No. 19-1004

In The
Supreme Court of the United States

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

Debtors,

TUMBLING DICE, INC. *ET AL*.,

Petitioners,

v.

UNDER MY THUMB, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

BRIEF FOR THE RESPONDENT

Team #51 R
Counsel for Respondent

QUESTIONS PRESENTED

1. Whether 11 U.S.C. § 365(c)(1) precludes assumption of 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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Perlman v. Catapult Entertainment (In re Catapult Entertainment), 165 F.3d 747 (9th Cir. 1999)

RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.), 361 F.3d 257 (4th Cir. 2004)

OPINIONS BELOW

The Opinion from the United States Court of Appeals for the Thirteenth Circuit is published at No. 18-0805, slip op. (13th Cir. 2019).

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

11 U.S.C. § 365(a):

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor. 11 U.S.C. § 365(c)(1):

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

(1)

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

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

11 U.S.C. § 365(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.

11 U.S.C. § 1129(a)(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

In the decision below, the Court of the Appeals for the Thirteenth Circuit correctly held that (1) 11 U.S.C. 365(c)(1) precludes assumption of a non-exclusive license of intellectual property over the objection of the licensor, and (2) 1129(a)(10) requires acceptance from an impaired class of claims of each debtor under a joint, multi-debtor plan.

I. Background

Tumbling Dice, Inc. ("TDI") is a holding company formed to own the membership interests of its nine wholly-owned debtor-subsidiaries, eight of which each operate a luxury casino and resort (collectively, the "Operating Debtors").[1] The remaining debtor-subsidiary, Tumbling Dice Development, LLC ("Development"), acts as the licensee under a non-exclusive software license agreement with Under My Thumb, Inc. ("UMT).[2] UMT is a software designer that specializes in customer loyalty programs for the hospitality industry.[3] In 2008, Development contracted with UMT to create a software system that would modernize TDI's casino loyalty program, Club Satisfaction.[4]

UMT incurred approximately $10 million in costs to create the Club Satisfaction software (the "Software"), a process which took nearly a year.[5] Development agreed to reimburse UMT for a portion of these costs pursuant to an unsecured $7 million promissory note (the "R&D Note").[6] Upon completion of the Software, the two parties entered into a license agreement (the "Agreement") that granted Development a non-exclusive license to use its copyrighted and

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[1] R. at 4.
[2] R. at 5.
[3] R. at 4.
[4] *Id*. at 4. (Casino loyalty programs operate similarly to frequent flyer miles, fostering brand loyalty by offering various spending-based incentives)
[5] R. at 4.
[6] R. at 4.

patented Software and permitted Development to "extend the benefits of the Agreement to its affiliated entities only."[7] Otherwise, the Agreement broadly prohibited the Debtors from assigning or sublicensing their rights to others without UMT's express written consent.[8] In exchange for the license, Development agreed to pay UMT a monthly fee based on the amount of spending activity by its loyalty club's members.[9] In addition, UMT was permitted to license similar versions of the Software to third parties.[10]

The Debtors remained current under the R&D Note until June 2015 when they abruptly ceased making payments due to their impending bankruptcy filing.[11] In December of 2011, TDI's stocks were acquired by a hedge fund, Start Me Up, Inc., through a leveraged buy-out.[12] As part of the transaction, TDI and the Operating Debtors granted first priority liens on their assets to a group of lenders (the "Lenders") in exchange for a $3 billion loan.[13] The Lenders did *not* require Development to act as a borrower or guarantor under the credit facility.[14] The leveraged buy-out transaction left the Debtors with a significant and unserviceable debt load.[15]

<u>II. The Bankruptcy Proceedings</u>

On January 11, 2016, the Debtors commenced voluntary cases under chapter 11 of the Bankruptcy Code.[16] The Debtors' cases were jointly administered pursuant to Bankruptcy Rule

[7] R. at 5.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] R. at 6.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*

1015(b),[17] and they were authorized by the bankruptcy court to continue using the pre-petition cash management system of their integrated business enterprise post-petition.[18]

As of the petition date, TDI and each of the Operating Debtors jointly and severally owed the Lenders approximately $2.8 billion.[19] The Debtors also owed an estimated $120 million more to unsecured creditors, including UMT, who was still owed more than $6 million under the R&D Note.[20] At this time, the Debtors were current on their payments to UMT.[21]

After lengthy, non-binding mediation ordered by the bankruptcy court involving the Debtors, Start Me Up, the Lenders, the unsecured creditors' committee and certain other stakeholders (but, notably, not UMT), the Debtors reached a deal and recorded its terms in a plan support agreement.[22]

The plan support agreement stated that the Debtors would restructure substantially all of the secured indebtedness owed to the Lenders by agreeing to a lower interest rate and extending payments over a period of twenty years.[23] In exchange for an insertion of new capital to fund a 55% distribution to unsecured creditors, Start Me Up would retain its equity interest in the Debtors.[24] In addition, the plan support agreement called for the cancellation of the existing shares and membership interests in the Debtors and the issuance of new shares and membership interests in the reorganized Debtors, without changing the overall corporate structure.[25]

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[17] R. at 7.
[18] *Id*.
[19] R. at 6.
[20] *Id*.
[21] *Id*.
[22] R. at 6-7.
[23] R. at 7.
[24] *Id.*
[25] *Id.*

The Debtors filed the joint Plan and disclosure statement in August of 2016.[26] The Plan expressly stated that "the Debtors' estates are not being substantively consolidated, and no Debtor is to become liable for the obligations of another."[27] The Plan also proposed to assume the Agreement with UMT under sections 365 and 1123(b)(2), and UMT would therefore continue receiving monthly payments for the use of the Software under the Agreement.[28] The Plan also included a pro rata distribution of $66 million to the Debtors' unsecured creditors, including the remaining obligation owed by Development to UMT from the R&D Note, which amounted to over $6 million.[29] UMT initially viewed the Plan favorably.[30]

Upon review of the disclosure statement, however, UMT learned that Start Me Up was only directly funding $31 million of the unsecured distribution.[31] The remaining $35 million was being invested by a private equity group known as Sympathy for the Devil, LP ("SFD").[32] In return, SFD would receive 51% of the voting shares of reorganized TDI (Start Me Up would receive the remaining 49%) and several seats on its reconstituted board of directors.[33] This was of significant concern to UMT because SFD's portfolio of companies includes a direct competitor of UMT who has tried to replicate the Software for several years.[34]

After creditor ballots were submitted, each of TDI and the Operating Debtors had at least one impaired accepting class of creditors.[35] Concerned with SFD's potential access to the

[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] R. at 7-8
[33] R. at 8.
[34] *Id.*
[35] *Id.*

Software, UMT, who controlled Development's only class of creditors, voted to reject the Plan, leaving Development with no impaired accepting class of creditors.[36]

III. Procedural History

Two of UMT's objections to the Plan were eventually pursued on appeal.[37] First, relying on the "hypothetical test," UMT argued that the proposed assumption of the Agreement by the Debtors was impermissible under section 365(c)(1) because applicable non-bankruptcy law excused performance by UMT in the absence of its consent, and UMT is not giving TDI consent. Second, it argued that the Plan was not confirmable under section 1129(a)(10) because no impaired class of creditors of Development had voted to accept it.[38]

The bankruptcy court confirmed the Plan, overruling UMT's objections and permitting Development to assume the Agreement. The court noted the overwhelming creditor support that existed aside from UMT.[39] With respect to UMT's first objection, the bankruptcy court adopted the so-called "actual test" and held that section 365(c)(1) requires a case-by-case inquiry into whether the non-debtor party was *actually* being forced to accept performance under its executory contract from someone other than the party with whom it originally contracted.[40] Regarding the second objection, the bankruptcy court held that § 1129(a)(10) is satisfied where at least one impaired class in a joint, multi-debtor plan accepts the plan.[41] Noting that all but one of the Debtors' impaired classes voted to accept the Plan, the court rejected UMT's argument

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[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] R. at 8-9.
[41] R. at 9.

that the Plan was not confirmable simply because no impaired class of Development voted in favor of it.[42]

The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court on both issues.[43] UMT appealed that ruling to the Court of Appeals for the Thirteenth Circuit, which reversed.

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Thirteenth Circuit correctly determined that § 365(c) does not permit Development from assuming a non-exclusive software license absent UMT's consent. The court properly applied the unambiguous language of 11 U.S.C. § 365(c)(1). The plain language of § 365(c)(1), by its terms, "bars a debtor in possession from assuming an executory contract without the non-debtor's consent where applicable law precludes assignment to a third party." Thus, because federal law governs the assignability of nonexclusive patent licenses, and because federal law makes such licenses personal and assignable only with the consent of licensor, Development may not assume Under My Thumb's license under 11 U.S.C. § 365(c).

Furthermore, the United States Court of Appeals for the Thirteenth Circuit correctly determined that the Debtors' Plan cannot be confirmed over UMT's objection. Under 11 U.S.C. 1129(a)(10), at least one debtor from each impaired class must vote in favor of the Plan in order for it to be confirmed. Here, Development has only one creditor, UMT. Because UMT has objected to plan confirmation, the lower court properly determined that the plan cannot be confirmed under the *per debtor* approach to 11 U.S.C. 1129(a)(10).

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[42] *Id.*
[43] *Id.*

ARGUMENT

<u>I. Section 365(c) Precludes Assumption of a Non-Exclusive License of Intellectual Property Over the Objection of the Licensor</u>

The United States Court of Appeals for the Thirteenth Circuit correctly determined that, under 11 U.S.C. § 365(c)(1), a debtor in possession cannot assume a non-exclusive software license over a licensor's objection.

Section 365(a) of the U.S. Bankruptcy Code authorizes a bankruptcy trustee to assume executory contracts, subject to the court's approval. The trustee may then assign an assumed executory contract. However, the trustee's rights to assume or assign are both limited by § 365(c). Section 365(c) provides, in pertinent part:

> *"The trustee may not assume or assign any executory contract . . . of the debtor . . . if*
> *1(A) applicable law excuses a party, other than the debtor, to [such executory contract] from accepting performance from or rendering performance to an entity other than the debtor or debtor in possession . . . , and*
> *(B) such party does not consent to such assumption or assignment . . ."*

The language of § 365(c) is plain, clear, and unambiguous. From a plain reading of the language, Congress utilized a disjunctive "or" to mean that assumption *or* assignment, independent of one another, may not occur if the requirements of § 365(c)(1)(A) and (B) are both met. With regard to independent grammatical structures in statutory language, the Supreme Court has recognized that "[t]he language and punctuation Congress used cannot be read in any other way."[44]

Section 365(c)(1) "by its terms bars a debtor in possession from assuming an executory contract without the non-debtor's consent where applicable law precludes assignment of the

[44] *United States v. Ron Pair Enterprises,* 489 U.S. 235, 242 (1989).

contract to a third party."[45] "An assumption and an assignment are 'two conceptually distinct events,' and the non-debtor must consent to each independently."[46] Here, the agreement in question is an executory contract which involves intellectual property, which qualifies as "applicable law" that "excuses a party, other than the debtor, to such contract . . . from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession."[47] In addition, the agreement broadly prohibits the debtors from assigning or sublicensing their rights without UMT's consent. Thus, because federal law governs the assignability of nonexclusive patent licenses, and because federal law makes such licenses personal and assignable only with the consent of the licensor, Development lacks the hypothetical authority to assign the agreement and may not assume the UMT license under 11 U.S.C. § 365(c).

Three preliminary issues need to be addressed before evaluating the statutory language of 11 U.S.C. § 365. First, UMT's license agreement is an executory agreement within the meaning of 11 U.S.C. § 365. Second, 11 U.S.C. § 365(c)'s use of the term "trustee" includes Chapter 11 "debtors in possession." Third, federal patent law constitutes "applicable law" within the meaning of § 365(c) and patent licenses are personal and not assignable.

11 U.S.C. § 365 does not define "executory contract."[48] In an oft-citing law review article, Professor Vern Countryman offered a definition of executory contracts.[49] The Countryman definition of executory contracts considers whether "the obligations of both the bankrupt and the other party are so far unperformed that the failure of either to complete performance would

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[45] *Perlman v. Catapult Entertainment* (In re Catapult Entertainment), 165 F.3d 747, 750 (9th Cir. 1999).
[46] *RCI Tech. Corp. v. Sunterra Corp.* (In re Sunterra Corp.), 361 F.3d 257, 267 (4th Cir. 2004).
[47] *In re Kazi Foods of Mich., Inc.*, 473 B.R. 887, 888 (Bankr. E.D. Mich. 2011). (citing 11 U.S.C. § 365(a) and (c)(1)).
[48] *Richard Levin & Henry J. Sommer,* 3 Colliers On Bankruptcy para. 365.02, at 365-16 (16th ed. 2019).
[49] *See* Vern Countryman, Executory Contracts in Bankruptcy: Part 1, 57 Minn. L. Rev. 439, 460 (1973).

constitute a material breach excusing the performance of the other."[50] The Tenth Circuit has adopted the Countryman definition and notes that "[o]ther courts have construed § 365's use of executory contract similarly."[51] Further, courts have held that Congress intended for the definition of executory contract aligns with the Countryman definition.[52]

Here, the Debtors and UMT entered into an executory contract. UMT and Development entered into an agreement that granted Development a non-exclusive license to use its copyrighted and patented software and permitted Development to extend the benefits of the Agreement to its affiliated entities only even though such affiliated entities were not technically parties to the Agreement. Under the Agreement, UMT incurred approximately $10 million in costs to create the Club Satisfaction software, a process which took nearly a year. Development agreed to reimburse UMT for a portion of these costs pursuant to an unsecured $7 million promissory note. At the time of bankruptcy, the Debtors still owed UMT $6 million under the R&D Note. Thus, significant unperformed obligations remained at the time of bankruptcy, such that failure to complete performance would constitute a breach. Further, courts have held that license agreements are executory contracts within the meaning of section 365 of the Bankruptcy Code."[53] Therefore, the agreement between the Debtors and UMT constitutes an executory contract.

[50] *In re Baird*, 567 F.3d at 1210 (citing Thomas American Stone & Bldg., Inc. v. White, 142 B.R. 449, 452-53 (D. Utah 1992)).
[51] *In re Baird*, 567 F.3d at 1211.
[52] *Id.* (citing In re Evatt, 112 B.R. 417, 419 (W.D. Okla. 1990) (collecting cases).
[53] *In re Kmart Corp*., 290 B.R. 614, 619 (Bankr. N.D. Ill. 2003). See In re Superior Toy & Mfg. Co. Inc., 78 F.3d 1169 (7th Cir. 1996) (holding trademark license executory); Novon Intern., 2000 U.S. Dist. LEXIS 5169, 2000 WL 432848 (viewing patent license as executory); In re Catapult Entertainment, Inc., 165 F.3d 747 (9th Cir. 1999), cert. dismissed 528 U.S. 924, 120 S.Ct. 369, 145 L.Ed. 2d 248 (1999) (recognizing patent license as executory).

Second, "[t]he terms 'trustee' and 'debtor in possession,' as used in the Bankruptcy Code, are … essentially interchangeable."[54] Conversely, relying on the Footstar case, TDI insists that "trustee" and "debtor in possession" mean distinct concepts for the purpose of Section 365(c)(1).[55] However, the Ninth Circuit notes that "it is well-established that § 365(c)'s use of the term 'trustee' includes Chapter 11 debtors in possession.[56] Such a reading of these terms comports with the Bankruptcy Code. "A Chapter 11 debtor in possession's ability to assume an executory contract is based on 11 U.S.C. § 1107(a). That section gives the Debtors, as Chapter 11 debtors in possession, the rights and powers of a trustee under § 365(a)."[57] "When no trustee is appointed, the Bankruptcy Code gives a debtor in possession the powers and duties of a trustee."[58] In particular, the Third Circuit cited the Federal Rules of Bankruptcy Procedure, which define the term "trustee" to include "a debtor in possession in a chapter 11 case."[59]

Third, federal patent law constitutes applicable law in this case. "It is well settled that a non-exclusive licensee of a patent has only a personal and not a property interest in the patent and that this personal right cannot be assigned unless the patent owner authorizes the assignment or the license itself permits assignment."[60]

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[54] Official Comm. of *Unsecured Creditors of Cybergenics Corp. v. Chinery* (In re Cybergenics Corp.), 226 F.3d 237, 243 (3d Cir. 2000) (citing L.R.S.C. Co. v. Rickel Home Centers, Inc. (In re Rickel Home Centers, Inc.), 209 F.3d 291, 297 & n. 7 (3d Cir. 2000)).
[55] *In re Footstar, Inc.*, 323 B.R. 566-570-71 (Bankr. S.D.N.Y. 2005).
[56] *Perlman v. Catapult Entm't* (In re Catapult Entm't), 165 F.3d 747, 750 (9th Cir. 1999) (*citing Institut Pasteur v. Cambridge Biotech Corp.,* 104 F.3d 489, 492 n. 7 (1st Cir. 1997); *City of Jamestown v. James Cable Partners, L.P.* (In re James Cable Partners), 27 F.3d 534, 537 (11th Cir. 1994); *In re W. Elecs*., Inc., 852 F.2d 79, 82 (3d Cir. 1988)).
[57] *In re Kazi Foods of Mich., Inc.*, 473 B.R. 887, 888-89 (Bankr. E.D. Mich. 2011).
[58] *In re Cybergenics Corp*., 226 F.3d at 243. (citing 11 U.S.C. § 1107(a) FED. R. BANKR. P. 9001(10)).
[59] FED. R. BANKR. P. 9001(10).
[60] *Gilson v. Republic of Ireland*, 787 F.2d 655, 658, 252 U.S. App. D.C. 99 (D.C. Cir. 1986) (Friedman, J.). See also *Stenograph Corp. v. Fulkerson*, 972 F.2d 726, 729 n.2 (7th Cir. 1992) ("Patent licenses are not assignable in the absence of express language."); PPG Industries, 597 F.2d at 1093 ("It has long been held by federal courts that agreements granting patent licenses are personal and not assignable unless expressly made so."); Unarco, 465 F.2d

The statutory language is the "cardinal canon" to be addressed "before all others."[61] The plain statutory language of 11 U.S.C. § 365(c)(1) establishes the "hypothetical test" and governs the assumption of executory contracts.[62] "The plain language of § 365(c)(1) 'links nonassignability under 'applicable law' together with a prohibition on assumption in bankruptcy.'"[63] Under the hypothetical test, "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 third party, even where the debtor in possession has no intention of assigning the contract in question to any such third party.[64]

TDI argues that 365(c)(1) applies only to assignment - and not assumption - of executory contracts. TDI would have this Court apply the "actual test" when interpreting §365(c)(1).[26] The so-called "actual test" reads 365(c)(1) in reference to the *actual* intent of the debtor-licensee. (Leroux) Under this interpretation, if the debtor-licensee has no intention to assign the license, then 365(c) does not prevent it from assuming it over the objection of the non-debtor licensor. This interpretation reads the disjunctive "or" in the statute as a conjunctive "and" and handles disputes on a "case-by-case" basis. (Cambridge) Critics of the hypothetical test argue that the plain meaning

at 1306 ("The long standing federal rule of law with respect to the assignability of patent license agreement provides that these agreements are personal to the licensee and not assignable unless expressly made so in the agreement."); Rock-Ola Manufacturing Corp. v. Filben Manufacturing Co., 168 F.2d 919, 922 (8th Cir.), cert. dismissed, 335 U.S. 855, 69 S. Ct. 134, 93 L. Ed. 403 (1948); E.I. du Pont de Nemours & Co. v. Shell Oil Co., 498 A.2d 1108, 1114 (Del. 1985) (rights conveyed by non-exclusive patent license are personal to licensee and not susceptible to sublicensing unless specific permission given).

[61] *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992).

[62] *In re Catapult Entertainment*, 165 F.3d at 751. See In re James Cable Partners, 27 F.3d at 537 (characterizing § 365(c)(1)(A) as posing "a hypothetical question"); In re West Elec., Inc., 852 F.2d at 83 (same); In re Catron, 158 B.R. 629, 633-38 (E.D. Va. 1993) (same), aff'd without op., 25 F.3d 1038 (4th Cir. 1994).

[63] *Id*. (citing David G. Epstein, Steve H. Nickles & James J. White, Bankruptcy § 5-15 at 474 (1992)).

[64] *Id*. See In re James Cable, 27 F.3d at 537 (characterizing § 365(c)(1)(A) as presenting "a hypothetical question"); In re West Elecs., 852 F.2d at 83 (same).

of 365(c)(1) is inconsistent with 365(f)(1) and with the legislative intent of the statute. (Catapult) These arguments, however, do not justify impermissibly deviating from the intent of Congress.

The Court of Appeals is correct in its reconciliation of §365(c)(1) with §365(f)(1). Petitioners argue that applying the "hypothetical test" to §365(c)(1) would render §365(f)(1) inoperative and superfluous. However, the "applicable law" referenced in §365(f)(1) differs from that in §365(c)(1). "Applicable law" under §365(f)(1) is the law "prohibiting or restricting assignments as such."[65] Under § 365(c)(1), "applicable law" embraces "legal excuses for refusing to render or accept performance, regardless of the contract's status as 'assignable.'"[66] That is to say, §365(f)(1) operates as a general rule for the assumption of executory contracts, and §365(c)(1) is an exception to that rule. See *In re Magness*, 972 F.2d 689 (6th Cir. 1992).

Intellectual property law is precisely the kind of applicable law that warrants such a legal excuse. Section 365(c)(1) provides this exception where the law prohibits assignment of the contract on the rationale that the identity of the contracting party is material to the agreement and is therefore "non-delegable."[67] The federal common law principle of patent non-assignability states that a patent owner is not required to accept performance of the license from an entity other than the entity with which it originally contracted.[68] This principle fits squarely within the exception given by §365(c) because the identity of the debtor-licensee is material to the underlying license. Reading §365(c)(1) to prevent the debtor-licensee from assuming or assigning the patent license without the patent owner's consent neither creates inconsistency with section 365(f)(1) nor renders the subsection inoperative or superfluous.

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[65] *In re Catapult Entm't* at 752.
[66] *In re Magness*, 972 F.2d at 700 (Guy, J., concurring).
[67] *See id.*
[68] *See Gilson v. Republic of Ireland*, 787 F.2d 655, 658 (D.C. Cir. 1986).

This principle blatantly manifests itself in the case at hand, as the change in the debtor-licensee's identity *is* material. Sympathy for the Devil is directly connected to one of UMT My Thumb's competitors. The pre-bankruptcy entity had no such connection.

In the U.S., a holder of intellectual property has the right to transfer any or all of its rights to others. This happens through a license or an assignment. In this case, UMT has a non-exclusive licensing agreement with Development. While the agreement allows for Development to extend the benefits to its affiliated entities, it is strictly prohibited from assigning or sublicensing rights in the software without express consent from UMT. A copyright or patent holder does not automatically give licensees the right to assign rights to third parties, and chapter 11 bankruptcy offers no exception to this principle. Reading this right into §365(c)(1) would violate the most fundamental principle of U.S. intellectual property law.

A court may only look beyond the language of a statute to the legislative history if the statutory language is unclear,[69] or "in rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters."[70] When the intent of Congress is clear from the language of the statute, however, the court must read the statute as it is written.[71]

In the context of patent licensing, because the bankruptcy estate is considered a separate legal entity than that of the debtor, an assumption of the license is also an assignment of the license regardless of whether the debtor-licensee intends to assign the license to a third party. In essence, the debtor-in-possession must be assigned the rights in order to assume the software license

[69] *Blum v. Stenson,* 465 U.S. 886, 896 (1984); *U.S. v. Lewis,* 67 F.3d 225, 228 (9th Cir. 1995).
[70] *Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564, 571 (1982).
[71] *FMC Corp. v. Holliday,* 498 U.S. 52, 58 (1990); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43 (1984).

because the bankruptcy estate is a different entity from Development. Inversely, assignment of an executory contract cannot occur without its assumption. If Congress meant for the statute to mean "assumption *and* assignment," it could have simply said "assignment."

The lower court properly applied the clear and plain and unambiguous language of § 365(c). Therefore, because the requirements of § 365(c) are satisfied here, this Court should affirm the judgment of the U.S. Court of Appeals for the Thirteenth Circuit.

II. In a jointly administered chapter 11 filing without substantive consolidation, §1129(a)(10) requires the approval of at least one impaired class per debtor.

The U.S. Court of Appeals for the Thirteenth Circuit correctly held that the Debtors' Plan cannot be confirmed over UMT's objection. Under 11 U.S.C. 1129(a)(10), at least one debtor from each impaired class must vote in favor of the Plan in order for it to be confirmed.[72] Courts refer to this application as the *per debtor* approach.

Under the *per debtor* approach, at least one creditor from each impaired class must vote for the plan in order for the plan to be confirmed. Here, Development is one of nine impaired classes. Development has only one creditor, UMT, and UMT has not voted in favor of plan confirmation. Thus, because Development only has one Creditor, UMT, and Under My Thumb has objected to plan confirmation, the plan cannot be confirmed under the *per debtor* approach to 11 U.S.C. 1129(a)(10).[73]

Chapter 11 specifically allows businesses to reorganize when faced with a large amount of unserviceable debt. This reorganization requires the creation and approval of a "plan" for paying

[72] *In re Tribune Co.*, 464 B.R. 126, 182 (Bankr. D. Del. 2011).
[73] *Id*. at 152.

off creditors. In the present case, TDI chose to file for chapter 11 bankruptcy because the leveraged buyout transaction wherein Start Me Up Inc. acquired TDI left the company with close to $3 billion in debt. One of the requirements for reorganization is that the reorganization plan, i.e. the proposed payment plan, between the debtors and the creditors, must be confirmed.[74] Section 1129 of the Bankruptcy Code lays out the requirements for plan confirmation.[75] There are sixteen separate requirements that have to be met in order for the plan to be confirmed, as set forth in § 1129(a).[76]

Of the sixteen requirements set forth in §1129(a), the TDI's Plan does not satisfy the § 1129(a)(10) requirement, which states:

> *(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.*[77]

In its analysis of § 1129(a)(10), the U.S. Court of Appeals for the Thirteenth Circuit agreed with UMT when it held that the proper way to understand the requirements of this section is through the *per debtor* approach. Put simply, the court framed the issue as this: when you have a joint plan such as the one in the present case, does § 1129(a)(10) require that each debtor taking part in the joint plan have at least one class of impaired creditors vote to accept the plan (i.e. "per debtor"), or can just one impaired class accept for all of the debtors taking part in the joint reorganization plan (i.e. per plan)? The lower court held that, because § 1129(a)(10) acts as

[74] 11 U.S.C. § 1129.
[75] *Id.*
[76] *Id.*
[77] 11 U.S.C. § 1129(a)(10).

a safeguard for the rights of creditors, the *per debtor* approach is appropriate because it, and not the *per plan* approach, works to fulfill this goal.

The *per debtor* approach was first properly discussed in 2011, when the U.S. Bankruptcy Court for the District of Delaware decided *In re Tribune Co*.[78] Similar to the present case, the debtors in *In re Tribune Co.* agreed not to substantively consolidate.[79] The court began its analysis of §1129(a)(10) by first determining that the word "plan" as used in the section does not have to mean *only one* plan.[80] That, according to §102(7), the singular also includes the plural.[81] Given this, the court reasoned that the mere fact that §1129(a)(10) refers to a "plan" in the singular does not mean that when you have a multi-debtor case only one debtor can satisfy the standard.[82] The court then went on to say that "[t]he practical effect of these 'non-substantive consolidation' provisions, while not articulated this way. . . is that each joint plan actually consists of a separate plan for each debtor."[83] In other words, because the debtors did not agree to substantively consolidate, the §1129(a)(10) standard must be applied to each plan in the joint plan. To do it any other way would be to abrogate the rights of particular classes of debtors.

The Delaware Bankruptcy Court soon re-affirmed their decision in the case *In re Jer/Jameson Mezz Borrower II, LLC*.[84] In this case, the sole creditor refused to vote for the plan of reorganization, forcing the debtor to argue that the plan could be confirmed without that creditor's consent.[85] Also in this case, as in *In re Tribune Co*., there was no substantive

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[78] *In re Tribune Co.*, 464 B.R. 126 (Bankr. D. Del. 2011).
[79] *Id*. at 182.
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *In re Jer/Jameson Mezz Borrower II, LLC*, 461 B.R. 293 (Bankr. D. Del. 2011).
[85] *Id*. at 301.

consolidation.[86] The court here agreed with the ruling in *In re Tribune Co.*, in that without substantive consolidation the only proper approach to section 1129(a)(10) is *per debtor*, wherein consent from each impaired class is required. Because the only creditor did not consent to confirmation of the plan the court held that that confirmation was "not possible."[87] Coupled with *In re Tribune Co.*, this case holds that when there is no substantive consolidation or consent from the impaired class, every debtor taking part in a jointly administered plan has to separately satisfy section 1129(a)(10). That, 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 each debtor (i.e. the *per debtor* approach). The *per plan* approach works against the aim of §1129(a)(10), which is to protect individual creditor's from entering into a plan that may not benefit their particular class of claims. The *per debtor* approach works to ensure that the plan, when confirmed, is one that is beneficial to each separate class of claims.

In the present case, the U.S. Court of Appeals for the Thirteenth Circuit correctly applied the *per debtor* approach to § 1129(a)(10). Similar to *In re Tribune Co.* and *In re Jer/Jameson Mezz Borrower II, LLC*., the court found that the *per debtor* approach is the correct interpretation of § 1129(a)(10) because it fulfills that sections purpose, by working to protect the rights of creditors in different impaired classes. Also similarly to the above two cases, the court found that where there is joint administration but no substantive consolidation, the *per debtor* approach is the correct method of application because to apply the *per plan* approach would be to create the effects of substantive consolidation without their actually being any substantive consolidation.

[86] *Id*. at 302.
[87] *Id.*

Converse to the reasoning employed by the U.S. Bankruptcy Court for the District of Delaware and the U.S. Court of Appeals for the Thirteenth Circuit, TDI relies upon the *per plan* approach to §1129(a)(10), and urges this Court to do the same. TDI's argument is misguided, however. As discussed above, the present case involves a jointly administered bankruptcy proceeding wherein the sole creditor for one of the impaired classes has not voted in favor of the Plan, and is distinguishable from cases where the courts have applied the *per plan* approach because this case lacks substantive consolidation. Traditionally, the cases where the courts have adopted the *per plan* approach were those where the debtor's had substantively consolidated, or practically had done so. The distinguishing factor between those courts applying *per debtor* and those applying *per pla*n is the presence of substantive consolidation. When it exists, the courts tend to adopt the *per plan* approach, because at that point the rights of creditors in different classes are not being abrogated, due to the consolidation. But adopting the *per debtor* approach in these circumstances would engender the same result, because then there would basically be one debtor.

The *per plan* approach was first adopted in *In re SGPA, Inc.*, out of the U.S. Bankruptcy Court for the Middle District of Pennsylvania.[88] In that case, SGPA and ten of its subsidiaries and affiliates filed for bankruptcy under chapter 11, all having agreed to joint administration without substantive consolidation.[89] A group of subordinated bondholders taking part in the reorganization effort objected to the proposed plan, stating that, without them, the plan could not be confirmed because, out of the eleven debtors, only one received the go-ahead from an impaired class.[90] Thus, the bondholders were arguing the *per debtor* approach to 1129(a)(10).

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[88] *In re SGPA, Inc.*, No. 1-01-02609, 2001 Bankr. LEXIS 2291 (Bankr. M.D. Pa. Sep. 28, 2001).
[89] *Id.* at 1.
[90] *Id.* at 9.

Ultimately the court ruled in favor of the debtors, finding that the *per plan* approach was most appropriate in that case.[91] The court came to this decision in part because, as it put it, "[w]hether these debtors were substantially consolidated or jointly administered would have no adverse affect on the Subordinated Bondholders."[92] One key takeaway from this case, then, is that the *per plan* approach is appropriate when there is substantive consolidation or its practical existence.

A few years after *In re SGPA*, in 2004, the U.S. Bankruptcy Court for the Southern District of New York also decided that the *per plan* approach would satisfy the section 1129(a)(10) requirement.[93] In *In re Enron Corp.* the debtors had agreed to both joint administration and substantive consolidation, and there was only one impaired class that hadn't voted in favor of the plan.[94] It was the existence of the substantive consolidation that largely influenced the court's decision to apply the *per plan* approach. "[B]y virtue of the substantive consolidation component of the global compromise, the requirements of section 1129(a)(10) are satisfied as to each of the Debtors lacking an impaired accepting class because those Debtors are part of the global compromise embodied in the Plan."[95] This reasoning is similar to that employed in *In re SGPA, Inc.*, in that both courts rely on the existence of substantive consolidation (or, in the case of *SGPA*, the practical existence of it) to inform their decision to choose the *per plan* approach.

There is one exception to the trend of courts only applying the *per plan* approach when there is substantive consolidation. The U.S. Bankruptcy Court for the Southern District of New

[91] *Id.* at 21.
[92] *Id.* at 22.
[93] *In re Enron Corp.*, No. 01-16034 (AJG), 2004 Bankr. LEXIS 2549 (Bankr. S.D.N.Y. July 15, 2004).
[94] *Id*. at 235.
[95] *Id.*

York applied the *per plan* approach without substantive consolidation in *In re Charter Communs.*[96] Similar to the case currently before the Court, the debtors in this case agreed to file for chapter 11 jointly, but not to substantive consolidation. *JPMorgan Chase Bank, N.A. v. Charter Communs. Operating, LLC* (*In re Charter Communs.*), 419 B.R. 221 (Bankr. S.D.N.Y. 2009). Even so, the court ruled that the *per plan* approach still applied.[97] This ruling is an aberration however, and one that has been noticed by other courts. The court in *In re Tribune Co.* found that the reasoning employed by the court in *In re Charter Communs.* on this point was "either an alternate ruling or *dicta*."[98]

Taking all of these cases together, they stand for the proposition that in a jointly administered chapter 11 filing without substantive consolidation, §1129(a)(10) requires approval of at least one impaired class per debtor. In the case presently before the Court, the Debtors did not agree to substantive consolidation. In fact, it was made explicitly clear that there would be no substantive consolidation: "the Debtors' estates are not being substantively consolidated and no Debtor is to become liable for the obligations of another."[99]

The United States Court of Appeals for the Thirteenth Circuit agreed with UMT on this point, and TDI has now appealed that decision to the Supreme Court of the United States. UMT asks this Court to uphold the lower Court's decision and find that the Plan cannot be confirmed over TDI's objection, because section 1129(a)(10) requires at least one impaired class's approval per debtor in a jointly administered bankruptcy case.

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[96] *JPMorgan Chase Bank, N.A. v. Charter Communs. Operating, LLC* (*In re Charter Communs.*), 419 B.R. 221 (Bankr. S.D.N.Y. 2009).
[97] 464 B.R. 126 (Bankr. D. Del. 2011) at 266.
[98] *Id*. at 182.
[99] R. at 3.

CONCLUSION

For the reasons set forth above, this Court should affirm the appellate court's holdings on both issues.