365(f). Subsection 365(f) applied because the ordinance barred assignability in

Bankruptcy which was a general prohibition against assignment. That does not excuse assignment. By contrast, the Court said that a non-delegable contract, like a personal service contract, is the kind of law that brings the 365(c) excuse into play.

"Only if the law prohibits assignment on the rationale that the identity of the contracting party is material to the agreement will subsection (c)(1) rescue it." *Perlman,* supra, at 752. Here, the applicable law is federal patent law which prohibits the assignment of the executory contract. The identity of the performing party is Development, who has a non-exclusive license to use the Software. The Software was developed in order for Under My Thumb to perform on its end of the contract. It got a patent to the product. However, the inevitable result of the Operating Debtors' proposed Plan is that SFD will assume those rights, by virtue of its status as a majority shareholder of Development. SFD is a direct competitor of Under My Thumb, and giving it the rights without the consent of Under My Thumb will not only undermine the contract between Under My Thumb and Development, but is likely to negatively and directly affect the business of Under My Thumb. Under My Thumb got a patent to protect its product and give it the autonomy of who it could license the product to. Such autonomy allows it to protect its own product and, specifically, seek out certain individuals it wants to license to. Getting the patent is meaningless if such power is taken away. Thus, the identity of Development is a material part of the contract. Under My Thumb would not have possibly thought about contracting to license its own creation to another if a direct competitor could just step in and have adverse effects to its profits as an entity. This is a personal service contract, is nondelagable "applicable law", and, therefore, the § 365(c) exception applies and Under My Thumb may withhold consent pursuant to the proper interpretation of the statute.

B. If the Court Finds That a Test is Required, the Hypothetical Test Should Be Applied Because it Interprets 365(c) Properly.

Even if the Court were to find that the language of § 365 is unclear, the hypothetical test is

the proper test to be applied here because its interpretation is in accordance with the plain meaning of § 365(c). Under applicable law, pursuant to the hypothetical test, Respondent can refuse performance by "an entity other than the debtor or the debtor in possession." *In re W. Elecs., Inc.*, 852 F.2d 79, 83 (3d Cir. 1988). This is within the plain meaning of the statute.

"By its plain language, § 365(c)(1) addresses *both* assumption and assignment." (Emphasis in original) *RCI Tech. Corp.,* supra, 361 F.3d at 267.

> The literal language of § 365(c)(1) is thus said to establish a "hypothetical test": a debtor in possession may not assume an executory contract over the nondebtor's objection if applicable law would bar assignment to a hypothetical third party, even where the debtor in possession has no intention of assigning the contract in question to any such third party.

Perlman, 165 F.3d at 750; see also *City of Jamestown* at 537 (holding that under the plain language of § 365(c)(1), the determination is whether under applicable law a party is excused from accepting performance from a hypothetical party other than the debtor or debtor in possession); see also *In re W. Elecs., Inc.* at 83 (holding that the hypothetical test is proper under the plain language of the statute).

Here, the hypothetical test is proper because the statute contemplates that a party may reject acceptance of performance of an executory contract that is *assumed or assigned*. The plain language of the statute shows that Under My Thumb could reject performance in the event that there was an attempt to have the contract assumed or assigned to a third party. Development attempted to assign its rights to SFD, and, in accordance with the statute, Under My Thumb has the right to independently refuse to consent to the assignment of an executory contract. The hypothetical test, therefore, is the correct test to be applied as it adheres to the statute's plain language. Furthermore, the statute gives Under My Thumb the right to reject the assignment of the executory contract.

C. The Agreement is Still not Assumable nor Assignable under the Actual Test.

Even if the "actual test" is the proper test to be applied, which it is not, the debtor still may not assume the executory contract in this case because it would materially alter the Agreement. "Under the actual test, a debtor can assume an executory contract or unexpired lease even if the debtor cannot assign the particular contract or lease to a third party." Michelle Morgan Harner and Carl E. Black and Eric R. Goodman, DEBTORS BEWARE: THE EXPANDING UNIVERSE OF NON-ASSUMABLE/NON-ASSIGNABLE CONTRACTS IN BANKRUPTCY, 13 Am. Bankr. Inst. L. Rev. 187 (2005); *see also Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997) (finding section 365(c) and section 365(e) contemplate case-specific inquiry into whether non-debtor party was forced to accept performance under executory contract from third party, quoting *Summit Inv. & Dev. Corp. v. Leroux*, 69 F.3d 608, 612 (1st Cir. 1995)). Thus, under the actual test, the interpretation of § 365(c) is that an executory contract can be assumed *or* assigned instead of assumed *and* assigned. In other words, the contract can be assumed by a party so long as applicable law does not stand in its way.

Here, the 365(c) exception is effective to bar assumption of the Agreement because it changes a material term of the Agreement: the parties.

> If there is a material change in the identity of the person rendering the performance under the contract, the identity of that person is an essential element of the contract, and the contract is nonassumable under applicable nonbankruptcy law, then the estate cannot assume the contract. The reason for that result is that assumption other than by agreement may result in prejudicial harm to the nondebtor party. Where the Trustee's assumption, as the representative of the estate, would not change the essential identity of the entity performing the services under the contract, the exception is not effective. In that situation the nondebtor party is not prejudiced, nor is his essential bargain affected by the assumption.

In re Cardinal Indus., 116 B.R. 964, 982 (Bankr. S.D. Ohio 1990). Pursuant to the contract, Under My Thumb required performance to develop the software and to give a non-exclusive licensing of

the software to Development. In return, Development was to pay back the R&D Note. R. at 4. Upon the Bankruptcy filing, however, the contract is sought to be assumed by a third party, SFD. R. at 7-8. The essential identity of Under My Thumb is being affected here and is an essential element under the contract. Respondent created a software and got it patented for Development. It subsequently licensed it to Development. Now, SFD, a direct competitor of Under My Thumb is coming into this Bankruptcy and will necessarily assume the contract by virtue of rights to a majority of the shares of TDI. Under My Thumb would never have gotten a patent if its license could be passed around at free will like the debtor is asking the court to do. Under My Thumb will undoubtedly be prejudiced by the assumption and the "essential bargain" to license its creation to Development will be grossly "affected by the assumption" when it gets in the hands of its competitor SFD.

In fact, allowing the assignment of the Software License undermines the fundamental policy of the patent system, which 365(c) of the Bankruptcy Code preserves for licensors such as Under My Thumb. To encourage disclosure of technology, federal patent law grants inventors the right to control the use of their inventions.

Inventor patents are protected by the United States Constitution. Const. Art. I, § 8, Cl. 8 reads:

> Cl 8. Patents and copyrights.
> 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.

This constitutional grant of power to Congress forms the basis of the fundamental policy of the patent system to encourage the "creation and disclosure of new, useful, and nonobvious advances in technology and design in return for the exclusive right to practice the invention for a period of years." *Bonito Boats v. Thunder Craft Boats*, 489 U.S. 141, 151, 109 S. Ct. 971, 977 (1989).

Further, the Patent Act was passed by congress to give protection to such inventors. Someone who "invents or discovers a new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent." Harner and Black and Goodman, supra, at 210. With respect to patent licenses, a license is an agreement to use the inventors product and to not transfer its ownership interest to another. The assignment of patent license is granted by the licensor, not the licensee. *Everex Sys.* at 676, n.2. Patented licenses are personal in nature to its creator. A licensor has an exclusive right to use his invention. Once he agrees to license his creation, he does so at his own volition. When he grants a non-exclusive license for another individual to use in a contract, he is saying that the licensee can use the license but not at the exclusion of others. The licensor has the autonomy to choose his own licensee's because it is the licensor's creation. The licensor must consent to the licensing of his patented product:

> Under federal common law, patent license agreements are personal to the licensee and, consequently, are not assignable by the licensee to a third party without the consent of the licensor unless the license agreement expressly provides otherwise. This proposition appears to be true for...nonexclusive patent licenses.

Harner and Black and Goodman, *supra*, at 211. The principle of barring such assignability is because patent licenses, just like other areas of intellectual property law, involve property that is inherently personal to an individual. Allowing a nonexclusive patent license to be assigned without the permission of its creator would be contradictory to the public policy purpose behind it. "Federal law principle against the assignability of nonexclusive patent licenses is rooted in the personal nature of a nonexclusive license - the identity of a licensee may matter a great deal to a licensor." *Perlman,* 165 F.3d at 752, n.4 (9th Cir. 1999); *see also Everex Sys.* at 679 (explaining rationale behind federal law rule against assignability).

Indeed, the court in *Perlman v. Catapult Entertainment (In re Catapult Entm't)*, 165 F.3d

747 (9th Cir. 1999) reviewed this public policy conflict. In that case, a licensor sought to prevent a third party from assuming a license in an executory contract from a party that filed for Chapter 11 reorganization protection. The court stated "where applicable nonbankruptcy law makes an executory contract nonassignable because the identity of the nondebtor party is material, a debtor in possession may not assume the contract absent consent of the nondebtor party. *Id.,* 754-55. Here, the identity of the nondebtor (Respondent Under My Thumb) is material. Under My Thumb designed and profited off the product. Now, a direct competitor in SFD is stepping in and trying to assume the executory contract. SFD may not step in and get the license to use Under My Thumb's license because it is against the public policy rationale of protecting inventors from others' unauthorized use of a creation. By contrast, this would freely grant licensing of the software to a competitor of Under My Thumb who it would never grant a license to in the first place.

II. IN A CASE WHERE A CLASS OF CLAIMS IS 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, RATHER THAN ACCEPTANCE FROM ONE IMPAIRED CLASS OF CLAIMS OF ANY ONE DEBTOR.

The decision of the Thirteenth Circuit Court of Appeals should further be affirmed because the Petitioner's per-plan approach is in contravention with the statutory language of 11 U.S.C. § 1129(a)(10). Moreover, the per-plan, as opposed to the correct per-debtor, approach impermissibly elevates convenience for debtors over the rights of creditors.

A. The Per-Plan Approach is the Correct Approach According to the Language and Purpose of the Bankruptcy Code.

First, and most simply, a correct reading of the Bankruptcy Code results in a requirement that a multi-debtor plan have a vote from an impaired class of creditors from each debtor.

With respect to statutory construction, "[t]he proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy

and objects of the legislature." *United States v. Hartwell*, 73 U.S. 385, 396, 18 L. Ed. 830 (1868); *see also In re Seaman,* 340 B.R. 698, 709 (Bankr. E.D.N.Y. 2006) (same). Specifically as to the Bankruptcy Code, this Court "has indicated a reluctance to declare provisions of the Bankruptcy Code ambiguous." *Crédit Agricole Corp. v. American Home Mortgage Holdings, Inc. (In re American Home Mortgage Holdings, Inc.),* 637 F.3d 246, 255 (3d Cir. 2011). In this case, § 1129(a)(10) is unambiguous, and requires an unambiguous result.

11 U.S.C. § 102(7) provides that "the singular includes the plural." Thus, the word "plan" in § 1129(a)(10) is to be read with the plural in the appropriate case, such as here, where there are multiple debtors in a jointly-administered proceeding. § 1129(a)(10) states 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 . . ." And § 1129(a)(10) requires at least one class of impaired claims under a plan to approve the plan before it can be confirmed. The instant case involves multiple debtors. Under this simple construction, the word "plan" contained in § 1129 is "plans", as there are multiple debtors. "The fact that §1129(a)(10) refers to 'plan' in the singular is not a basis, alone, upon which to conclude that, in a multiple debtor case, only one debtor — or any number fewer than all debtors — must satisfy this standard." *In re Tribune Co.,* 464 B.R. 126, 182 (Bankr. D. Del. 2011).

The Petitioner may argue that the language of § 1129(a) is ambiguous to this point in an attempt to compel a favorable result. However, the Petitioner's argument that § 1129 may be, by itself, susceptible to differing constructions does not mean that it is ambiguous. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co*., 519 U.S. 337, 341, 136 L. Ed. 2d 808, 117 S. Ct. 843 (1997). Reading § 1129(a)(10) as the Petitioner suggests requires a result not contemplated in the Bankruptcy Code.

As more fully explained in the subsequent section, infra, if separate plans do not exist for each debtor in a multi-debtor bankruptcy case, and the Court agrees with the per-plan approach to § 1129(a)(10), then the substantive rights of creditors at best impermissibly altered and at worst extinguished completely. Since a creditor's ability to vote is its most powerful substantive right, eliminating this right by reading "plan" singularly even where there are multiple debtors that are not substantively consolidated undermines the rights granted to creditors in such proceedings. To avoid this result, § 1129(a)(10) must be read, as § 102(7) allows it to be, to require the use of the per-debtor approach.

Moreover, any "ambiguity" with respect to § 1129(a)(10) should be resolved in favor of the Respondent. 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. Cram down is a powerful remedy available to plan proponents under which dissenting classes are compelled to rely on difficult judicial valuations, judgments, and determinations. The policy underlying Section 1129(a)(10) is that before embarking upon the tortuous path of cram down and compelling the target of cram down to shoulder the risks of error necessarily associated with a forced confirmation, there must be some other properly classified group that is also hurt and nonetheless favors the plan.

In re 266 Wash. Assocs., 141 B.R. 275, 287 (Bankr. E.D.N.Y. 1992), aff'd, 147 B.R. 827 (E.D.N.Y. 1992). Thus, to the extent that the Petitioner argues that as a matter of principle a single creditor of one of the operating debtors should not be able to prevent cramdown, the Bankruptcy Code contemplates otherwise. The very purpose of § 1129(a)(10) is to ensure that an impaired creditor, such as the Respondent here, does not suffer the consequences of a cramdown without at least one other similarly situated creditor. This cannot be done if the per-plan, as opposed to the correct per-debtor, approach is followed.

B. The Per-Plan Approach Would Allow the Petitioner to Bypass the Requirements of the Bankruptcy Code and Would Elevate Convenience for the Petitioner over the Rights of the Respondent.

The per-debtor approach does not leave the debtor without a means of allowing the confirmation of a single plan in a jointly administered proceeding. A debtor with multiple, separately-operating subsidiaries – such as the Petitioner here – can, and in this case was in fact required, to move for substantive consolidation if the end goal is a singular Chapter 11 plan. Failing to do so, however, and requesting the per-plan approach under § 1129 despite the absence of substantive consolidation circumvents the rights of the Respondent and the requirements of the Bankruptcy Code. Absent substantive consolidation or consent to a per-plan approach by the creditors, each of the separate nine debtors involved in this jointly administered plan must separately satisfy § 1129(a)(10) with votes from their creditors.

i. Applicable bankruptcy law provides the legal route to combine all of the estates and proceed accordingly, which the Petitioner did not take.

The Petitioner had the opportunity to substantively consolidate the bankruptcy estates and seek a single plan, and should have done so if the Petitioner sought that result. The filing of a joint petition, by itself, does not create a single, substantively consolidated estate and concomitant liabilities. Joint administration is not designed to alter creditors' rights or the bankruptcy estate of each debtor; the estates of each debtor remain separate and distinct, and creditors are able to reach only the assets of the specific debtor with which they have a claim. *Bunker v. Peyton (In re Bunker)*, 312 F.3d 145, 153 (4th Cir. 2002) ("Joint administration does not affect the substantive rights of either the debtor or his or her creditors."). Conversely, successful substantive consolidation *does* authorize changing the rights of the parties in the case. *In re Owens Corning,* 419 F.3d 195, 205 (3d Cir. 2005) ("Substantive consolidation treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities"); *FDIC v. Colonial Realty Co.*, 966 F.2d 57, 58 (2d Cir. 1992) ("The substantive consolidation of estates in bankruptcy effects the

combination of the assets and the liabilities of distinct, bankrupt entities and their treatment as if they belonged to a single entity.") In short, "substantive consolidation enables a bankruptcy court to disregard separate corporate entities, to pierce their corporate veils in the usual metaphor, in order to reach assets for the satisfaction of debts of a related corporation." (Internal citations and quotations omitted) *Alexander v. Compton (In re Bonham),* 229 F.3d 750, 764 (9th Cir. 2000).

The Petitioner-Debtors here filed their case jointly, and they never moved to substantively consolidate their assets and liabilities into a single estate. R. at 7. The Plan in this case states that "the Debtors' estates are not being substantively consolidated and no Debtor is to become liable for the obligations of another." R. at 7. Substantive consolidation of multiple estates is not assumed simply by virtue of joint administration, and the Thirteenth Circuit in this case correctly declined to assume it. *Reider v. FDIC (In re Reider),* 31 F.3d 1102, 1109 (11th Cir. 1994) (the filing of a joint petition does not result in the automatic substantive consolidation of the two debtors' estates). Bankruptcy Rule 1015 and 11 U.S.C. § 302(b) make clear that joint administration, as here, does not equal substantive consolidation. *See* Bankruptcy Rule 1015 ("[i]f two or more petitions by, regarding, or against the same debtor are pending in the same court, the court may order consolidation of the cases"); 11 U.S.C. § 302(b) ("[a]fter the commencement of a joint case, the court shall determine the extent, if any, to which the debtors' estates shall be consolidated"). *See also* Bankr. Rule 1015(b) (authorizing joint administration with instruction to "give consideration to protecting creditors of different estates against potential conflicts of interest") Importantly, the Advisory Committee Notes to Bankr. Rule 1015 note that "this rule does not deal with the consolidation of cases involving two or more separate debtors . . . [which is] neither authorized nor prohibited by this rule".

Thus, the Petitioner never requested that the Court treat all separately operating subsidiaries

as a single entity, and the subsidiaries should be treated as such. Pursuant to § 1129(a)(10), each operating debtor – including Development – is required to have at least one accepting class of impaired creditors. Since Development did not have an accepting class of impaired creditors, § 1129(a)(10) is not met, and cramdown is not permissible.

ii. Substituting joint administration for substantive consolidation bypasses the cramdown requirements in § 1129(a) by eliminating impaired creditors' right to vote on a plan.

In this case, the Petitioner seeks to affect a substantive right of the Respondent by requiring only a vote from each impaired class of creditors per plan, rather than an impaired class of creditors of each debtor. The Petitioner's per-plan approach vis-à-vis joint administration is not a substitute for consolidation. Had the Petitioner sought to alter the rights of the Respondent, it should have substantively consolidated the estates. The per-plan approach, without substantive consolidation, denies rights to a creditor which does not agree to a plan and allows an impaired class of claims for one debtor to speak for the creditors of another debtor who are situated differently, and have different rights and interests.

The loss of a right that the per-plan approach via joint administration causes the Respondent is the loss of a meaningful opportunity to engage in the Chapter 11 process – namely, a vote in confirmation of the plan. As a result, it alters the rights of the Respondent, and joint administration is therefore not appropriate to confirm a single plan. *See e.g., Bunker v. Peyton (In re Bunker)*, supra, 312 F.3d at 153. Had the Thirteenth Circuit agreed with the Petitioner and required only that one creditor from each impaired class vote on the plan, the Respondent would have been deprived of its broad, stated rights to consent – or to not consent – to what kind of recovery it may receive in a Chapter 11 plan. The Respondent's position that § 1129(a)(10) requires only a vote from each class of impaired creditors per plan thus disregards the rights of

creditors.

Creditors are entitled to a broad right of recovery under the Bankruptcy Code, and rights of impaired creditors are entitled to heightened protection. Under 11 U.S.C. § 101(5), a "claim" refers broadly to a creditor's right to recovery in bankruptcy.[5] In Chapter 11 cases specifically, the Code preserves the rights of creditors who are impaired under a proposed Chapter 11 plan. *See* 11 U.S.C. § 1124 (a claim is impaired unless the plan "leaves unaltered the legal, equitable, and contractual rights to which such claim . . . entitles the holder of such claim.") "If the debtor's Chapter 11 reorganization plan does not leave the creditor's rights entirely 'unaltered,' the creditor's claim will be labeled as impaired under § 1124(1) of the Bankruptcy Code." *Solow v. PPI Enterprises (U.S.) (In re PPI Enterprises (U.S.)),* 324 F.3d 197, 202 (3d Cir. 2003). It is this impairment that enables a creditor to make its own decision as to whether or not it will accept the proposed recovery of its claim under a reorganization plan. *See* 11 U.S.C. § 1126(a) and (f). At least one class of claims impaired by a Chapter 11 plan must vote in favor of the plan for it to be confirmed. *See* 11 U.S.C. § 1129(a)(10). As the Thirteenth Circuit correctly noted, "[the right to vote] is, in effect, [a creditor's] bargaining chip at the negotiating table." R. at 16. This consideration is particularly applicable here. The Debtors left Respondent out of negotiations to come to a resolution, including the court-ordered forum of mediation. R. at 6. Thus, Respondent's sole ability to have any leverage with the outcome of this bankruptcy case was a vote.

The right for a creditor to bargain and negotiate in the bankruptcy case with its voting power is not a second-class entitlement, as the per-plan approach necessarily suggests. The very purpose of 11 U.S.C. § 1129(a)(10) is

> to provide some indicia of support [for a plan of reorganization] by affected creditors and prevent confirmation where such support is lacking. . . As such, §

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[5] *See e.g., Johnson v. Home State Bank*, 501 U.S. 78, 83, 111 S. Ct. 2150 (1991) ("We have previously explained that Congress intended by this language to adopt the broadest available definition of 'claim.'")

> 1129(a)(10) requires that a plan of reorganization pass muster in the opinion of creditors whose rights to repayment from the debtor are implicated by the reorganization. By providing impaired creditors the right to vote on confirmation, the Bankruptcy Code ensures the terms of the reorganization are monitored by those who have a financial stake in its outcome.

(Internal citation and quotations omitted) *In re Combustion Engineering, Inc*., 391 F.3d 190, 243-44 (3d Cir. 2004); *see also JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props. (In re Transwest Resort Props.),* 881 F.3d 724, 732 (9th Cir. 2018) (one "safeguard" to cramdown "is in section 1129(a)(10), which requires that at least one impaired creditor has accepted the plan.") Without that vote, a creditor – in particular here, an impaired creditor – has virtually no rights in the Chapter 11 process. To the contrary, the per-debtor approach ensures that the creditors of each debtor – or at least one impaired creditor of each debtor – retain meaningful protection and a vote in how the proposed reorganization plan allocates and distributes value. *See generally* Suzanne T. Brindise, CHOOSING THE "PER-DEBTOR" APPROACH TO PLAN CONFIRMATION IN MULTI-DEBTOR CHAPTER 11 PROCEEDINGS, 108 NW. U.L. Rev. 1355, 1380 (2014). At best, reducing – and at worst, eliminating – the value of an impaired creditor's vote during the Chapter 11 process strips a creditor of the most important benefit it receives in a bankruptcy case. A creditor's decision to vote or not to vote, as the case may be, affects what the Supreme Court considers the main principles of Chapter 11: to "preserv[e] going concerns" and "maximize[e] property available to satisfy creditors." *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 453, 119 S.Ct. 1411 (1999). This goal is undermined by disallowing creditors to protect their rights.

The Petitioner's position that the per-plan approach fails to acknowledge that it would extinguish the Respondent's ability to participate meaningfully in the bankruptcy process, and would disallow the Respondent from exercising its rights to the extent to which it is entitled. Thus,

the Petitioner's nine estates cannot simply be jointly administered with a single plan. Here, the Respondent is the sole creditor of Development, one of the nine subsidiaries of the Petitioner-Debtors. The Respondent's *only* ability to vote against the plan in this case is dependent upon whether or not Development is considered to have its own plan. Such a result is a perverse reading of the Bankruptcy Code and fails to recognize the rights afforded to creditors in the Chapter 11 process.

Petitioner overlooks the appropriate vehicle for substantive consolidation of a multi-debtor bankruptcy case, and instead fabricates a path towards a "simple" or "convenient" singular plan confirmation. However, a debtor may not manipulate the requirements of the Bankruptcy Code to achieve a convenient result.[6] The nine debtors here operate separately and are presumed distinct as such. Entity separateness is a fundamental tenet of the law. *In re Tribune Co*., 464 B.R. 126, 182 (Bankr. D. Del. 2011), *citing Owens Corning,* supra, 419 F.3d at 211 (absent compelling circumstances, courts consider entity separateness as "the general expectation of state law and of the Bankruptcy Code, and thus of commercial markets"). [7] Each of the debtor-subsidiaries operate a casino and resort. The Respondent operates solely as a licensee. It does not operate a casino nor a resort. However, despite the stark difference between the Respondent and the remaining debtors, the Petitioner argues that the Respondent should be treated the same as the other debtors and asks the Court to confirm a single plan on behalf of nine separately operating entities, one of which does not engage in the primary business operation of the parent corporation. *See e.g., Skidmore, Owings & Merrill v. Canada Life Assurance Co.,* 907 F.2d 1026, 1027 (10th Cir. 1990) ("Absent

[6] For example, a debtor may not impermissibly manipulate classes for voting purposes. *See John Hancock Mutual Life Ins. Co. v. Route 37 Business Park Associates*, 987 F.2d 154, 158 (3d Cir. 1993) ("Section 1129(a)(10) . . . would be seriously undermined if a debtor could gerrymander classes").

[7] Rule 1015(b) further recognizes the separateness principle as it provides additional protections for creditors from conflicts of interest in jointly-administered cases. *See* Rule 1015(b) (authorizing joint administration with instruction to "give consideration to protecting creditors of different estates against potential conflicts of interest.")

circumstances justifying disregard of the corporate form, a parent company is treated as a legal entity separate from the subsidiary.") (Internal citations omitted). Though allowed by the Bankruptcy Code (*see* 11 U.S.C. § 1123(a)(5)(C) (providing that a plan may provide for the "merger or consolidation of the debtor with one or more persons")), the Record is devoid of any steps taken by the Petitioner in order to do so.

To the extent that the Petitioner argues that the per-debtor approach in this case foils its ability to reorganize in a Chapter 11 scenario, this is insufficient to overcome the requirements of the law. Congress specifically enacted the Bankruptcy Code the way it is stated; it did not specifically enact certain provisions of the Bankruptcy Code to be bypassed when it is inconvenient for a debtor. *See e.g., Lamie v. United States Tr.,* 540 U.S. 526, 538, 124 S. Ct. 1023 (2004) ("Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding"); *see also Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13, 120 S. Ct. 1942 (2000) ("Achieving a better policy outcome . . . is a task for Congress, not the courts.") [8] Likewise, the fact that the Petitioner may not agree with the reasoning behind Respondent's refusal to vote in favor of the plan is irrelevant. *See In re Village at Lakeridge, LLC*, BAP NV-12-1456, 2013 WL 1397447, at *9 (Bankr. App. 9th Cir. Apr. 5, 2013) (§ 1129(a)(10) is 'somewhat mechanical on its face, and thus would not under a plain meaning analysis permit an inquiry into motive' of a creditor), *citing* 7 COLLIER ON BANKRUPTCY § 1129.02[10] (Alan N. Resnick & Henry J. Somer, eds. 16th ed. 2009), aff'd sub nom. *In re The*

[8] Further, the proposition that § 1129(a)(10) is simply a "technical requirement" (*see* R. at 30) is misplaced. While *In re Rhead,* 179 B.R. 169, 177 (Bankr. D. Ariz. 1994) acknowledged that § 1129(a)(10) has come under criticism, and while more recent efforts may have been undertaken to call into question the provision's utility (*see* R. at 32, fn. 16), disagreement with a provision of the law does not mean it does not currently exist. Indeed, the AMERICAN BANKRUPTCY INSTITUTE COMMISSION TO STUDY THE REFORM OF CHAPTER 11, https://abiworld.app.box.com/s/vvircv5xv83aavl4dp4h (last visited Jan. 4, 2020) does not consider the issue in the context specifically of a jointly administered case where it could or should have been substantively consolidated, as is the issue here.

Village at Lakeridge, LLC, 814 F.3d 993 (9th Cir. 2016). The Respondent is entitled to make its own business judgment, and is under no obligation to elevate the business needs of the Petitioner over its own.

The Petitioner will undoubtedly argue that is that it is in the Petitioner's best business interests, and consistent with the goals of reorganization to treat all nine debtors as one, and confirm a single plan. However, Petitioner cannot avoid the fact that they could have pursued the proper channels to ensure that their estates were treated as one and the same. Since the Petitioner did not do so, the Petitioner should not receive the benefits of substantive consolidation; namely, a single plan for each of the nine debtors. The Respondent exercised its right not to vote to confirm the plan and its right is entitled to enforcement by the Court. Therefore, the decision of the Thirteenth Circuit should be affirmed, and the plan should not be crammed down.

iii. The Petitioner's estates could not have been substantively consolidated because the equities weigh in favor of votes from each individual debtor.

Even if the Petitioner had pursued the appropriate vehicle in which a multi-debtor Chapter 11 can achieve the confirmation of a single plan, substantive consolidation would not have been appropriate in this case and a single plan would not be authorized under the law. Substantive consolidation is not permitted because it would be inequitable to the creditors – particularly the Respondent here. The Court's authority to substantively consolidate bankruptcy estates is found within the Court's equitable powers. *See* 11 U.S.C. § 105(a) (bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title") *see also FDIC v. Colonial Realty Co*., 966 F.2d 57, 59 (2d Cir. 1992) ("[S]ubstantive consolidation has no express statutory basis but is a product of judicial gloss. . . Courts have consistently found the authority for substantive consolidation in the bankruptcy court's general equitable powers as

set forth in 11 U.S.C. § 105.") (Internal citations omitted).

Equity, in this case, disfavors the substantive consolidation of the estates. "The sole purpose of substantive consolidation is to ensure the equitable treatment of all creditors." *In re Augie/Restivo Baking Co*., 860 F.2d 515, 518 (2d Cir. 1988). The *Augie/Restivo* matter provides a number of criteria relevant to determine whether substantive consolidation will result in equitable treatment to creditors, which ultimately come down to two factors: (i) whether creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit, or (ii) whether the affairs of the debtors are so entangled that consolidation will benefit all creditors. *Id.,* at 518. While the *Augie/Restivo* factors are not exhaustive, other courts have adopted substantially similar, albeit not identical, criteria for substantive consolidation; however, all generally boil down to substantial business identity between the entities, and relative prejudice or harm to the parties.[9] *See e.g., Drabkin v. Midland-Ross Corp. (In re Auto-train Corp.),* 258 U.S. App. D.C. 151, 810 F.2d 270, 276 (D.C.Cir.1987) ((1) there is substantial identity between the entities to be consolidated; and (2) consolidation is necessary to avoid some harm or to realize some benefit); *First Nat'l Bank of El Dorado v. Giller (In re Giller),* 962 F.2d 796, 799 (8th Cir. 1992) ((1) the necessity of consolidation due to the interrelationship among the debtors; 2) whether the benefits of consolidation outweigh the harm to creditors; and (3) prejudice resulting from not consolidating the debtors).

The Petitioner's estates could not have been substantively consolidated. Creditors did not deal with the nine operating subsidiaries as a single economic unit. This is particularly so with respect to the Respondent, Under My Thumb, whose sole involvement in this bankruptcy case is the result of its relationship with Tumbling Dice Development, LLC, one of the nine debtor-

[9] The Respondent submits that the various tests ultimately come the same result. Under any of these tests, substantive consolidation would not be permitted in this case.

subsidiaries. Development's sole purpose in the corporate structure is the licensee for the Respondent's software license. R. at 4. None of the other eight entities are licensees for the Respondent's software. Second, for almost the same exact reason, it cannot be said that the debtors' affairs are so entangled that consolidation would benefit all creditors. The operation of Respondent differs significantly from the eight other subsidiaries. The Respondent is a licensor. It does not operate a casino, nor a resort, nor a restaurant, nor does it employ staff for these purposes. Moreover, Respondent contracts exclusively with one of the operating debtors – Development. Only one of the nine debtors pays the Respondent, and that is Development. R. at 4. In fact, the Respondent was virtually unaffected by the eight other debtors' affairs – Development was current with payments to the Respondent under the Agreement. R. at 6. Development is not the reason for this bankruptcy case. Thus, the estates of all nine debtors in this case could not have been substantively consolidated.

In light of these differences, there is relatively little harm to the Petitioner by not substantively consolidating the estates. The only "harm" to the Petitioner is that it does not have the benefit of convenience of confirming a single plan through joint administration. However, a contrary result would be to elevate form over substance. As courts are courts of equity, bankruptcy courts hold that that substance will prevail over form. *See Pepper v. Litton*, 308 U.S. 295, 304-05, 60 S. Ct. 238, 244 (1939) (affirming that bankruptcy courts should invoke their equitable powers to ensure that "substance will not give way to form").

If the Petitioner's estates could not even be consolidated through the proper channels, then finding that a singular, generic plan can be crammed down for all nine of them is an absurd result. The Court should, as the Thirteenth Circuit did, decline to elevate mere convenience of the administration of the Petitioner's bankruptcy case over the rights of the Respondent. As such, the

Court should affirm the decision of the Thirteenth Circuit.

CONCLUSION

For the reasons set forth above, the Respondent respectfully submits that this Court should affirm the decision of the Court of Appeals for the Thirteenth Circuit, and remand this case to the Bankruptcy Court with instructions to sustain the Respondent Under My Thumb, Inc.'s objections to the Petitioner's Plan.

Respectfully submitted,
RESPONDENT, UNDER MY THUMB INC.

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