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

Counsel for Respondent
Team R. 49

STATEMENT OF THE ISSUES 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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OPINION BELOW

Both the Bankruptcy Court and the Bankruptcy Appellate Panel for the Thirteenth Circuit ruled for Petitioner on both issues regarding Section 365(c)(1) and Section 1129(a)(10). (R. at. 3.) Respondent timely appealed, and the Thirteenth Circuit Court of Appeals reversed the decision. (*Id.*)

STATEMENT OF SUBJECT MATTER JURISDICTION

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

STATUTES

Section 365

(a)-(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

(d)-(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 executory contract or unexpired lease of the debtor only if—

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

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(g)-(p) [omitted]

Section 1129

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

(1) The plan complies with the applicable provisions of this title.

(2) [omitted]

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4)-(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) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less

than the value of such holder's interest in the estate's interest in the property that secures such claims.

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

(A) such class has accepted the plan; or

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

(9) [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.

STATEMENT OF THE CASE

The Debtors, Tumbling Dice, Inc. ("TDI") and its nine wholly-owned debtor subsidiaries constitute a large national gaming operation. (R. at 4.) TDI is a holding company that owns the membership interests of eight debtor-subsidiaries that operate eight luxury casinos and resorts (the "Operating Debtors") and a debtor-subsidiary Tumbling Dice Development, LLC ("Development"). (*Id.*).

Respondent, Under My Thumb, contracted with Development, to create a software system that would modernize the Debtors' nearly thirty years old casino loyalty program, Club Satisfaction. (*Id.*) Debtor Development and the Respondent formed a Research and Development Agreement to create the club satisfaction software (the "Patented Software"). (*Id.*) Respondent spent approximately $10 million over the course of nearly a year to create the Patented Software. (*Id.*) Under the Research and Development Agreement, Development would reimburse Respondent for an unsecured $7 million promissory note (the "R&D Note"). (*Id.*)

Respondent and Debtor Development also entered into a contract (the "License Agreement") that granted Debtor Development a non-exclusive license to use the Patented Software, to "extend the benefits of the agreement to its affiliated entities only" but could not assign its licensing right to nonaffiliated entities without Respondents express written consent. (R. at 5.) In exchange Debtor Development would pay Respondent a monthly fee based on the amount spent by Club Satisfaction Members. (*Id.*) The other nine Debtors, TDI and the Operating Debtors, were not parties to the R&D Note nor the License Agreement. (R. at 4-5.)

The software version for Club Satisfaction was a financial success and mutually beneficial to both Debtors and Respondent. Debtors consider the Patented Software an essential

part of their business model. (R. at 5.) Respondent has granted licenses for similar versions of the Software to third parties and each month receives higher than expected monthly payments from Development, its licensee. (R. at 5-6.)

In December 2011, TDI stock was bought in a leveraged buy-out by Start Me Up, Inc., ahedge fund company. (*Id.*) In exchange for a $3 billion loan by a syndicated group of lenders (the "Lenders"), Debtor TDI and the eight Operating Debtors, but not Development, granted first priority liens on their assets to Lenders. (Id.) In June 2015, Development stopped making regular payments under the R&D Note to Respondent. (R. at 6.) In January 2016, TDI and the eight Operating Debtors jointly and severally owed the Lenders approximately $2.8 billion in unserviceable debt leading the Debtors to initiate these chapter 11 jointly administered cases. (*Id.*) Additionally, the Debtors owed an estimated $6 million in unsecured debt to Respondent Under My Thumb and an estimated $114 million to other unsecured creditors. (*Id.*) The $6 million dollars in unsecured debt owed by Development to Respondent was under the R&D Note, and not the License Agreement as Development was current with its monthly license fee payments. (*Id.*)

The Debtors presented a plan support agreement that was the result of lengthy negotiations by the Debtors, Start Me Up, the Lenders, the unsecured creditors' committee, and other stakeholders, but not the unsecured creditor Respondent. (R. at 6-7.) The plan support agreement stated that the Debtors would restructure all of the secured indebtedness owed to the Lenders by lowering the interest rate of the loan and extending payments over 20 years. (R. at 7.) Start Me Up, Inc. would retain its equity interest in exchange for new capital to fund a 55% distribution to the Debtor's unsecured creditors. (*Id.*) The corporate structure of the reorganized

Debtors would not change, but existing shares and membership interests in the Debtors would be canceled. (*Id.*)

In August 2016, the Debtors filed the Plan, in accordance with the plan support agreement, and disclosure statement. (*Id.*) The Plan was a joint plan filed on behalf of all Debtors and stated that "the Debtors' estates are not being substantively consolidated and no debtor is to become liable for the obligations of another." (*Id.*)

The Plan proposed to assume the License Agreement with Respondent under Section 365 and 1123(b)(2). (*Id.*) Respondent would continue to receive monthly fee payments for use of the software by Development under the existing License Agreement. (*Id.*) The Plan proposed a pro rata distribution of $66 million (i.e., 55%) to the Debtors' unsecured creditors. (Id.) This included the $6 million plus obligation owed to Respondent according to the R&D note by Debtor Development. (*Id.*) Respondent initially favored the Plan because its License Agreement was being assumed and its distribution on its unsecured claim exceeded the value of Debtor Development's assets. (*Id.*)

However, after reviewing the disclosure statement Respondent discovered that $35 million of the unsecured distribution was being invested by Sympathy for the Devil, LP ("SFD"), a private equity group that would receive 51% of the voting shares for the reorganized Debtor TDI and several seats on Debtor TDI's reconstituted Board of Directors. (R. at 7-8.) Naturally, Respondent immediately became suspicious of SFD's involvement in the Plan because SFD is a direct competitor of Respondent that for several years has unsuccessfully attempted to replicate its Patented Software. (*Id.*)

After creditor ballots for the Plan were tallied TDI and the eight Operating Debtors each had at least one impaired accepting class of creditors, but Debtor Development had none. (*Id.*) Respondent is Debtor Development's only class of creditor, and Respondent voted against the Plan because of its concern with SFD's possible access to the Patented Software. (*Id.*) Therefore, Debtor Development had no impaired accepting class of creditors. (*Id.*)

Respondent objected to the Plan and on appeal pursued two objections. (*Id.*) First, Respondent claimed that the proposed assumption of the License Agreement was impermissible by the Debtors under section 365(c)(1) because applicable non-bankruptcy law, in this case federal patent law, excuse performance by respondent if it refused to consent under the "hypothetical test." (*Id.*) Second, Respondent claimed that under section 1129(a)(10) the Plan was not confirmable because debtor Development did not have an impaired accepting class of creditors. (*Id.*)

The Bankruptcy Court overruled both objections and confirmed the Plan. (*Id.*) The Bankruptcy Court applied the "actual test" and ruled that section 365(c)(1) requires a case-by-case inquiry into whether the non-debtor party under its executory contract was actually being forced to accept performance from someone other than the party with whom it contracted (R. at 8-9.) The Bankruptcy Court held that Development could assume the License Agreement because Respondent was only being asked to fulfill its existing contractual obligation with Development. (R. at 9.) The Bankruptcy Court also held that in a joint, multi-debtor plan if at least one impaired class accepts the plan section 1129(a)(10) is satisfied. Since all but one of the Debtors' impaired classes voted for the Plan the bankruptcy court ruled that the plan was confirmable. (*Id.*) The Thirteenth Circuit's Bankruptcy Appellate Panel ("BAP") affirmed the bankruptcy court rulings on both issues. But the United States Court of Appeals for the

Thirteenth Circuit determined that that the Thirteenth Circuit's BAP decision was improper as to both issues and reversed. (*Id.*)

SUMMARY OF THE ARGUMENT

As the Rolling Stones say, "You can't always get what you *want*, but you always get what you *need*." The lyric adequately sums of the result this Court should uphold. 11 U.S.C. § 365 and § 1129(a)(10) exist to protect an entity like that of Respondent from having to accept performance or render performance of its Patented Software license by requiring a non-debtor's consent. Thus, in tune with the Rolling Stones song, even though Petitioner cannot get what it *wants* (i.e. to assume the Respondent's owned Patented Software unilaterally), Petitioner can still pursue what it *needs*, a successful plan confirmation. Additionally, Respondent is also unfortunately not receiving what a creditor *wants* (i.e. the full value of its R&D note) through the bankruptcy process, but only what it *needs* by controlling its use of its license.

The Thirteenth Circuit Court of Appeals correctly found that without the Respondent's consent to the assumption of the License Agreement by Petitioner and without Respondent's affirmative vote Petitioner's proposed plan was not confirmable. For an assumption of an executory contract the majority of Circuits require a non-debtor party to consent and apply the hypothetical test following a plain language interpretation of 11 U.S.C. § 365. However, Petitioner fails to satisfy the rule; Petitioner lacks the Respondent's consent to assume the License Agreement, and the application of the hypothetical test, which derives from 11 U.S.C. § 365(c)(1) bars a unilateral intellectual property assignment, even if Petitioner intends to assume the executory contract. Thus, the statute and a majority of case law support Respondent's position that the License Agreement cannot be assumed without its consent.

Regarding the second question, Petitioner's proposed Plan requires acceptance from at least one impaired class of claims of each debtor under 11 U.S.C. § 1129(a)(10). The Thirteen Circuit Court of Appeals correctly found that Respondent's affirmative vote for Petitioner's plan was required in a jointly administer plan in order to satisfy the § 1129(a)(10) requirement that at least one impaired class of creditor accepted the plan.

A plain language reading of 11 U.S.C. § 1129(a) and the Bankruptcy Code's Canon of Construction that the "singular includes the plural" establish a "per debtor" approach should be used in confirming a jointly administered multiple debtor plan. In this case, because the ten debtors were not substantively consolidated and separate entity status was maintained, the majority correctly reasoned that the phrase "the plan" in a jointly administered case must refer to multiple debtors as in the "per debtor" approach and not just a debtor as in the "per plan" approach in order to avoid a result in which an impaired class of creditor's vote will be disenfranchised.

A plain language reading of 11 U.S.C. § § 1129(a) and the "Whole Act Rule" Canon of Construction establish that a "per debtor" approach should be used in confirming a jointly administered multiple debtor plan. The "Whole Act Rule" supports the "per debtor" approach since to adopt "per plan" would make (a)(10) incompatible with other sections such as (a)(3) and (a)(7) in 11 U.S.C. § 1129. Examining the meaning of § 1129(a)(10) in the context of subsections (a)(1), (a)(3), (a)(7) and (a)(8) indicates that the per debtor approach should be used in order to satisfy the requirements of 11 U.S.C. § 1129(a) in jointly administered plans.

The Legislative History indicates that Congressional intent in passing 11 U.S.C. § 1129(a)(10) was to afford creditors more protection in the Chapter Eleven Plan Confirmation Process. The legislative history behind § 1129(a)(10) also supports the "per debtor" approach.

Contrary to the Ninth Circuit's holding in Transwest that "the plain language of § 1129 (a)(10) indicates that Congress intended a 'per-plan' approach," the legislative history seemed to indicate the opposite. In 1984 the inserted term "impaired" in 11 U.S.C. § 1129(a)(1) indicates Congressional intent in increasing creditor protection. Finally, Adopting the Minority "per plan" approach to 11 U.S.C. § 1129(a)(10) effectively results in de facto substantive consolidation of the proposed plan without satisfying the rigorous elements required in substantive consolidation.

ARGUMENT

Questions of the interpretation of the Bankruptcy Code are questions of law reviewed *de novo*. *In re Weinstein*, 272 F.3d 39, 42 (1st Cir. 2001). Here, the Court must decide on the statutory construction of Bankruptcy Code provisions 11 U.S.C. § 365(c)(1) and § 1129(a)(10). Thus, this Court reviews legal questions *de novo*.

I. THE PLAIN-READING OF THE BANKRUPTCY CODE PROVISION SECTION 365(C)(1) AND MAJORITY OF CASE LAW PROHIBIT RESPONDENT FROM ASSUMING THE LICENSE AGREEMENT WITHOUT RESPONDENT'S CONSENT.

This Court should affirm the United States Court of Appeals Thirteenth Circuit's decision that Respondent can refuse to accept performance or render performance to Petitioner as to the License Agreement because of both the plain meaning of 11 U.S.C. § 365(c)(1) and the application of the hypothetical test, which most circuit courts adopt today. *See, e.g., In re West Elec., Inc.,* 852 F.2d 79 (3d Cir. 1988); *In re Sunterra Corp.,* 361 F.3d 257 (4th Cir. 2004); *In re Catapult Entm't, Inc.*, 165 F.3d 747, 750 (9th Cir. 1999); *In re James Cable Partners L.P.,* 27 F.3d 534 (11th Cir. 1994). Thus, Respondent should not be required to accept performance or render performance to Petitioner because Congress made clear that it seeks to protect Respondent's rights in a Chapter Eleven case such as this by specifically requiring for the non-

debtor parties' consent in the assumption of an executory contract by a debtor-in-possession, and Respondent's consent is lacking here. To find for Petitioner would run counter to the Bankruptcy Code and would particularly be unfair for Respondent because its Patented Software should not be treated differently in the bankruptcy system. Thus, to hold that Petitioner can assume the License Agreement, absent the Respondent's consent, evidently runs counter to federal intellectual property law and is most importantly in direct conflict with the Code.

A. Under 11 U.S.C. Section 365(c)(1), Petitioner Does Have the Right to Assume an Executory Contract Unilaterally

The law on the assumption of executory contracts is generally codified in 11 U.S.C. § 365. *See* 2 Norton, Bankr. L. & Prac. 3d § 46:1. In bankruptcy, an executory contract equates to: (1) the Countryman definition established by Professor Countryman in *Countryman, Executory Contracts in Bankruptcy: Part I, 57 Minn.L.Rev. 439, 460 (1973)* requiring both parties to perform material obligations under a contract or (2) the definition found in case law like *In re Oxford Royalty Mushroom Products, Inc.,* 46 B.R. 792, 794 (Bankr. E.D. Pa. 1985) that only "requires substantial performance by *either* party to the agreement other than the payment of money…." (quoting *In re Norquist*, 43 B.R. 224, 228 (Bankr. E.D. Wash. 1984)).

Here, whether using the executory contract definition established by Professor Countryman, or the more pragmatic executory contract definition adopted in *In Re Norquist,* the License Agreement is an executory contract. This is because the License Agreement between Respondent and Petitioner requires both parties to perform material obligations; that is, Petitioner, licensee, holds a non-exclusive right to use the Patented Software of Respondent, licensor, in exchange for a monthly fee. (R. at 6.)

According to 11 U.S.C. § 365(a) subject to the court's approval, "the trustee … may assume … any executory contract." However, 11 U.S.C. § 365(c)(1) limits the expansive power of the trustee. So, as a matter of law, whether a debtor-in-possession can assume an executory contract depends on whether the non-debtor party granted its required consent, and whether "applicable law" would permit an assignment, even if the debtor-in-possession is only pursuing to assume the executory contract. 11 U.S.C. § 365(c)(1).

Pursuant to11 U.S.C. § 365(c)(1)(B) a debtor in possession may not assume an executory contract if "such party does not consent to such assumption." Accordingly, the plain language of 11 U.S.C. § 365(c), specifically Subsection (1)(B), requires a non-debtor party to consent to a debtor's assumption of an executory contract. Therefore, the Petitioner cannot assume the License Agreement without the Respondent's consent.

Moreover, the plain language of 11 U.S.C. § 365(c)(1) provides that a trustee or debtor-in-possession "may not assume or assign any executory contract … if … applicable law excuses a party, other than the debtor, to such contract … from accepting performance or rendering performance to an entity other than the debtor in possession." When considering whether a debtor-in-possession can assume an executory contract, a majority of the Circuits have routinely required as part of their analysis whether a debtor-in-possession may assign the executory contract under "applicable law." (R. at. 11). Indeed, Circuits like the Third, Fourth, Ninth, and Eleventh adopt the hypothetical test because its framework most closely relates to the plain reading of 11 U.S.C. § 365(c)(1). *See, e.g., In re West Elec., Inc.,* 852 F.2d 79; *In re Sunterra Corp.,* 361 F.3d 257; *In re Catapult Entm't, Inc.*, 165 F.3d 747; *In re James Cable Partners, L.P.,* 27 F.3d 534; *see also In re Neuhoff Farms, Inc.*, 258 B.R. 343, 350 (Bankr. E.D.N.C. 2000) (where the court summarized the hypothetical test by stating "a debtor in possession may not

assume an executory contract over the non-debtor's objection if applicable law would bar assignment to a hypothetical party, even where the debtor in possession has no intention of assigning the contract to any such party.") The Seventh Circuit has also concurred with the cases mentioned above by applying the hypothetical test in *In re XMH Corp.*, 647 F.3d 690 (7th Cir. 2011). Additionally, the phrase "applicable law" refers to "applicable non-bankruptcy law." H.R. REP. 95-595, 95th Cong., 1st Sess. 348 (1977); S. REP. 95-989, 95th Cong., 2d Sess. 59 (1978).

When a law is unambiguous, a Court should "presume that a legislature says in a statute what it means and means in a statute what it says there" and the Court must uphold the statute. *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992). Like the Third, Fourth, Seventh, Ninth and Eleventh Circuits' have done, this Court should give the hypothetical test more weight because it encapsulates the plain language of the Bankruptcy Code. Consequently, where a debtor-in-possession seeks to assume an executory contract, 11 U.S.C. § 365(c) invites the court to factor into its analysis whether an assignment is permissible under the non-bankruptcy law governing the executory contract, even if the debtor in possession is only seeking to assume.

Here, federal intellectual property law constitutes the "applicable law" phrase in 11 U.S.C. § 365(c)(1) because, in the instant case, the executory contract is a license. In federal intellectual property law, the assignability of patent licenses without the express consent of the licensor is prohibited. *See In re Catapult Entm't, Inc.*, 165 F. 3d at 750; *Unarco Indus., Inc. v. Kelley Co.,* 465 F.2d 1303, 1306 (7th Cir. 1972) ("[L]ong standing federal rule of law with respect to the assignability of [intellectual property licenses] provides that these agreements are personal to the licensee and not assignable unless expressly made so in the agreement."); *see also In re Trump Entm't Resorts, Inc.*, 526 B.R. 116, 123-25 (Bankr. D. Del. 2015). This intellectual

property protection, particularly when it comes to patents, is solidified through federal law, and policy, which is to

> to foster and reward invention … Limiting assignability to licenses in which the patent holder expressly agrees to assignment aids the patent holder in exploiting the patent and thus "rewards" the patent holder. Free assignability of a nonexclusive patent license without the consent of the patent holder is inconsistent with patent monopoly and thus inconsistent with federal policy.

In re Access Beyond Techs., Inc., 237 B.R. 32, 45 (Bankr. D. Del. 1999) (quoting *In re CFLC, Inc.,* 174 B.R. 119, 123 (N.D.Cal.1994))

As a result, in applying the plain language of 11 U.S.C. § 365, it is clear that Petitioner cannot assume the License Agreement because federal intellectual property law and policy precludes the assignment of the Patented Software without the Respondent's consent. Thereby, Respondent can refuse to accept performance or render performance of the License Agreement.

Despite the commonsense approach of the hypothetical test, Petitioner argues that this Court should apply the actual test, which has only been adopted by the First and Fifth Circuits'. *See Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489 (1st Cir. 1997); *In re Mirant Corp.,* 440 F.3d 238, 249 (5th Cir. 2006). The actual test makes the restriction imposed by applicable law prohibiting assignment irrelevant when the debtor is only assuming the license. *Institut Pasteur*, 104 F.3d at 493 (1st Cir. 1997).

Even if this court chose to rely on the actual test in its analysis, 11 U.S.C. § 365(c)(1)(A) is still triggered because the literal assumption of the License Agreement by the Petitioner in practice constitutes an assignment. In practicality, the construction of an assignment is present for several reasons. Here, STD, a direct competitor of Respondent, seeks to buy 51 percent of Petitioner's stock and appointments to its Board of Directors to fund Petitioner's Plan. (R. at 8.) By doing so, STD not only inevitably changes Petitioner's business composition, but the negotiating circumstances of the License Agreement executed in 2008 significantly change as

well, as Respondent would never have agreed to license its Patented Software to a direct competitor, who now potentially has access to the patent. As a result, the case by case analysis established under the actual test supports Respondent's argument that the literal assumption by Petitioner over the License Agreement is practically an assignment.

Petitioner may rely heavily on *Institut Pasteur*, which adopted the actual test and allowed the debtor-licensee to assume an intellectual property license and transfer its stock to a direct competitor of the non-debtor licensor party. *Id.* at 494. However, this Court should approach such an interpretation of 11 U.S.C. § 365(c) carefully because the distinction between *Institut Pasteur* and the present case involves Petitioner granting STD seats in its managerial board. Thus, *Institut Pasteur* can be distinguished from this case because the facts of this case show that confirmation of the proposed plan will result in a change of the board in Petitioner's business. Moreover, if this Court applies the actual test, it would be disregarding the majority of the case law and the plain meaning of the statute at issue, which is why it must approach using such test cautiously.

B. **The Bankruptcy Code Provisions Section 365(f) and Section 365(c) Are Not in Direct Conflict With Each Other**

Congress enacted 11 U.S.C § 365(f) to grant a debtor-in-possession the power to assign a contract when the express terms of the contract prevent such assignment. 11 U.S.C. § 365(f) of the Bankruptcy Code states:

> Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.
>
> (2) The trustee may assign an executory contract or unexpired lease of the debtor only if—
>
> (A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

> (B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

While at first glance, 11 U.S.C. § 365(f)(1) may appear to be in direct conflict with 11 U.S.C. § 365(c)(1), a closer reading of the Bankruptcy Code, which is what cases like *In re James Cable Partners, L.P.*, and *In re Magness,* 972 F.2d 689 (6th Cir. 1992) have held is required, shows that a conflict between these two provisions is illusory. In *In re James Cable Partners, L.P.* and *In re Magness,* both courts found that that the "applicable law" phrases found in both 11 U.S.C. § 365(f)(1) and § 365(c)(1) are distinct, that is, that the phrase "applicable law" in (f)(1) and (c)(1) is referring to two different types of laws in each of these respective statutes. *See In re James Cable Partners, L.P.*, 27 F.3d at 538 (where the court held that "the 'applicable law' to which subsection (c) refers must mean 'applicable law' other than general prohibitions barring assignment."); *see also In re Magness, 972 F.2d* at 695 (where the court read both statutes together and held that "a careful parsing of the provisions suggests that § 365(f) contains the broad rule and § 365(c) contains a carefully crafted exception to the broad rule made necessary by general principles of the common law and our constitutions.")

This Court should adopt the *In re Magness* and *In re James Cable Partners, L.P.* line of reasoning that 11 U.S.C. § 365(f) and § 365(c)(1)(A) are not in direct conflict. While 11 U.S.C. § 365(f)(1) grants a debtor-in-possession the right to overlook anti-assignment provisions, it also true that the plain introductory language of this Code provision limits the debtor power in certain situations. Section 365(f) begins by stating, "*Except as provided in subsections (b) and (c) of this section* … notwithstanding a provision in an executory contract … or in applicable law, that prohibits, restricts, or conditions the assignment of such contract … the trustee may assign such contract." 11 U.S.C. § 365(f) (*emphasis* added). Therefore, it logically follows that Congressional intent was clearly for 11 U.S.C. § 365(c)(1) to be treated as an exception to 11

U.S.C. § 365(f)(1). Because11 U.S.C. § 365(c)(1) is triggered in the instant case, this Court should respect Congress' decision to protect a non-debtor party, like Respondent, as the statute by its plain terms "links nonassignability under applicable law together with a prohibition on assumption in bankruptcy." 1 DAVID G. EPSTEIN, STEVE H. NICKLES & JAMES J. WHITE, BANKRUTPCY § 5-15 at 474 (1992). Thus, the Court should affirm the lower court's ruling that Respondent cannot be forced to accept performance or render performance to Petitioner under 11 U.S.C. § 365(c)(1) because its incorporation of federal intellectual property law and the hypothetical test require Respondent consent for assumption.

C. **As the Catapult Court Held, This Court Should Reject the Debtor's Assumption of the Executory Contract Because What the Law Requires Outweighs Any Policy Considerations That May Exist**

This Court should apply the same reasoning in *In re Catapult Entm't, Inc.* to the present case for two reasons. First, the fact patterns between *Catapult* and the present case are similar, in that the assumption of a non-exclusive license agreement without the non-debtor party's consent was also at issue then, yet the court chose to apply the plain reading of 11 U.S.C. § 365(c)(1). *Id.* at 750; (where the court held that it was "bound by the plain terms of the statute"). Second, the debtors' in both cases claim that a court should apply the actual test because of the absurd policy consequences that would allegedly result through the plain language of Section 365(c); however, the Ninth Circuit easily disposed of such policy contentions at the time. *Id.* at 754. Indeed, the court wrote in its opinion that even in the event 11 U.S.C. § 365(c)(1) ran counter to bankruptcy policy, courts should not be the ones to step in to correct any injustices so to speak because "Congress is the policymaker, not the courts." *Id.* Moreover, the court further explained:

> Policy arguments cannot displace the plain language of the statute; that the plain language of § 365(c)(1) may be bad policy does not justify a judicial rewrite. And a rewrite is precisely what the actual test requires. The statute expressly provides that a debtor in possession "may not assume or assign" an executory contract where applicable

> law bars assignment and the nondebtor objects. 11 U.S.C. § 365(c)(1). The actual test effectively engrafts a narrow exception onto § 365(c)(1) for debtors in possession, providing that, as to them, the statute only prohibits assumption and assignment, as opposed to assumption or assignment. *See In re Fastrax*, 129 B.R. at 277 (admitting that, by adopting the actual test, the court reads the word "assume" out of subsection (c) with respect to debtors in possession).

Id. Like in *Catapult*, this Court should abide by the *Catapult* holding that policy-making is a power the judicial branch does not hold, and that in the absence of amendments, or clear legislative history, a court is bound to only give effect to the plain and clear language of a statute. What's more, is that even in the case this Court were to determine that Congress could not have intended to bar a debtor in possession from assuming an executory contract unilaterally for policy reasons, this Court should balance non-debtors' rights as well into its analysis, especially when it comes to rendering performance of a license to a direct competitor.

D. <u>The Dissent Fails to Demonstrate How Substituting the Word "Trustee" With the Phrase "Debtor in Possession" Meets the Statutory Construction Standard of Absurdity</u>

The Dissent to the United States Court of Appeals for the Thirteenth Circuit opinion argues that Congress could not have intended for "trustee" and "debtor in possession" to mean the same thing because such an interpretation would lead to absurdity. (R. at 23.). The argument goes that a distinction between the "trustee" and "debtor in possession" must exist because 11 U.S.C. § 365(c) only includes the phrase, "The trustee," and that if "trustee" and "debtor in possession" were truly synonyms, then 11 U.S.C. § 365(c)(1) would read "the debtor in possession may not assume … any contract if … applicable law excuses {the counterparty} … from accepting performance from or rendering performance to an entity other than the debtor in possession." (*Id.*)

However, the minority's effort to render the interchangeability of the terms "debtor in possession" and "trustee" as absurd does not meet the Supreme Court of the United States'

absurdity canon standard established under *Sturges v. Crowninshield*, 17 U.S. 122, 203 (1819) and which has guided courts since. In *Sturges*, Chief Justice Marshall wrote that the absurdity canon should only be applied when "the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application." *Id*. Thus, Petitioner's claim that the replacement of "trustee" with "debtor in possession" renders 11 U.S.C. § 365 absurd is unpersuasive because it does not meet the absurdity doctrine's heightened standard.

Additionally, as the Thirteenth Circuit Court of Appeals opinion eloquently cites, the terms "trustee" and "debtor in possession" are regarded in the bankruptcy system as the same. *See Official Comm. Of Unsecured Creditors of Cybergenics Corp. v. Chinery* (*In re Cybergenics Corp.*), 226 F. 3d 237, 243 (3d Cir. 2000) (where "[t]he terms 'trustee' and 'debtor in possession,' as used in the Bankruptcy Code, are …. essentially interchangeable."). Additionally, courts long ago, have applied 11 U.S.C. § 365 to business reorganization cases. *See Wien Air Alaska, Inc. v. Bachner*, 865 F. 2d 1106, 1111 (9th Cir. 1989). As a result, the finding that 11 U.S.C. § 365(c)(1) includes both a trustee and debtor in possession logically follows.

E. Because Recent Opinions Have Held A Court Cannot Render a Statute Invalid for Surplusage Reasons This Court Cannot Rely on the Surplusage Canon Here

Petitioner may contend that the better policy of adopting the actual test is appropriate because the plain reading of 11 U.S.C. § 365(c)(1) "violates a canon of construction repeatedly relied upon by the Supreme Court - a rule against surplusage." (R. at 24.) However, the basic principle of statutory construction is to "assume that Congress meant to incorporate 'the cluster of ideas'" attached to the statute adopted." *See Microsoft Corp. v. I4I Ltd. P'ship*, 564 U.S. 91, 103 (2011); *Beck v. Prupis*, 529 U.S. 494, 501 (2000).

In light of the fact that the Supreme Court precedent establishes how the "cardinal principle of statutory construction is to save and not to destroy," the Court cannot apply the surplusage canon here to the phrase "assume or assign" to render the effect of 11 U.S.C. § 365(c)(1) null. *Quoting N.L.R.B. v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 30 (1937). As a result, the argument that the adoption of the actual test is justified for surplusage purposes does not carry any legal weight. This is also especially true because there is arguably no surplusage in Bankruptcy Code provisions 11 U.S.C. § 365(f)(1) and § 365(c)(1) with the phrase "applicable law," as discussed earlier.

F. Legislative History Does Not Establish that Petitioner's Assumption of the License Agreement Without Consent Is Proper

Because 11 U.S.C. § 365(c)(1) is unambiguous, the Court's "judicial inquiry" is complete. *Quoting Conn. Natl' Bank*, 503 U.S. at 253-54. However, even if we were to take into account legislative history it can safely be assumed that if the actual test was Congress' true intent, then the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 would have provided Congress with the perfect opportunity to correct the alleged drafting error Petitioner claims. Pub. L. No. 109-8, 119 Stat. 23. However, the fact that Congress chose not to amend the text of 11 U.S.C. § 365(c)(1) bolsters Respondent's argument that the application of the hypothetical test is proper. Moreover, the fact that the Supreme Court of the United States denied certiorari to resolve the circuit split of the tests in *N.C.P. Grp., Inc. v. BG Star Prods., Inc.*, 556 U.S. 1145 (2009) strengthens the argument that the use of the literal interpretation of 11 U.S.C. § 365 most courts use today is correct because if legislative history were completely at odds with the hypothetical test, then the Supreme Court would most likely have intervened.

G. **If This Court Chooses to Adopt the Actual Test for Policy Reasons with Respect to the Executory Contract Issue, then Such a Decision Would Create Severe Repercussions in and Outside of the Bankruptcy System**

Respondent can concede that the bankruptcy courts' recent decisions appear to be in line with the application of the actual test for business reorganization purposes; however, this trend is mistaken for several reasons. First, throughout the Bankruptcy Code, Congress' intent is clearly to incorporate both federal and state law when applicable. Second, by such inclusion, Congress recognizes the fact that non-debtor parties deserve as much protection as creditors. Thus, the outright denial of non-debtors' rights is not consistent with Congress' intent or a majority of case law.

Thus, if this Court departs from the plain language of 11 U.S.C. § 365(c)(1), then it will be engaging in the work of the legislator. By siding with Petitioner, the Court would also be creating confusion for the bankruptcy court appeal system. Lastly, intellectual property advancement could stifle because future creditor-licensors may reduce transacting with debtor-lessees for the risk of losing their right to control which entities may have access to their patented product.

II. BANKRUPTCY CODE PROVISION SECTION 1129(A)(10) REQUIRES RESPONDENT'S VOTE FOR PETIONER'S PLAN CONFIRMATION

The Court should affirm the Thirteenth Circuit Court of Appeals ruling that U.S.C. § 1129(a)(10) should be analyzed under a "per debtor" approach. Analysis for U.S.C. § 1129(a)(10) must start from the plain "the starting point in discerning Congressional intent is the existing statutory text." *Lamie v. U.S.T.R.,* 540 U S. 526, 534 (2004). Under 11 U.S.C. § 1129(a)(10) of the Bankruptcy Code requires that at least one class of claims impaired by a Chapter Eleven plan vote in favor of the proposed plan for it to be confirmed. This requirement must be satisfied for a bankruptcy court to confirm a plan. *See In re Barakat v. Life Ins. Co, of*

Va. (In re Barakat), 99 F.3d 1520, 1523. (9th Cir. 1996); *In re L & J Anaheim*, 995 F.2d 940, 942 (9th Cir. 1993) (states that Section 1129(a)(10) must be met by the plan proponent for a cramdown). The Ninth Circuit identified the significance of Section 1129(a)(10) in protecting a creditor's rights by stating that "Section 1129 of Title 11 contains a number of safeguards for secured creditors who could be negatively impacted by a debtor's reorganization plan [including that] at least one class of impaired creditors has accepted the plan." *U.S. Bank N.A. v. Vill. at Lakeridge, LLC (In re Vill. at Lakeridge, LLC)*, 814 F.3d 993, 1000 (9th Cir. 2016).

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 instead of any one debtor. While the Petitioner argues that § 1129(a)(10) merely requires an affirmative vote by a single impaired class of creditors, the plain language, the legislative history and as the public policy objectives behind this statute all favor the "per debtor" approach in analyzing § 1129(a)(10) for joint multi-debtor cases.

A. <u>The Plain Language of Section 1129(a) and the Bankruptcy Code's Canons of Construction Establish a "Per Debtor" Should Be Used In Confirming a Plan</u>

A plain meaning reading of 11 U.S.C. § 1129(a)(10) requires that the court should apply the "per debtor" approach in determining if a proposed bankruptcy plan should be confirmed by the court. Questions of statutory interpretation must begin with the language of the statute itself. *Landrelh Timber Co v. Landreth*, 471 U.S. 681, 685 (1985). Any ambiguity that may be found in the statute is resolved by the Bankruptcy Code's own statutory rules of construction. 11 U.S.C. 102(7) of the Bankruptcy Code, titled Rules of Construction, states that in title 11 "the singular includes the plural." In *In re Tribune Co.,* the Delaware Bankruptcy Court correctly used 11 U.S.C. § 102(7) to read that in a jointly administered case, in which the debtors retain their

separate entity status, "ascribing the plural to the meaning of "plan" in 11 U.S.C. § 1129(a)(10) is entirely logical and consistent." 464 B.R. 126, 182 (Bankr. D. Del., 2011). In *In re Tribune* Co., claims against a debtor were only to be satisfied by the assets of that specific debtor, obligations of any specific debtor remained with that specific debtor, and no debtor could become responsible for the obligations of another debtor. *Id.*

Similarly, in this case, separate entity status was maintained because the ten Debtors were not substantively consolidated. The majority correctly reasoned that the phrase "the plan" in a jointly administered case must refer to multiple debtors as in the "per debtor" approach and not just a debtor as in the "per plan" approach in order to avoid a result in which an impaired class of creditor's vote would effectively be disenfranchised and strip any negotiating ability the specific creditor could use with its debtors in drafting the terms of the proposed Plan. The majority correctly stated that in this case "the Plan actually consists of ten different plans, one for each of the Debtors" because to view otherwise would permit the vote of one impaired class of creditors to speak for not only the debtor it has claims against but also entirely different debtors in which the accepting impaired class has no claims. (R. at 19.) The "per plan" approach of reading "the Plan" would impermissibly alter the voting rights that Chapter 11 creditors rely upon to safeguard their interests. The majority correctly ruled that the accepting vote of the impaired class of unsecured creditors for Petitioner's Operational Debtors cannot satisfy the requirement of 11 U.S.C. § 1029(a)(10) as it applies to Petitioner Debtor Development when the only creditor with claims against Debtor Development is Respondent. (R. at 8.)

B. The Plain Language of Section 1129 and the "Whole Act Rule" Canon of Construction Establish that a "Per Debtor" Approach Should Be Used In Confirming A Plan

According to the "whole act rule" canon of construction, "a statute is to be read as a whole since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). The analysis of 11 U.S.C. § 1129(a)(10) should be placed in its context and the interpretation should be consistent with other sections in §1129(a) which require that all debtors fulfill each of the requirements in order to obtain confirmation. According to 11 U.S.C. § 1129(a)(1) states that the "plan" (stated in the singular) must comply with the applicable provisions of the Bankruptcy Code. This requirement can not be fulfilled if only some, but not all, debtors in a joint plan complied with them. Similarly, 11 U.S.C. § 1129(a)(3) mandates that the "plan" (stated in the singular) be proposed in good faith and not by any means forbidden by law. This requirement also cannot be met unless all debtors in a joint plan satisfy them.

For further evidence under 11 U.S.C. § 1129(a)(7) states that "each impaired class of claims" should either accept the plan or receive other prescribed treatments. This requirement only makes sense if read as every impaired class of creditors for each debtor possesses a right to prescribed treatment. To interpret 11 U.S.C. § 1129(a)(10) in a "per plan" approach would contradict 11 U.S.C. § 1129(a)(7) since there is an impaired class of claims which does not receive this right to prescribed treatment. *In re Tribune Co.*, 464 B.R. 126, 183. A close inspection of 11 U.S.C. § 1129 (a)(8) would present the same issue, each class of claims should either accept the plan 11 U.S.C. § 1129 (a)(8)(A) or not be impaired under the plan 11 U.S.C. § 1129 (a)(8)(B). Only under the "per debtor" approach can 11 U.S.C. § 1129(a)(10) be satisfied while at the same time not violating 11 U.S.C. § 1129(a)(8). Examining the meaning of 11 U.S.C. § 1129(a)(10) in the context of subsections (a)(1), (a)(3), (a)(7),

(a)(8)(A) and (a)(8)(B) indicates that the per debtor approach should be used in order to satisfy the requirements of 11 U.S.C. § 1129(a) in jointly administered plans.

C. **Legislative History Indicates that Congressional Intent in Passing Section 1129(a)(10) Was to Afford Creditors More Protection in the Plan Confirmation Process**

In addition to the text, Congressional intent is another important consideration the Court may use in determining how to interpret and apply a text. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979). Contrary to the Ninth Circuit's holding in *Transwest* that "the plain language of § 1129 (a) (10) indicates that Congress intended a 'per-plan' approach," the legislative history seemed to indicate the opposite. *In re Transwest Resort Properties*, 881 F.3d 724, 732 (2018) at 5. A careful examination of the legislative history of 11 U.S.C. § 1129(a)(10) indicates that Congress was attempting to safeguard the rights of creditors harmed under a cramdown plan as well as remove some of the perceived harshness of the cramdown provision when drafting 11 U.S.C. § 1129(a)(10).

According to the Bankruptcy Reform Act of 1978, the 1978 version of § 1129 (a)(10) required that "at least one [non-insider] class of claims has accepted the plan." *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978). The accepting-class requirement of the statute was intended to address a pre-Bankruptcy Code single-asset real estate case called *In re Pine Gate Assocs. Ltd.* No. B75-4345A, 1976 WL359641, at 17 (N.D. Ga. Oct. 20, 1976). In *In re Pine Gate,* the debtor's sole secured creditor was forced to accept a cramdown plan in which the debtor provided the creditor with a cash payment equal to the fair market value of the real estate. *Id.*; *National Bankruptcy Review Commission Final Report, Bankruptcy: The Next 20 Years*, Oct. 20, 1997, at 584, n.1474 (stating that § 1129 (a) (10) was enacted in response to *Pine Gate*).

After the holding in *Pine Gate*, courts begin citing its precedent to permit confirmation of a debtor's plan over the objection of the debtor's only creditor, once that creditor received the fair-market value of the property. *See* Bruce A. Markell, Clueless on Classification: Toward Removing Artificial Limits on Chapter 11 Claim Classification, 11 *Emory Bankr. D. J.* 1, 38 (1994-95) (discussing "maximum cramdown"); *In re Hobson Pike Assocs. Ltd.*, No. B76-2124A, 1977 WL 182364, at 7 (N.D. Ga. Sept. 20, 1977); *In re Marietta Cobb Apartment Co.*, No. 76-B-1523, 1977 WL 182365, at 4 (Bankr. S.D.N.Y. Sept. 9, 1977).

Prior to 11 U.S.C. § 1129(a)(10), the reorganization plan for real property could be confirmed "so long as the mortgagee received the appraised value of the subject property." 11 U.S.C. § 861 (repealed 1978). *Id.* This was problematic for lenders because in distressed real estate markets, lenders could not recover the full debt since recovery was capped at current market value. *Id.* "The structure of this provision imposed 'the entire risk of under-valuation by the bankruptcy court on the secured creditor and permits the debtor to receive all of the benefits of future appreciation of the property.'" *In re 222 Liberty Assoc.*, 108 Bankr. 971, 979 n.6 (Bankr. E.D. Pa. 1990). In response to this problem, 11 U.S.C § 1129(a)(10) was enacted to remedy the inequality between the debtors and creditors by affording creditors greater protection.

However, after 11 U.S.C. § 1129(a)(10) was passed, the question arose as to whether an unimpaired class satisfied the accepting-class requirement. *In re Barrington Oaks Gen. P'ship*, 15 B.R. 952, 967 (Bankr. D. Utah 1981) (discussing conflicting inferences amongst §§ 1126(f) deemed acceptance by unimpaired class), 1129(a)(8) (class either accepts plan or is unimpaired) and 1129(a)(10) (accepting class is required), and whether an unimpaired class satisfies acceptance under § 1129(a)(10)).

In order to address the confusion on this issue, in 1984 the term "impaired" was added to the statute, and a congressional report indicated that this amendment was intended to ensure that a class of creditors affected by the plan voted in its favor. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984); *In re Bloomingdale Partners*, 170 B.R. 984, 994 n.15 (Bankr. N.D. Ill. 1994) (citing 1983 Senate report that stated, "Paragraph (10) makes clear the intent of section 1129(a)(10) that one 'real' class of creditors must vote for the plan of reorganization").

The intent and purpose of the section has been addressed in case law that states that 11 U.S.C. § 1129(a)(10) indicates to the court how much support a plan of reorganization receives from affected creditors as well as avoid a situation where "such support is lacking." *Windsor on the River Assocs. v. Balcor Real Estate Fin. (In re Windsor on the River Assocs.),* 7 F.3d 127, 131 (8th Cir. 1993). Section 1129(a)(10) also strives to ensure that those who were financially related to a proposed reorganization plan will monitor the plan and its outcome because they would be directly influenced by the implementation of the plan. *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 243-44 (3d Cir. 2004).

Upon review of this legislative history, the Congressional intent behind the language of 11 U.S.C. § 1129(a)(10) was to protect creditors from the potential inequities of the "cramdown" provisions of the Bankruptcy Act. *See* Peter E. Meltzer, Disenfranchising the Dissenting Creditor through Artificial Classification or Artificial Impairment, 66 Am. Bankr. L.J. 281, 311-12 (1992). The intent of Congress is best upheld by the "per debtor" approach because this framework provides creditors the protection Congress believed impaired creditors were previously lacking.

D. Adopting the Per Plan Approach to Section 1129(a)(10) Effectively Results in De Facto Substantive Consolidation of the Proposed Plan Without Satisfying the Various Elements Required In Substantive Consolidation

Contrary to the minority, adopting the "per plan" approach to 11 U.S.C. § 1129(a)(10) effectively results in de facto substantive consolidation of the proposed plan without satisfying the various elements required in the substantive consolidation. A key issue in analyzing 11 U.S.C. § 1129(a)(10) in jointly administered cases is whether bankruptcy courts will respect the corporate separateness of multiple debtors when satisfying plan-confirmation requirements. It has long been held that corporate separateness is "the rule [and] not the exception," *Anderson v. Abbott*, 321 U.S. 349, 362 (1944). Therefore, in the absence of expressed statutory exception corporate separateness should be respected in bankruptcy proceedings.

The Petitioner relies on a recent Ninth Circuit case in which the court determined that the plain language of 11 U.S.C. §1129(a)(10) should be read as a "per plan" approach. *JPMCC 2007-Cl Grasslawn Lodging, LLC v. Transwest Resort Props., Inc.* (In re Transwest Resort Props., Inc.), 881 F.3d 724. In *In re Transwest Resort Properties*, *Inc.*, the bankruptcy court confirmed a joint plan with one impaired accepting class of creditors for only one of the debtors under the plan over the objection of one of the impaired class creditors. No. 10-37134 (Bankr. D. Ariz. Dec. 16, 2011). The objecting impaired creditor appealed, but the Ninth Circuit dismissed the appeal on the grounds of equitable-mootness and did not address the 11 U.S.C. § 1129(a)(10) issue.

Circuit Judge Friedland agreed that "*de facto*" substantive consolidation had occurred through the courts application of the "per plan" approach to 11 U.S.C. § 1129(a)(10). The court stated that, "I believe any unfairness resulted…From the fact that this particular reorganization

treated the 5 debtor entities as if they had been substantively consolidated." 881 F.3d at 731. The Chapter Eleven reorganization resulted in *"de facto"* substantive consolidation because the plan treated debtors as a single entity and satisfied creditor claims from the substantively consolidated assets of the debtors. *Id*. In order to address the objecting creditors concerns, Judge Friedland suggested that an evaluation of whether the requirements of substantive consolidation have been satisfied should be conducted before confirming the plan because "there should have been an evaluation of whether substantive consolidation was appropriate before it (effectively) occurred." *Id.* at 731-33. Judge Friedland argued that such an assessment should occur on a case-by-case basis whenever creditors object that the assets of different estates are improperly being intermingled without consent. *Id.* Moreover, absent substantive consolidation, permitting creditors of one debtor entity to cramdown creditors of an entirely different debtor entity arguably causes an untenable disenfranchisement of those aggrieved creditors and does not encourage consensual bankruptcy plans.

In the Plan proposed by the debtors in 2016, the Plan expressly "stated that the Debtors' estates are not being substantively consolidated." (R. at 7). If a "per plan" approach is used for 11 U.S.C. § 1129(a)(10) the proposed plan clearly results in a "*de facto*" substantive consolidation regarding the debtor's assets. For the purpose of convenience, this case, like other complicated multiple debtors' cases, was jointly administered with each Debtor retaining its corporate separateness. (R. at 3).

Joint administration and substantive consolidation are two very distinct mechanisms to obtain Chapter Eleven multi-debtor reorganization. A joint administration is a procedural tool solely for the purpose of convenience and is common practice in Chapter Eleven bankruptcies. Substantive consolidation is not a procedural convenience but a judicial remedy that

significantly alters substantial rights. *In re Flora Mir Candy Corp.*, 432 F.2d 1060, 1062 (2d Cir.1970). Consolidation should be used carefully in order to avoid the unfair treatment of creditors. See *In re Bonham*, 229 F.3d 750, 767 (9th Cir. 2000).

It is very important to differentiate between cases where substantive consolidation has not been approved. "In the absence of substantive consolidation, entity separateness is fundamental." *In re Tribune Co.*, 464 B.R. 126, 182. There are rigorous tests for the application of substantive consolidation. In *In re Vecco Constr. Indus., Inc.,* specified seven elements to be considered when determining if substantive consolidation was appropriate including "The degree of difficulty in segregating and ascertaining individual assets and liabilities" and "The presence or absence of consolidated financial statements". *In re Vecco Constr. Indus., Inc.*, 4 Bankr. 407, 410 (Bankr. E.D. Va. 1980). Two overarching elements that appear in all Circuits when considering substantive consolidation are:

1. Prepetition Chapter Eleven reorganization, the debtors disregarded corporate separateness so significantly that their creditors relied on the breakdown of entity borders and treated them as one legal entity.

2. Post-petition Chapter Eleven reorganization, the entities' assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors.

In re Owens Corning, 419 F.3d 195, 211 (3d Cir. 2005). In this case the Petitioner did not demonstrated that it could satisfy the requirements for substantive consolidation. To use the "per plan" approach instead of the "per debtor" approach in analyzing 11 U.S.C. § 1129(a)(10) would infringe on Respondent's creditor's rights as well as allow Petitioner to enjoy the benefits of "*de*

facto" substantive consolidation without first demonstrating that it would satisfy the rigorous requirements of substantive consolidation.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court affirm the Thirteenth Circuit Court of Appeals decision.