No. 19-1004

In The

Supreme Court of the United States

October Term, 2019

In re Tumbling Dice, Inc. *et al.*, Debtors,

Tumbling Dice, Inc. *et al.*, Petitioner

v.

Under My Thumb, Inc., Respondent.

On Writ of Certiorari to the United States

Court of Appeals for the Thirteenth Circuit

BRIEF FOR RESPONDENT

Team R.47

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 decisions of the Bankruptcy Court for the District of Moot and the Bankruptcy Appellate Panel for the Thirteenth Circuit are both unreported and therefore unavailable. The opinion for the U.S. Court of Appeals for the Thirteenth Circuit is set forth in Case No. 18-0805, dated March 4, 2019, and is incorporated in the record on appeal (hereinafter, "R.").

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

The relevant statutory provisions involved in this case are listed below and are reproduced in Appendices A through F.

11 U.S.C. § 365(c)

11 U.S.C. § 365(f)

11 U.S.C. § 1107(a)

11 U.S.C. § 1123(a)

11 U.S.C. § 1124

11 U.S.C. § 1126(a)

11 U.S.C. § 1126(c)

11 U.S.C. § 1126(d)

11 U.S.C. § 1129(a)

STATEMENT OF THE CASE

Under My Thumb, the creditor and Respondent in this appeal, entered into a contractual relationship with Tumbling Dice Development, LLC ("Development") in 2008 to create a comprehensive software system (the "Software"). R. at 4. Under My Thumb spent almost a year and approximately $10 million dollars to develop this custom Software for Development. R. at 4. Upon the completion and integration of the Software, Under My Thumb entered into a non-exclusive license agreement (the "Agreement") with Development and an unsecured $7 million promissory note for the repayment of the research and development ("R&D Note"). R. at 4. The Agreement allowed Development to "extend the benefits of the Agreement to its affiliated entities only". R. at 5. Otherwise, the Agreement prohibited Development and any of its affiliates, including Tumbling Dice, Inc. ("TDI") and its eight legally separate subsidiaries (each an "Operating Debtor"), from assigning or sublicensing their rights under the Agreement without Under My Thumb's express written consent. R. at 4-5.

The Software provided a way for TDI, the Operating Debtors, and Development (collectively "Debtors") to track customer spending, capture their preferences, and encourage these customers to spend more money in each operating casino through membership in Club Satisfaction. R. at 5. In exchange for the ongoing license and use of the Software, the Agreement required Development to pay Under My Thumb a monthly fee calculated based on the amount of spending by the Operating Debtors' customers. R at 5.

Prior to the implementation of the Software, the Operating Debtors had managed the eight separate casinos under a different loyalty program for thirty years. R. at 4. The Software improved the operations and proved to be very successful for the Debtors, tripling membership in the loyalty program and increasing each member's spending. R. at 5.

Under My Thumb contracted directly with Development and did not require any guarantee from the other Debtors. Development remained current on the R & D Note until June 2015 when they stopped making payments. R. at 6. In December 2011, a hedge fund, Start Me Up, Inc., used a leveraged buy-out to acquire the stock of TDI. R. at 6. As part of the leveraged buy-out, TDI and the Operating Debtors gave priority liens to a group of lenders ("Lenders") as consideration for a $3 billion loan. *Id.* The Lenders recognized the separateness of Under My Thumb and its limited purpose and did not require Development to sign on the new loan. *Id.* As a result, Development's only creditor is Under My Thumb. *Id.*

As is common with many leveraged buy-outs, the Debtors were unable to service the new loan, and filed Chapter 11 bankruptcy in January 2016. *Id.* At the time of filing, the Debtors still owed Lenders $2.8 billion for the leveraged buy-out and Development still owed Under My Thumb $6 million for the R&D Note. *Id.* The Debtors, without including Under My Thumb, negotiated a plan support agreement between Debtors, Start Me Up, the Lenders, and the unsecured creditors' committee. *Id.* The plan would restructure substantially all of the secured debt owed to Lenders by lowering the interest rate and extending payments over twenty years. R. at 6-7. The plan required Start Me Up to inject new capital in order to fund a 55% distribution to its unsecured creditors and allow Start Me Up to retain its equity interest in the Debtors. R. at 7. The Debtors filed this plan support agreement (the "Plan") with the bankruptcy court in August 2016. *Id.*

The Debtors filed the Plan as a joint plan; however, the Plan directly states that the Plan is not being substantively consolidated and "no Debtor is to become liable for the obligations of another." *Id.* The Plan proposed the assumption of the Agreement under sections 365 and 1123(b)(2) of Bankruptcy Code (the "Code"). *Id.* According to the Plan, Under My Thumb

would continue receiving monthly payments for use of the Software and the Debtors would pay a pro rata share of the $6 million owed under the R&D Note. R. at 7.

However, the Debtors failed to disclose to Under My Thumb that the capital injection would be partially funded by Sympathy for the Devil LP ("SFD") who is a direct competitor of Under My Thumb. *Id.* SFD had been actively attempting to replicate Under My Thumb's proprietary Software without success. R. at 7-8. SFD's capital injection would give SFD voting shares and several seats on TDI's board of directors. R. at 8. Despite SFD's new equity position and access to Under My Thumb's Software, the Debtors failed to provide written notice or request express written consent to sublicense the Software from Under My Thumb, as required by the contractual provisions of the Agreement. R. at 4, 8.

Due to the Debtors' breach of the contractual provisions of the Agreement, Under my Thumb, as Development's only creditor, objected to the Plan as filed. R. at 8. Under My Thumb objected to the Plan on several grounds and two are pursued on appeal: (1) Under My Thumb argues that the proposed assumption for the Agreement is impermissible under § 365(c)(1); and (2) the Plan is not able to be confirmed under § 1129(a)(10) because no impaired class of Development's creditors voted to approve the Plan. R. at 8.

Despite the lack of support by Development's only creditor and in contravention of the "hypothetical test" for assumption of the Agreement, the bankruptcy court confirmed the Plan. *Id*. With respect to the first issue, the bankruptcy court adopted the "actual test" and concluded that Under My Thumb was being asked to honor its existing contractual relationship. R. at 8-9. The bankruptcy court dismissed the second issue, holding § 1129(a)(10) is satisfied where one impaired class accepts the Plan in a multi-debtor filing. R. at 9. The district court affirmed,

however, upon appeal, the Thirteenth Circuit reversed the findings. R. at 3, 21. This appeal follows.

SUMMARY OF THE ARGUMENT

Under My Thumb requests the Court affirm the judgment below because the plain language interpretation of § 365(c)(1) requires the use of the "hypothetical test" and finding that § 1129(a)(10) must be analyzed on a per debtor basis, not a per plan basis.

The first issue presented deals with whether Debtors may assume the non-exclusive executory contract between Development and Under My Thumb without Under My Thumb's consent. This issue has split those circuits that have interpreted the issue because of the phrases "assume or assign" and "applicable language" in § 365(c)(1). The first choice as advanced by the debtors is known as the "actual test" which would violate the cardinal canon of construction and change the meaning of the disjunctive word "or" to suddenly mean the conjunctive word "and." As it is well established that the plain language of the statute should always be the starting point for interpretation, and only if the literal reading would produce an "absurd" result or one that was at "demonstrably at odds with Congressional intent" should courts look elsewhere, the Court here is faced with deciding whether the plain language of § 365(c)(1) is unambiguous and straightforward. Since the word "or" is quite literally the opposite of "and" it seems unlikely that Congress would use the one but really mean the other when they spent years drafting and carefully wording the Bankruptcy Code. Therefore, as advanced by the second choice and majority of those circuits who have interpreted the issue, the "hypothetical test" is the only logical interpretation for the statute.

The second phrase at issue in § 365(c)(1) regarding "applicable law" also can be solved as well using the plain language interpretation. Because § 365(f)(1) dismisses "applicable law", but § 365(c)(1) applies applicable law and (f)(1) is specifically limited by (c)(1) under its own

plain language, the two subsections must be applying "applicable law" of different scope. The "applicable law" that § 365(c)(1) references, has been interpreted at those laws in which the identity of the parties is important, like here with federal intellectual property law. Therefore, the literal plain language interpretation that the "hypothetical test" follows does not result in any conflict between or within surrounding subsections and should logically be interpreted in such manner.

In the second issue, Under my Thumb urges the Court to confirm the ruling of the Thirteenth Circuit in acknowledging a "per debtor" interpretation of § 1129(a)(10) in multi-debtor plans, or in the alternative, accept a "per plan" approach and clarify that absent substantial consolidation, multiple plans exist in a multi-debtor reorganization, thereby requiring approval from an impaired class of claims of each debtor.

Under My Thumb, as an impaired creditor and Development's only class of impaired creditors, has the right to vote to accept or reject Development's Plan pursuant to § 1126. In order to confirm a plan reorganized under Chapter 11, the court must verify the plan meets the sixteen requirements of § 1129. Section § 1129(a)(10) specifies acceptance of the plan by at least one class of claims that is impaired under the plan. Under My Thumb asks the Court to interpret § 1129(a)(10) as requiring a "per debtor" approach which requires plan approval by a class of claims per individual debtor. The "per debtor" approach allows the most cohesive reading of the remainder of the statute and other sections of the Bankruptcy Code governing Chapter 11 reorganizations.

Absent substantial consolidation of a multi-debtor plan, the Thirteenth Circuit and the Delaware Bankruptcy Court interpret § 1129(a)(10) to require a "per debtor" approach rather than the "per plan" approach advanced by the Debtors. A "per plan" interpretation of §

1129(a)(10) allows approval of a multi-debtor plan by a combined class of claims of all creditors of all Debtors, sufficient to satisfy § 1126. If the Court adopts this interpretation of § 1129(a)(10), Under My Thumb asks the Court to clarify, in a multi-debtor reorganization, being jointly administered for the sole purpose of judicial efficiency and absent substantial consolidation, there are separate plans proposed by each debtor entity under joint administration. By recognizing each plan proposed by the individual debtor, the creditors of each debtor have the ability to approve or reject the distinct debtor plan and thereby preserve the powerful right to vote on the plan, as Congress intended.

Substantial consolidation, as an equitable remedy, circumvents and directly opposes areas of corporate and contract law and should be used sparingly. A substantial consolidation is different than joint administration because it places all of the assets, liabilities, and creditors of multiple debtor entities into one plan. The extreme remedy of substantial consolidation is necessary in some cases; however, it is not necessary, nor ordered, on the facts of this case. In order for the ten plans of the ten Debtors to constitute only one plan for approval, the plans must be substantially consolidated by order of the court. The court below recognized there was no substantial consolidation ordered and therefore, ten plans exist, and each plan has its own class of creditors. Under My Thumb is the only creditor of Development and expressly rejects the plan. Therefore, the Court should affirm the judgment of the Thirteenth Circuit.

ARGUMENT

I. Legal Standard

On appeal, bankruptcy court decisions are subject to de novo review for conclusions of law and clear error for findings of fact. *Texas v. Soileau (In re Soileau)*, 488 F.3d 302, 305 (5th Cir. 2007). The Parties do not dispute the facts, and both issues in this case involve questions of law. R. at 9. Thus, the Court review is de novo.

II. Section 365(c)(1) Precludes Assumption Of A Non-Exclusive License Of Intellectual Property Over The Objection Of The Licensor.

Assumption and assignment of an executory contract in the bankruptcy setting is dictated by either §§ 365(c)(1) or 365(f)(1). The Agreement between Development and Under My Thumb falls under § 365(c)(1) which precludes a trustee or Chapter 11 debtor in possession from assuming or assigning any executory contract of the debtor, if (1) "applicable law excuses a party, other than the debtor, to such contract or lease from . . . rendering performance to an entity other than the debtor or debtor in possession"; and (2) "such party does not consent to such assumption or assignment." 11 U.S.C. §365(c)(1). Thus, by its clear unambiguous language the section precludes Debtors from assuming *or* assigning Under My Thumb's non-exclusive license because of the applicable federal intellectual property laws without Under My Thumb's consent.

Furthermore, because the statute is straightforward and clear, the more widely accepted hypothetical test is the only logical option for properly interpreting whether the executory contract can be assumed at all by the Debtors. Consequently, because the Debtors cannot assign the contract due to its character, they cannot assume the contract at all.

Finally, the Debtor's arguments that the actual test should apply fall short, as rewriting statutes for better policy sake is the not the job of the courts, the legislative history does not render the literal reading "absurd," and the plain language interpretation does not render any related sections superfluous or inoperative as the Debtors claim.

A. A Debtor In Possession Holds The Same Powers And Limitations As A Trustee.

In continuing Chapter 11 cases, there is no bankruptcy trustee, only the debtor in possession. The management of the company trying to reorganize is given the chance to continue running their business, unless or until the reorganization fails or the debtor successfully makes it through the bankruptcy process. To ensure the debtor in possession has the powers and

tools necessary to complete this process, 11 U.S.C. §1107(a) grants the debtor in possession all the rights and powers, "subject to any limitations" a trustee would have in the same situation. 11 U.S.C. §1107(a). Thus, it is well established that when the bankruptcy code uses the term "trustee" it also means "debtor in possession." *Official Comm. Of Unsecured Creditors of Cybergenics Corp. v. Chinery (In re Cybergenics Corp.)*, 226 F.3d 237, 243 (3d Cir. 2000).

While the Debtors, acting as the debtor in possession, have the same powers and tools as a trustee, they are still subject to the same limitations as a trustee would have and are not given any different accommodations or work arounds, simply because they are the *debtor* in possession.

B. Interpretation Of A Statute Must Begin With The Plain Language.

When a statute's meaning is called into question, the first step to resolving the dispute "begins where all such inquiries must begin: with the language of the statute itself." *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989). This cardinal canon of construction dictates that "courts must presume that a legislature says in a statute what it means and means in a statute what it says." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). If the "words of the statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

Only when "literal application of the statutory language at issue results in an outcome that can truly be characterized as absurd" or that is "demonstrably at odds with clearly expressed congressional intent" is there an exception from following a statute's plain language. *RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257, 265 (4th Cir. 2004). "The instances in which either of these exceptions to the Plain Meaning Rule apply 'are, and should be, exceptionally rare.'" *Id.* (quoting *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 342 (4th Cir. 2000)). If a party wishes to demonstrate that the plain meaning of a statute is "at odds with the

intentions of its drafters", they must do more than show "the statute's literal application is unreasonable in light of bankruptcy policy." *In re Sunterra Corp.*, 361 F.3d at 269. Courts should however hesitate in creating "discord among related provisions." *Perlman v. Catapult Entm't (In re Catapult Entm't)*, 165 F.3d 747, 751 (9th Cir. 1998).

Section 365(c)(1) has two phrases that have caused discord among the courts and that are at issue in the present case. The first deals with the meaning of "or" from "[t]he trustee may not assume *or* assign." The second deals with the phrase "applicable law" as it applies specifically to 365(c)(1) as compared to the same phrase in section 365(f)(1). Each of these phrases however can be properly interpreted by following the cardinal canon of construction, by starting with the plain language of the statute.

1. "Or" Does Not Mean "And."

Here, the plain language of Section 365(c)(1) clearly uses the disjunctive term "or" rather than the conjunctive term "and" as the Debtors would have it interpreted. Because the statute says "or," the trustee, or debtor in possession in this case, cannot assume *or* assign any executory contract, including the license for intellectual property with Under My Thumb. Therefore, "two independent events must occur before a Chapter 11 debtor in possession is entitled to assign an executory contract. The debtor in possession must first obtain the nondebtor's consent to assume the contract, and it must thereafter obtain the nondebtor's consent to assign the contract." *In re Sunterra Corp.*, 361 F.3d at 267. If the legislature wanted trustees to be able to assume *and* assign, meaning consent must be given only if both occur, then the statute would say "and." Instead, the disjunctive was chosen, meaning if a trustee assumes *or* assigns an executory contract, then the remaining language of Section 365 is triggered, specifically that consent must be given.

Debtors may argue that as debtors in possession they are not technically assuming or assigning the contract, as they are the original party that contracted with Under My Thumb to use the non-exclusive license. However, this interpretation would grant Debtors, as debtors in possession, an additional right that a trustee does not have. Section 1107 says that a debtor in possession has the same rights, tools, powers, and limitations as a trustee, not this additional right simply because they are not run by a trustee throughout the Chapter 11 process.

Additionally, as explained in *In re West Electronics, Inc.*, Congress chose to specify that the applicable law excuses performance to an entity "other than the debtor *or the debtor in possession.*" *In re West Elecs., Inc.* 852 F.2d 79, 83 (1988) (italics added for emphasis). By explicitly discussing a debtor and debtor in possession as two separate units, a solvent party and an insolvent debtor in possession, it demonstrated Congress' intent and belief that the parties are "materially distinct entities." *Id.* Therefore, the argument that nothing is being assumed or assigned because it is still the same contracting party, falls short and demonstrates that Debtors should not be able to wiggle out of § 365(c)(1)'s application simply because they are debtors in possession rather than a trustee.

As this plain reading does not produce an "absurd result" or an "outcome demonstrably at odds with clearly expressed congressional intent" there is no exception to accepting the literal interpretation in this case. *In re Sunterra Corp.*, 361 F.3d at 265. Debtors cannot assume the executory contract at issue because Under My Thumb has not provided consent for them to do so. Even if the agreement was somehow found to say *assumption* was allowed by Debtors, *assignment* is not allowed because of applicable law. This brings us to the larger issue of whether subsection (c)(1) or subsection (f)(1) should apply, and what Congress had in mind when drafting the two subsections.

2. The Specific of 365(c)(1) Overrides The General Of 365(f)(1)'s Applicable Law.

As is well established, when interpreting the plain language of a statute, courts should minimize any "discord among related provisions" and give effect to "all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *In re Catapult Entm't*, 165 F.3d at 751. It is also a basic principle of statutory construction "that when two statutes are in conflict, a specific statute closely applicable to the substance of the controversy at hand controls over a more generalized provision." *Sigmon Coal Co. v. Apfel*, 226 F.3d 302 (quoting *Farmer v. Emp't Sec. Comm'n of N.C.*, 4 F.3d 1274, 1284 (4th Cir. 1993)). Interpreting § 365 has troubled bankruptcy courts because of this exact problem, the same one facing the Parties in the present case.

The plain language of subsection 365(c)(1) bars assumption (absent consent) whenever "applicable law" would bar assignment[1], yet the language of subsection 365(f)(1) states that "applicable law" notwithstanding, executory contracts may be assigned[2]. As § 365(f)(2)(A) specifically requires assumption prior to assignment, 11 U.S.C. § 365(f)(2)(A), there appears to be discord between the two subsections if the plain language interpretation is employed. However, as discussed in *In re Magness*, the Sixth Circuit has reconciled this discord by noting "each subsection recognizes an 'applicable law' of markedly different scope." *See In re Magness*, 972 F.2d 689, 695 (6th Cir. 1992). The court interpreted (f)(1) to be a "broad power to assume and assign executory contracts" even though the contract or applicable law prohibits said assignment. *Id*. Subsection (c)(1) by contrast limits (f)(1)'s broad power in the specific circumstance of when "the attempted assignment by the trustee will impact upon the rights of a

[1] 11 U.S.C. § 365(c)(1)
[2] 11 U.S.C. § 365(f)(1)

non-debtor third party," at which point "any applicable law protecting the right of such party to refuse to accept from or render performance to an assignee will prohibit assignment by the trustee." *Id.* Meaning a court must ask "why the 'applicable law' prohibits assignment" to determine if the "applicable law stands or falls under 365(f)(1)." *In re Catapult Entm't,* 165 F.3d at 752. Only if because the identity of the contracting party is material to the agreement, will subsection (c)(1) rescue an applicable law from subsection (f)(1). *Id.*

In the present case, it is federal law on intellectual property that is the applicable law that affects the non-exclusive license. The assignability of a patent license "is a specific policy of federal patent law" which "provides that [such] agreements are personal to the licensee and not assignable unless expressly made so in the agreement." *Unarco Indus. v. Kelley Co.*, 465 F.2d 1303, 1306 (7th Cir. 1972). Thus, clearly the identity of the contracting parties is important, as only those parties can utilize the license unless specifically contracted for otherwise. Under My Thumb and Development's agreement does not allow for anyone other than Development or its affiliates to utilize the license, thus it is non-exclusive and non-assignable because the identity of the parties is important.

Therefore, the character of the agreement dictates that § 365(c)(1) rescues the applicable federal patent law and under the plain language bars the assumption and assignment by Debtors.

C. The Hypothetical Test Is The Only Logical Option For Interpreting Section 365(c)(1).

The current circuit split regarding which test to use for interpreting Section 365(c)(1) has led to the "hypothetical test" and the "actual test." With a majority of the circuits favoring the approach, the literal reading of the statute is said to establish a "hypothetical test": if a debtor in possession lacks hypothetical authority to assign a contract, then it may not assume it, even if no assignment was actually intended. *See, e.g., In re Sunterra Corp.*; *In re Catapult Entm't*; *In re*

West Elecs., Inc. Simply put, a debtor in possession may not assume a contract without consent if they lack the authority to assign it.

The actual test on the other hand "contemplate[s] a case-by-case inquiry into whether the nondebtor party *actually* was being 'forced to accept performance under its executory contract from someone other than the debtor party with whom it originally contracted.'" *Institute Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997) (italics in original) (quoting *Dev. Corp. v. Leroux (In re Leroux)*, 69 F.3d 608, 612 (1st Cir. 1995)). Therefore, a debtor in possession may assume an executory contract without consent provided no actual assignment to a third party is contemplated.

The decision to pick a test was before the Court in *N.C.P. Mktg. Grp., Inc. v. BG Star Prods., Inc.* in 2009, but certiorari was denied due to other issues required in the case that were "antecedent questions under state law and trademark-protection principles." *N.C.P. Mktg Grp., Inc. v. BG Star Prods., Inc.*, 129 S. Ct. 1577, 1578 (2009). However, the importance of the decision was highlighted in the brief statement respecting denial. With no antecedent questions of law that can cloud or clarify the ultimate decision, the current case provides the perfect opportunity to end the circuit split and provide clarity for all courts and parties involved in Chapter 11 bankruptcies.

Here the Debtor asks the Court to choose the actual test for interpretation for three main reasons, each of which is rebutted herein:

1) The literal reading sacrifices sound bankruptcy policy;

2) The literal reading is incompatible with the legislative history; and

3) The literal reading creates inconsistencies within § 365.

1. A Better Policy Is Not For The Courts To Create.

While the Debtors would have the Court believe accepting the literal plain language reading is "absurd" because "such a reading conflicts with the general bankruptcy policy of fostering a successful reorganization and maximizing the value of the Debtor's assets," this is untrue because in drafting, Congress could not and "did not sacrifice every right of the nondebtor party to the reorganization process." *In re Sunterra Corp.*, 361 F.3d at 268. Instead, some benefits need to remain for those nondebtor parties to executory contracts who have found themselves as unwitting bankruptcy participants. Under My Thumb simply desires to maintain some control over the agreement and software that they have spent years and millions of dollars creating, a desire Congress granted when passing Section 365(c)(1).

As mentioned in *N.C.P. Mktg. Group Inc.*, the hypothetical test could create a "windfall to nondebtor parties to valuable executory contracts." *N.C.P. Mktg. Group Inc.*, 129 S. Ct. at 1147. As is not one of the general bankruptcy policy considerations or goals, courts may be concerned that by allowing nondebtor parties to renege on its agreement simply because the debtor is now in bankruptcy, it would allow nondebtor parties to take their business elsewhere for more money, leaving the debtor without a valuable contract necessary for reorganization. However, while this concern is valid to protect against, it is well established that policy making should be left to Congress, not to the courts. *See In re Catapult Entm't*, 165 F.3d at 754; *Hartford Underwriters Inc. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13-14 (2000) ("Achieving a better policy outcome . . . is a task for Congress, not the courts."); *United States v. Childress*, 104 F.3d 47, 53 (4th Cir. 1996) ("We must interpret statutes as written, not as we wish for them to be written."); *Sigmon Coal Co. v. Apfel*, 226 F.3d at 308 ("our job is to determine the meaning of the statute passed by Congress, not whether wisdom or logic suggests that Congress could have done better").

The parties in an executory contract entered into the agreement with thought and consideration as to whom they would partner with. Companies like Under My Thumb who develop and run copyrighted and trademarked software do not enter into agreements with every other entity in the world, they pick and choose who they go into business with. They also specifically control who can use the license in each agreement, as here Development and its affiliates are the only entities that can use the software under the license. Federal patent and trademark law specifically protect the interests of all parties to a license agreement for these reasons. While outside the bankruptcy process the parties are at the mercy of any mergers or take-overs (if allowed in the license agreement), the bankruptcy process triggers an amendment to any agreement. Suddenly the non-debtor party is potentially facing losing the full benefit of their bargain and deserves some protection to their previously held rights of creativity. Forcing a non-debtor party to give up those rights simply so the debtor party can continue benefitting from an agreement seems excessively one-sided, which is why it is understandable that Congress would build some protection into the Bankruptcy Code for those nondebtor parties in the form of § 365(c)(1). Under My Thumb is simply asking the Court to allow them to protect their company as is their right under the plain language of § 365(c)(1).

2. A Single House Committee Report Does Not Indicate Full Congressional Intent.

The Debtors would also have the Court believe a literal reading of the statute is unwise because its result would be at odds with the legislative history. However, as discussed above, if there is no ambiguity in the plain statutory language, courts need not look to legislative history. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 808-09 n.3 (1989). Even if this is disregarded however, the legislative history Debtors rely upon does not demonstrate enough proof of Congress's intent in its language choices to negate the plain language interpretation. In

a 1980 House amendment to an earlier Senate technical corrections bill, an accompanying committee report stated:

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

In re Catapult Entm't, 165 F.3d at 754 (quoting H.R. Rep. No. 1195, 96th Cong., 2d Sess. § 27(b) (1980)). As the court discussed, "the report relates to a different proposed bill, predates enactment of §365(c)(1) by several years, and expresses at most the thoughts of only one committee in the House" thereby failing to be "some sort of clear indication of contrary intent that would overcome the ambiguous language of subsection (c)(1)." *In re Catapult Entm't*, 165 F.3d at 754.

3. Discord Among The Subsections Is Illusory.

Debtor's final argument that a literal reading of § 365(c)(1) would render § 365(f)(1) superfluous or inoperative, or that it would create conflict within itself is false. As discussed above, the plain language interpretation of § 365(c)(1) does not render § 365(f)(1) superfluous or inoperative because the applicable law in each subsection is of "markedly different scope." *In re Sunterra Corp.*, 361 F.3d at 266 (quoting *In re Magness*, 972 F.2d at 695). While subsection (f)(1) presents a broad rule allowing assumption and assignment of executory contracts regardless of nonbankruptcy law, subsection (c)(1) will rescue the nonbankruptcy law policy and application if the identity of the contracting party is the main purpose of forbidding assignment of the agreement. Thus, any perceived discord between the statutes is illusory.

Here, the non-exclusive license of the Software falls under federal intellectual property law, which forbids assignment unless specified in the agreement because the identity of the parties is important to protecting individual's creative rights. Therefore, because the identity is important, as the applicable federal law rescues the agreement to apply under § 365(c)(1) rather than under § 365(f)(1).

Claims that the literal reading of § 365(c)(1) would create conflict within itself are also illusory because a debtor in possession is a distinctly different entity than the debtor. The claim comes because if read literally the phrase "or the debtor in possession" is rendered superfluous. *See In re Hartec Enters., Inc.*, 117 B.R. 865, 871-72 (Bankr. W.D. Tex. 1990) ("[i]f the directive of Section 365(c)(1) is to prohibit assumption whenever applicable law excuses performance relative to *any* entity other than the debtor, why add the words 'or debtor in possession?'"). However, because the plain reading of the statute requires consent to be given both if an agreement is to be assumed and then again if assigned, on the second application "the relevant question would be whether 'applicable law excuses a party from accepting performance from or rendering performance to an entity other than . . . the debtor in possession." *In re Catapult Entm't*,165 F.3d at 752. Thus, the second question askes, does federal patent law excuse Under My Thumb from rendering performance to an entity other than the Debtors as debtor in possession? It does, therefore, consent is required, which here Under My Thumb is denying. Any purported internal conflict is unsubstantiated and the literal reading and therefore the hypothetical test must win out.

III. Under My Thumb Is An Impaired Creditor Under Development's Plan And Has The Right To Vote To Approve Or Reject The Plan.

Under My Thumb's impaired rights include two components: (1) the contractual right to payment of the unsecured note and ongoing profit payments under the executory contract; and

(2) legal and equitable rights of exclusivity to intellectual property of the software. Unless a creditor's legal, equitable, and contractual rights are left unaltered under a plan, the creditor's rights are said to be impaired. 11 U.S.C. § 1124. The Plan approved by the bankruptcy court has left Under My Thumb's rights impaired because: (1) the Plan breaches the contractual restrictions prohibiting Development from assigning or sublicensing their rights to others without Under My Thumb's express written consent; and (2) the Plan cannot calculate a liquidation amount for the ongoing payments due to Under My Thumb pursuant to the Agreement. *See generally Pittsburgh & Lake Erie R. Co. v. Ry. Labor Execs.' Ass'n,* 491 U.S. 490, 503 (1989) (noting that a court should consider the ongoing consequences to a written contract when proposed change would alter a party's bargaining rights under the contract).

Under My Thumb holds a substantive contractual right to require exclusivity or express written consent for sublicensing to others. R. at 5. However, the Plan, as proposed, would directly violate that substantive right under contract law by allowing parties not contemplated under the license to have direct access to proprietary development resulting from months of work and $10 million in research and development. R. at 4. While certain license restrictions, such as due-on-sale provisions, have been held unenforceable as a payment restriction rather than a substantive right of a creditors, courts recognize and respect substantive contractual provisions during bankruptcy. *See Matter of Transwest Resort Props., Inc*., 881 F.3d 724, 728 (2018). As an impaired creditor, Under My Thumb has the right to vote to approve or reject the plan pursuant to § 1126 and the bankruptcy court cannot confirm a plan unless all of the provisions of § 1129(a) are satisfied and absent a "cram down" under § 1129(b). A "cram down" under § 1129(b) is not appropriate because a liquidation amount due under the executory contract cannot be calculated. 11 U.S.C. § 1129(b); *see Toibb v. Radloff*, 501 U.S. 157, 163 (1991)

(acknowledging that creditors are not generally expected to approve a plan unless the debtor's creditors would receive as much as they would from "an immediate liquidation of the debtor's assets").

The inequity and breach of substantive contractual rights proposed by the Plan leaves Under My Thumb an impaired creditor with rights to vote on the Plan and without Under My Thumb's approval, the bankruptcy court cannot confirm this Plan. 11 U.S.C. §§ 1126, 1129.

IV. Statutory Interpretation Of Creditor Voting Under § 1129(a)(10) Requires A "Per Debtor" Approach To Approving A Plan Where There Are Multiple Debtor Entities With Separate Creditors.

Section 1129(a), establishes the sixteen requirements for court confirmation of a Chapter 11 plan. 11 U.S.C. § 1129(a). Pertinent to this appeal, §1129(a)(10) requires that when there is an impaired class of claims, at least one class of claims that is impaired under the plan has accepted the plan. 11 U.S.C. § 1129(a)(10).

The circuit split and subject of this issue on appeal, is whether a multi-debtor plan, jointly administered for judicial efficiency, should require a "per debtor" or a "per plan" approach to plan acceptance. Under the "per debtor" approach, advanced by Under My Thumb, each separate legal entity, as debtor, must receive plan approval by at least one class of its impaired creditors sufficient to satisfy §1126. 11 U.S.C. § 1126. The "per plan" approach would consolidate the assets, liabilities, and obligations of separate legal entities into a singular "plan" and the creditors of multiple entities are placed into combined impaired classes for credit voting, even when substantial consolidation has not been ordered.

Under My Thumb urges the Court to interpret § 1129 as requiring a "per debtor" approach. When endeavoring to interpret a statute, the analysis must begin with the plain language of the statute. *Unites States v. Ron Pair Enters.*, 489 U.S. at 241. When the words of a statute are unambiguous, the first endeavor is the last: "judicial inquiry is complete." *Conn. Nat'l Bank v.*

Germain, 503 U.S at 253-54. However, where there is ambiguity, a statute cannot be read to render other parts of the statute as absurd or superfluous. *Corley v. United States*, 556 U.S. 303, 305 (2009).

To interpret the plain language of §1129(a)(10), one must consider the Code's construction rule, §102(7), providing that "the singular includes the plural." *In re Tribune Co*., 464 B.R. 126, 182 (Bankr. D. Del. 2011). Where there is ambiguity, the court will look to congressional intent. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837, 838 (1984).

While the plain language reading of § 1129(a)(10) requires approval by at least one class of claims impaired under the plan to accept the plan, allowing the singular "plan" to include the plural "plans" renders the plain language reading ambiguous. Any ambiguity can be easily resolved by understanding the legislative intent to provide a powerful bargaining chip to creditors subject to a Chapter 11 plan of reorganization. Congressional intent allows Chapter 11 bankruptcy proceedings to generously protects a debtor's ability to continue operations but provides a substantial protection to creditors through plan voting pursuant to § 1126. Congressional intent in drafting § 1129(a)(10) was to require "some indicia of creditor support for the debtor's schemes." *In re LOOP 76*, 442 B.R. 713, 722 (2010).

When a plan consists of a separate plan for each debtor, "ascribing the plural to the meaning of 'plan' in §1129(a)(10) is entirely logical and consistent." *In re Tribune Co.,* 464 B.R. at 182. In order to protect a creditor and allow a creditor to support the debtor's plan or reorganization, a multi-debtor plan must allow the creditors of each debtor to approve the plan. Under My Thumb as the only creditor of Development, does not support the scheme proposed and confirmation of a plan without creditor support is in opposition to congressional intent.

Because interpretation of a statute should not render other portions of the statute superfluous, Under My Thumb urges the Court to interpret § 1129(a)(10) as requiring a "per debtor" approach. In the joint administration of a multi-debtor plan, the text of § 1129(a)(10) should be interpreted to require approval by a class of claims, per debtor, sufficient to satisfy the voting strictures of § 1126.

In a multi-debtor plan being jointly administered, interpreting §1129(a)(10) as requiring a "per plan" approach would render portions of the statute superfluous. The requirement of §1129(a)(8) that creditor outcomes be either satisfaction by consent or non-impairment, absent a "cram down", would be rendered superfluous. 11 U.S.C. § 1129(a)(8). Under My Thumb's rights are impaired by the Plan and Under My Thumb did not consent. By applying a "per plan" approach, the confirming court below did not allow the Plan to meet the requirements of § 1129(a)(8) as it applies to Under My Thumb.

If creditors of each debtor of a multi-debtor plan are not allowed to accept or reject the respective debtor's plan, as it applies to that creditor, the creditor rights are ostensibly harmed in many cases. This unfair treatment of creditors does not embody the "best interest of the creditors" test under §1123(a)(7). *In re Tribune Co.*, 464 B.R. at 183. Under My Thumb, as the only creditor of Development, does not approve the Plan and Under My Thumb's rights have been impaired; the Plan is not in the best interest of Development's only creditor.

As the Court has said, the Court is "not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Pittsburgh & Lake Erie R. Co. v. Ry. Labor Execs.' Ass'n*, 491 U.S. at 510. The sections of §1123, § 1126, and § 1129 are quite capable of co-existence when each debtor has a separate

plan of bankruptcy. These statutes can also co-exist where multiple debtors are consolidated for judicial efficiency and each class of creditors of each debtor is allowed to accept or reject a plan. However, these statutes cannot co-exist where multiple creditors of distinct debtors are arbitrarily forced to form one class of creditors with rights to approve or reject a consolidated plan.

Under My Thumb urges the court to apply a "per debtor" approach to multi-debtor plans administered jointly for judicial efficiency. In the alternative, Respondent asks the court to acknowledge that a "per plan" approach is not appropriate when there are multiple Chapter 11 plans that have not been substantially consolidated either by motion or by appropriate use of de facto substantial consolidation.

V. **Joint Administration Of A Multi-Debtor Plan Allows For Judicial Efficiency But Does Not Allow Consolidation Of The Assets, Liabilities, And Creditor Claims Of Separate, Legal Entities, Absent Substantial Consolidation.**

Joint administration of a multi-debtor case allows for judicial efficiency. *Matter of Transwest Resort Props., Inc.*, 881 F.3d at 731. Substantive consolidation is also a tool of convenience for the administration of the plan. *Id.* The important distinction between joint administration and substantial consolidation is the latter allows two or more debtors to be combined as a "single debtor, a single estate with a common fund of assets, and a single body of creditors." *Id.* (citing *In re Parkway Calabasas Ltd.*, 89 B.R. 832, 836 (Bankr. C.D. Cal. 1988). As a result, substantive consolidation affects the rights of the creditors of different debtors. *Matter of Transwest Resort Props., Inc.*, 881 F.3d at 731. Substantial consolidation is a harsh equitable remedy that should be used sparingly. *In re Reider*, 31 F.3d 1102, 1107 (11th Cir.1994).

Generally, a party must petition the court for substantial consolidation but without such motion and subsequent affirmation, a plan may still be administered through substantial

consolidation when no objection is made by any creditor or party in interest. *Id.* The plan would then proceed under a "de facto" substantive consolidation. *Id.* Any objection to substantive consolidation must be made timely and if made within the statutory timelines, Respondent is not barred by the equitable doctrine of laches. *See SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 137 S. Ct. 954, 957 (2017) (holding that where a party objects to a ruling within the statute of limitations, that party cannot be barred by the equitable doctrine of laches.)

Substantive consolidation initially found support where the court determined there was a corporate alter ego or piercing the corporate veil was necessary and equitable. *In re Reider*, 31 F.3d at 1105. Later, circuit courts began to develop applicable tests to determine when substantial consolidation was appropriate. *See In re Bonham*, 229 F.3d 750, 765 (9th Cir. 2000); *In re Owens Corning*, 419 F.3d 195, 210 (3d Cir. 2005); *In re Auto-Train*, 810 F.2d 270, 276 (D.C. Cir. 1987); *In re Augie/Restivo*, 860 F.2d 515, 518 (2nd Cir. 1988).

A. No Party Made A Motion To Pierce The Corporate Veil To Reach TheAassets And Liabilities Of Affiliated Entities And The Court Did Not Order Substantial Consolidation To Pierce The Corporate Veil.

Absent circumstances justifying disregard of the corporate form, including one company acting as an instrumentality of the other, a parent company is treated as a legal separate entity from the subsidiary. *See Quarles v. Fuqua Indus., Inc.*, 504 F.2d 1358, 1362 (10th Cir. 1974); *see also New Sheridan Hotel & Bar, Ltd. v. Commercial Leasing Corp. Inc*., 645 P.2d 868, 869 (Colo.App. 1982). Piercing the corporate veil is an extreme judicial remedy that should be used cautiously and reluctantly. *Cascade Energy & Metals Corp. v. Banks*, 896 F.2d 1557, 1576 (10th Cir. 1990).

Where an entity establishes a corporation as a means of carrying out business purposes, the entity "may not ignore the existence of the corporation in order to avoid its disadvantages."

Terry v. Yancey, 344 F.2d 789, 790 (4th Cir. 1965). TDI and its related entities formed ten different corporation in order to take advantage of the shield of limited liability provided under corporate law. Now, however, Debtors seek to fold the ten legal entities into one conglomerate in order to advance a "per plan" approach to avoid the disadvantages of having ten separate legal entities: namely, that each debtor is a separate entity with its own class of creditors.

TDI intentionally established nine separate entities to gain the benefits afforded under corporate law, namely limited liability. R. at 4. Under corporate and contract law, TDI may not ignore the separate corporate form of Development. The court has given no reasoning or suggestion that the corporate form was ignored or that the extreme remedy of piercing the corporate veil is necessary or appropriate to approve the Plan.

B. The Court Below Did Not Order Substantial Consolidation Upon A Motion By Either Party And The Facts Of This Case Do Not Warrant De Facto Substantial Consolidation Based On Tests Developed By Various Circuits.

The Plan was submitted with express intent to avoid substantial consolidation noting that "no Debtor is to become liable for the obligations of another." R. at 7. No party made a motion for substantial consolidation nor did the court order the remedy. Where there is no motion for substantial consolidation, the court may still apply substantial consolidation, de facto, where the case warrants this severe remedy.

Circuits have applied various tests to determine when substantial consolidation is an appropriate and equitable remedy. (*See generally In re Bonham*, 229 F.3d at 765; *In re Owens Corning*, 419 F.3d at 210; *In re Auto-Train*, 810 F.2d 276; *In re Augie/Restivo*, 860 F.2d 518).

The Second, Sixth, Third, Eleventh, and Ninth Circuits have adopted a test for substantial consolidation initially established by the Second Circuit under *In re Augie/Restivo*. *See In re Owens Corning*, 419 F.3d at 203; *In re Bonham*, 220 F.3d at 771; *In re Augie/Restivio*, 860 F.2d at 518; *Eastgroup Props. v. S. Motel Ass'n*, 935 F.2d 245, 248 (11th Cir. 1991). The

Augie/Restivo test requires that de facto substantial consolidation may be applied when either: (1) the creditors dealt with the consolidated entities as if they were the same; or (2) the affairs of the consolidated entities are so entangled [post-petition] that it would not be feasible to identify and allocate all of their assets and liabilities. *In re Augie/Restivio*, 860 F.2d at 518.

The Second Circuit identified several principles the courts should remember in ordering substantial consolidation rather than simply consulting a checklist of elements under various circuit tests. These principles include (1) limiting the "cross-creep of liability by respecting entity separateness as a 'fundamental ground rule'"; (2) the harm to creditors caused by substantial consolidation when that harm is nearly always caused by debtors who disregard separateness; (3) administrative efficiency alone is not a sufficient harm to justify substantial consolidation; (4) the extreme remedy of substantial consolidation is a harsh and imprecise remedy which should be rare and of last resort; and (5) substantive consolidation may not be used offensively to disadvantage a group of creditors in the plan process or to alter the creditor rights. *In re Owens Corning*, 419 F.3d at 211.

The D.C. Circuit established the *Auto-Train* three-part test to determine when de facto substantial consolidation is appropriate. *In re Auto-Train*, 810 F.2d at 276. Under the *Auto-Train* test, all three elements must be satisfied to in order to properly order substantive consolidation. *In re Bonham,* 220 F.3d at 766. The first test under *Auto-Train* requires (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. *Id.* at 765. Upon such showing, a prima facie assumption arises that the creditors have not relied solely on the credit of one entity which then shifts the burden to an objecting creditor to show: (1) it relied on the separate credit of one of the entities to be consolidate; and (2) it will be prejudiced by substantial consolidation. *Id*. at 766.

The third test arises when the objecting creditor makes the required showing and allows substantial consolidation only when the demonstrated benefits of consolidation "heavily" outweigh the harm of not consolidating a plan. *Id.*

The Eleventh Circuit established a test for the application of de facto substantial consolidation in individual Chapter 7 bankruptcy cases. *In re Reider*, 31 F.3d at 1108. The *Reider* test provides a two-part test to determine the appropriateness of substantial consolidation: (1) whether there is a substantial identity between the assets, liabilities, and handling of financial affairs between the debtor spouses; and (2) whether harm will result from permitting or denying consolidation. *Id.* at 790 (citing *Eastgroup Properties v. S. Motel Assoc., Ltd*., 935 F.2d 245).

The *Augie/Restivo* case is applied by the majority of circuits because of its procedural simplicity and because it captures principles well-established in contract law and corporate law. (*See generally In re Owens Corning*, 419 F.3d 195 at 211 (citing *Nesbit v. Gears Unlimited*, 347 F.3d 72, 86-88 (3d Cir. 2003)). The D.C. Circuit's adoption of the *Auto-Train* test also attempts to balance principles of contract law and corporate law by shifting the evidentiary burden between the debtor and the creditor based on the harms alleged. The Eleventh Circuit *Reider* test, while simplistic and applicable to individual bankruptcy cases, fails to recognize legal principles of corporateness or weigh the harms alleged when applying this "harsh" equitable remedy.

C. Application Of Circuit Tests To The Facts Of This Case Do Not Support The Harsh Remedy Of De Facto Substantial Consolidation.

Under My Thumb would urge the court to adopt and apply the *Augie/Restivo* test to the facts of this case. Under the first prong, Debtors must show they dealt with Under My Thumb and as one entity; as if they were the same. On the contrary, Under my Thumb dealt exclusively with Development as a separate corporate entity. R. at 4. Under My Thumb did not rely on the

financial capacity of the other nine entities and did not require any guarantee by the parent corporation. R. at 5. Under My Thumb is a voluntary contract creditor who, after sufficient opportunity for due diligence and demonstration of ongoing business dealing with Development, chose to contract with Development and no other affiliate.

The second prong of *Augie/Restivo* would require the court to determine that the assets of Development and the other Debtors are so entangled that it would not be feasible to allocate and identify the assets. Development has one major asset, the software, and one creditor, Under My Thumb. R. at 4. It is feasible to allocate and identify the creditors and assets of Development. Alternatively, if the Court applied the *Auto-Train* test to the facts, Debtors would not meet the first prong of the test. The first prong requires a substantially similar identity between the entities being consolidated and necessity of consolidation to avoid some harm or realize a benefit. Development and Debtors maintained separate identities and more importantly, consolidation is not necessary to avoid harm or realize a benefit because the assets and liabilities are identifiable and traceable. Voluntary contract creditors, such as Under My Thumb, elected to do business with certain entities and those obligations are known and traceable.

TDI, the Operating Debtors, and Development each operate separately and in a non-integrated fashion. R. at 4. None of the Debtors rely on each other for the operation of the other. Where companies operate on a fully integrated basis so that each entity relies on the operation of the other, courts have held that §1129(a)(10) is satisfied by approval of the majority of the creditors of the multi-debtor entities. *See In re Charter Communications*, 419 B.R. 221, 266 (2009). In contrast, TDI operated for thirty years successfully and had proven success without Under My Thumb's Software. R. at 4. Under My Thumb's Software and intellectual property, through contract with Development, has improved the Debtors' performance, but is not

inextricably linked to the success of the company. R. at 4. It was only in the last eight years before filing bankruptcy that TDI incorporated the Software to be used by the Operating Debtors. R. at 4.

Since neither the prong of the *Augie/Restivo* test is satisfied and the initial prong of the *Auto-Train* test is not satisfied, the majority of circuits would hold that de factor substantial consolidation cannot be applied to the facts of this case.

D. Because The Bankruptcy Court Substantially Consolidated The Debtors, There Was An Abuse Of Discretion And The Appellate Court Properly Reversed The Holding.

"In the absence of substantive consolidation, entity separateness is fundamental." *In re Tribune* Co., 464 B.R. at 182 (citing *In re Owens Corning*, 419 F.3d at 211). Applying the *Augie/Restivo* case, along with the majority of the circuits, this case would not satisfy the requirements to for a de facto substantial consolidation. If the facts on record do not support a finding of substantial consolidation and the record finds Under My Thumb's objection to substantial consolidation is not barred, then it is an abuse of discretion to apply substantial consolidation. *In re Reider*, 31 F.3d at 1112.

Under My Thumb timely objected to the plan and the court's use of a "per plan" approach to the joint, multi-debtor plan. R. at 8 - 9. This action is appealable because the Plan is a final order by the court below. *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1688 (2015). Under My Thumb asks the Court to confirm the Bankruptcy Appellate Panel decision to reverse the court below.

VI. Other Areas Of Law Are At Odds With A "Per Plan" Approach In A Multi-Debtor Plan Where The Result Is De Facto Substantial Consolidation Of Assets, Liabilities, Debtors, and Creditors.

"Equality among creditors who have lawfully bargained for different treatment is not equitable, but its opposite. . ." *In re Owens Corning*, 419 F.3d at 216 (citing *In re Seatrade*

Corp., 369 F.3d 845, 848 (2d Cir. 1966). Consolidating all of the creditors of various Debtors is hardly the agreement struck by any creditor. Under My Thumb became a voluntary contract creditor of Development only. Creditors who lawfully bargain prepetition to do business with one Debtor should not get a lower bargaining power post-petition.

Corporate law and contract law would be at odds with a "per plan" interpretation of § 1129(a)(10) in a multi-debtor case under joint administration. Corporate separateness is a fundamental rule of corporate law. *In re Augie/Restivio*, 860 F.2d at 210. Absent the need to constitute the harsh remedy of substantial consolidation, individual corporations should remain separate to avoid the erosion of limited liability provided by corporate law. *Id.* Further, substantive consolidation may not be used offensively to disadvantage a group of creditors in the plan process or to alter the creditor rights. *Id*. at 211.

Even though Debtors may have an ownership interest in Development, Debtors have no direct interest in the assets of Development. *See Kreisler v. Goldberg*, 478 F.3d 209, 213 (4th Cir. 2007). Under my Thumb contracted solely with Development for both the unsecured note and the executory contract secured by the Software and the Agreement. TDI and Operating Debtors do not now have direct interest in the Software and Agreement to bolster their bargaining position in bankruptcy. Fundamental separateness, as a cornerstone of corporate law, would not allow TDI and the Operating Debtors to reach the assets of Development and allow their creditors to have voting rights on behalf of Development's creditors.

The Debtors, who have now given an equity position to SFD, would offensively like to disadvantage Under My Thumb's rights in the plan voting through substantial consolidation. However, the harsh remedy of substantial consolidation cannot be used to subvert corporate and contract law or to alter creditor rights.

CONCLUSION

Debtors wish to assume and assign to themselves as debtors in possession the non-exclusive Software license under the "actual test," arguing that its interpretation of § 365(c)(1) is the better interpretation due to policy reasons. However, the plain language interpretation and well-established rule that creating better policy is not a role for the courts demonstrate how only the "hypothetical test" can logically be adopted as applied to § 365(c)(1)

On the second issue, for the reasons established above, we urge the Court confirm the Bankruptcy Appellate Panel for the Thirteenth Circuit and to accept a "per debtor" approach to the statutory interpretation of § 1129(a)(10) when there is a multi-debtor plan under joint administration. In the alternative, where the Court recognizes a "per plan" interpretation of §1129(a)(10), Under My Thumb prays the Court recognize, in the absence of substantial consolidation, ten separate Chapter 11 plans of ten separate legally established companies exist, thus requiring approval by the impaired creditors of each resulting plan.

For the foregoing reasons, the judgment of the Thirteenth Circuit Court of Appeals should be affirmed.

Respectfully Submitted,

Team R.47

Counsel of Record

APPENDIX A

11 U.S.C. § 365

Executory Contracts and Unexpired Leases.

(a) [omitted]

(b) [omitted]

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if –

(1)

(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) [omitted]

(3) [omitted]

(d) [omitted]

(e) [omitted]

(f)

(1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2) The trustee may assign an executor contract or unexpired lease of the debtor on if—

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) [omitted]

(3) [omitted]

(g) [omitted]

(h) [omitted]

(i) [omitted]

(j) [omitted]

(k) [omitted]

(l) [omitted]

(m) [omitted]

(n) [omitted]

(o) [omitted]

(p) [omitted]

APPENDIX B

11 U.S.C. § 1107

Rights, Powers and Duties of Debtor in Possession.

(a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a) (2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

(b) [omitted]

APPENDIX C

11 U.S.C. § 1123

Contents of Plan.

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

(1) [omitted]

(2) [omitted]

(3) [omitted]

(4) [omitted]

(5) [omitted]

(6) [omitted]

(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee; and

(8) [omitted]

(b) [omitted]

APPENDIX D

11 U.S.C. § 1124

Impairments of Claim or Interests.

Except as provided in section 1123(a)(4) of this title, a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan—

(1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest; or

(2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default—

(A) cures any such default that occurred before or after the commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title or of a kind that section 365(b)(2) expressly does not require to be cured;

(B) reinstates the maturity of such claim or interest as such maturity existed before such default;

(C) compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law;

(D) if such claim or such interest arises from any failure to perform a nonmonetary obligation, other than a default arising from failure to operate a nonresidential real property lease subject to section 365(b)(1)(A), compensates the holder of such claim or such interest (other than the debtor or an insider) for any actual pecuniary loss incurred by such holder as a result of such failure; and

(E) does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest.

APPENDIX E

11. U.S.C. § 1126

Acceptance of Plan.

(a) The holder of a claim or interest allowed under section 502 of this title may accept or reject a plan. If the United States is a creditor or equity security holder, the Secretary of the Treasury may accept or reject the plan on behalf of the United States.

(b) [omitted]

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

(d) A class of interests has accepted a plan if such plan has been accepted by holders of such interests, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount of the allowed interests of such class held by holders of such interests, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

(e) [omitted]

(f) [omitted]

(g) [omitted]

APPENDIX F

11 U.S.C. § 1129

Confirmation of Plan.

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

(1) [omitted]

(2) [omitted]

(3) [omitted]

(4) [omitted]

(5) [omitted]

(6) [omitted]

(7) With respect to each impaired class of claims or interests—

(A) each holder of a claim or interest of such class—

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) [omitted]

(8) With respect to each class of claims or interests—

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

(9) [omitted]

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

(11) [omitted]

(12) [omitted]

(13) [omitted]

(14) [omitted]

(15) [omitted]

(16) [omitted]

(b) [omitted]

(c) [omitted]

(d) [omitted]

(e) [omitted]