No. 19-1004

IN THE

SUPREME COURT OF THE UNITED STATES

SPRING TERM 2020

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

Debtors,

TUMBLING DICE, INC. *ET AL.*,

Petitioner

v.

UNDER MY THUMB,

Respondent.

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

BRIEF FOR THE RESPONDENT

Team 53R

QUESTIONS PRESENTED

I. 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.

II. Whether, in a case where a class of claims is proposed to be impaired under a joint, multi-debtor plan, 11 U.S.C. § 1129(a)(10) requires acceptance from at least one impaired class of claims of each debtor, or alternatively, acceptance from one impaired class of claims of any one debtor.

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STATEMENT OF THE CASE

Tumbling Dice Development, LLC ("Development") and Under My Thumb, Inc. ("Under My Thumb") entered into a contractual arrangement common in the gaming industry. (R. at 4). Under My Thumb would create a comprehensive, integrated software (the "Software") which would modernize Development's parent company, Tumbling Dice, Inc. ("TDI"), and its eight casinos and resorts ("Debtors"). *Id.* The software would allow them to reap copious, valuable data about members of their loyalty program. (R. at 5). Development was the licensee in this arrangement; in exchange for the use of Under My Thumb's copyrighted and patented software, Development was granted a non-exclusive software license agreement (the "Agreement"). *Id.* Development could "extend the benefits of the Agreement to its affiliated entities only" – Debtors under TDI's umbrella – even though these companies were not parties to the Agreement. *Id.* Notably, the Agreement prohibited the Debtors from assigning or sublicensing their rights to others without Under My Thumb's express, written consent. *Id.* Development would thus pay Under My Thumb a monthly fee based on the amount of spending by members. *Id.* Additionally, Development signed a $7 million unsecured research and development note to reimburse Under My Thumb for the Software's cost. (R. at 4).

The software was a success for TDI, tripling the membership in TDI's loyalty program and increasing spending by the members as well. (R. at 5). The good times ended with the hedge fund Start Me Up's leveraged buyout of TDI in December 2011, saddling TDI with an unserviceable loan debt that led to a chapter 11 filing in January 2016. (R. at 6). The stated intent was to restructure or refinance the debt load; the Debtor's plan support agreement required a swap of the existing shares and membership interests in the Debtors for new shares and membership interests in the reorganized Debtors, and most importantly, without changing the overall corporate structure.

(R. at 6-7). The Plan was a joint plan that expressly stated "the Debtors' estates are not being substantively consolidated and no Debtor is to become liable for the obligations of another." (R. at 7).

The Plan provided for a 55% distribution to the Debtors' unsecured creditors, for a pro rata distribution of $66 million – supposedly backed by Start Me Up's injection of new capital – and would assume the Agreement. (R. at 7). Based on this, Under My Thumb initially supported the Plan, until it carefully reviewed the disclosure statement. *Id.* It then discovered that Start Me Up was only directly investing $31 million of the unsecure distribution and that the private equity group Sympathy For the Devil, LP ("SFD") was providing the remaining $35 million. (R. at 7-8). SFD would thus receive 51% of the voting shares of the reorganized TDI, with Start Me Up receiving 49%. (R. at 8). Crucially, SFD's portfolio of companies includes a direct competitor to Under My Thumb, who had tried to replicate its software. *Id.* Under My Thumb then objected to the Plan on several grounds, two of which it has prevailed on appeal. *Id.*

Under My Thumb first asserted that the proposed assumption of its Agreement by the Debtors was impermissible under section 365(c)(1). (R. at 8). Using the 'hypothetical test', it argued that applicable non-bankruptcy law excused performance by Under My Thumb without its consent, which it would not give. *Id.* Second, it argued that the Plan was not confirmed under section 1129(a)(10) because no impaired class of creditors had voted to accept it. (R. at 9). The bankruptcy court rejected both arguments in favor of the Debtors. *Id.* The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the rulings of the bankruptcy court. *Id.* The United States Court of Appeals for the Thirteenth Circuit reversed on both issues. *Id.*

SUMMARY OF THE ARGUMENT

In chapter 11 bankruptcy cases the "debtor in possession" assumes the role of the "trustee" in other chapters of the code. The powers of the debtor in possession are addressed in § 365 of the code. Specifically, § 365(c) of the code addresses the debtor in possession's power to assume executory contracts held by the debtor before bankruptcy. In the case at hand, the debtor in possession held an executory contract which was based on intellectual property protections. When faced with such situations, bankruptcy courts have interpreted § 365(c) using two methods, the "hypothetical test," or the "actual test." The plain language interpretation of the text necessitates the application of the hypothetical test. Additionally, while some commentators have opined that § 365(c) and § 365(f) when interpreted via plain language lead to absurd consequences, the application of the hypothetical test can distinguish between the two sections. Finally, bankruptcy courts must rule based on the bankruptcy code, and the case at hand demonstrates that ruling based on the bankruptcy code achieves the policy consideration set out by the drafters.

Joint administration and substantive consolidation serve distinct purposes in multi-debtor Chapter 11 bankruptcy filings. In this case, the Petitioner did not seek substantial consolidation, and the Debtors remained separate entities. For such cases, the rule of statutory construction in §102 (7) must be applied to § 1129(a)(10) in a jointly administered case to preserve the separateness of the entities. Only when § 1129(a)(10) is read on a per debtor basis does it serve its purpose as a statutory gatekeeper, and applying a per plan approach to the statute yields absurd results. Finally, reading § 1129(a)(10) on a per debtor basis promotes successful reorganizations while at the same time preserves creditor and debtor rights.

ARGUMENT

I. A DEBTOR IN POSSESSION MAY NOT ASSUME AN EXECUTORY CONTRACT OVER THE OBJECTION OF A NON-DEBTOR PARTY WHEN APPLICABLE NON-BANKRUPTCY LAW EXCUSES THE NON-DEBTOR PARTY FROM ACCEPTING OR RENDERING PERFORMANCE TO AN ENTITY OTHER THAN THE DEBTOR IN POSSESSION

In chapter 11 cases, it has been well established that the "debtor in possession" performs the same functions as the "trustee" in other chapters of the Bankruptcy Code. 11 U.S.C. § 1107. The term "trustee" and "debtor in possession" as used in the Bankruptcy Code are essentially interchangeable. *Official Comm. Of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 226 F.3d 237, 243 (3d Cir. 2000). Hence, § 365 of the Bankruptcy Code, which addresses the powers of the Trustee, gives a debtor in possession the power to assume executory contracts held by the debtor before bankruptcy. 11 U.S.C. § 365(a).

However, the power of the debtor in possession over executory contracts is limited by §365(c)(1), which provides that:

> 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…

Federal courts have taken two approaches as to the interpretation of § 365(c)(1) as it relates to assumption of a non-exclusive license of intellectual property over the objection of the licensor. *NCP Marketing Group, Inc. v. B.G. Star Prods., Inc.*, 556 U.S. 1145 (2009) (denying certiorari). First, the Third, Fourth, and Ninth Circuits have interpreted 365(c)(1) via the "hypothetical test," meaning that a debtor in possession may assume an executory contract only if it can hypothetically assign it to a third party. *See e.g., In the Matter of West Electronics*, 852 F.2d 79 (3d Cir. 1988); *RCI Tech. Corp. v. Sunterra Corp.*, 361 F.3d 257 (4th Cir. 2004); *In re Catapult Entertainment, Inc.*, 165 F. 3d 747 (9th Cir. 1999). Meaning, if the debtor in possession lacks the hypothetical power to assign the contract, then the debtor in possession has no actual

intention of assigning the contract to a third party. *See, e.g.*, *Sunterra*, 361 F.3d. Second, First and Fifth Circuits have adopted the "actual test," whereby a chapter 11 debtor may assume an executory contract in the case that the debtor has no actual intent to assign the contract to a third party. *See, e.g.*, *Summit Inv. & Dev. Corp. v. Leroux*, 69 F. 3d 608 (1st Cir. 1995); *Institut Pasteur v. Cambridge Biotech. Corp.*, 104 F.3d 489 (1st Cir.), cert. den., 521 U.S. 1120 (1997); *Bonneville Power Admin. v. Mirant Corp.*, 440 F.3d 238, 240 (5th Cir. 2006). The heart of the distinction between these two tests lies in the statutory interpretation of § 365(c)(1)(B) as to whether "assumption *or* assignment" should be interpreted as "assumption *and* assignment."

In this case, the creditor-licensor, Under My Thumb, granted the debtor-licensee, Development, the non-exclusive use of its intellectual property via the Agreement subject to the restrictions of the licensor. (R. at 5). Courts have widely held that such arrangements are executory contracts. *See, e.g.*, *In re Kmart Corp.*, 290 B.R. 614, 618 (Bankr. N.D. Ill. 2003). Federal rule of law prohibits the assignment of such intellectual property under such agreements by the licensee, absent the consent of the licensor. *See, e.g.*, *Unarco Indus., Inc. v. Kelley Co., Inc.*, 465 F.2d 1303, 1306 (7th Cir. 1972). Thus, the Agreement is a license of intellectual property that is not assignable under non-bankruptcy law.

A. <u>The Plain Language of the Statute Necessitates the Application of the Hypothetical Test.</u>

The Supreme Court in, *Conn. Nat'l Bank v. Germain*, held that circuit courts must "presume that a legislature says in a statute what it means and means in a statute what it says there." 503 U.S. 249, 253-54 (1992). Furthermore, "When the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete.'" *Id.* A straightforward reading of § 365(c) demonstrates that the drafters of the statute placed an "or" as a disjunctive, not an "and" as a conjunctive to serve as additional protection for creditors or licensors in such circumstances as the one at hand. The use of the "or" creates a more stringent standard that balances debtor versus creditor rights by allowing the debtor to assume or reject contracts while affording protections to the creditor. Thus, given the plain language of § 365(c), the court must interpret the statute to be the disjunctive "or" and not the conjunctive "and." The legislature, not the court, is tasked with writing the Bankruptcy code and for the court to change the plain language of the code would be outside the scope of the judicial system's authority. As the Supreme Court recently pointed out, "The

Bankruptcy Code standardizes an expansive (and sometimes unruly) area of law, and it is our obligation to interpret the Code clearly and predictably using well established principles of statutory construction." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 649 (2012).

B. The Application of Hypothetical Test Distinguishes § 365(c) and § 365(f).

The "hypothetical test," which was created and subsequently adopted by reading § 365(c) in accordance with its plain language, has drawn criticism as it seemingly contradicts § 365(f)(1). § 365(f)(1). reads:

> 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.

The contradiction between § 365(c) and § 365(f)(1) arises out of the reference to "applicable law" in both provisions. On one hand, 365(c)(1) disallows assumption when applicable law would bar such assignment. On the other, 365(f)(1) allows executory contracts to be assigned despite applicable law protecting against assignment.

Courts have distinguished the scope of these two provisions, thus resolving the seeming contradiction. *See, e.g.*, *Catapult*, 165 F.3d at 752; *Sunterra*, 361 F.3d at 266. For example, the Sixth Circuit has recognized that the conflict between § 365(c)(1) and § 365(f)(1) is illusory, because "each subsection recognizes an 'applicable law' of markedly different scope." *In re Magness*, 972 F.2d 689, 695 (6th Cir. 1992). The Fourth Circuit has also recognized this distinction then nuanced the interpretation. *Sunterra*, 361 F.3d at 266.

The *Sunterra* court recognized that first, § 365(f)(1) lays out the broad rule that a law that as a general matter "prohibits, restricts, or conditions the assignment" of executory contracts is trumped by the provisions of subsections of § 365(f)(1). *Id.* The *Sunterra* court then recognized that the Ninth Circuit's *Catapult* decision created an exception to this broad rule. *Id.* (citing *Catapult*, 165 F.3d at 752). The *Catapult* court's exception to the general ban excuses a party having to accept or render performance to an

entity different from the one with which the party originally contracted. *Catapult*, 165 F.3d at 752 (citing *In re James Cable*, 27 F.3d at 538; *Magness*, 972 F.2d at 695). Thus, 365(f)(1) addresses "applicable law" as the law which prohibits or restricts assignments, whereas 365(c) embraces legal excuses for refusing to render or accept performance, irrespective of the contract's assignability. *Magness*, 972 F.2d at 699 (Guy, J., concurring). Courts must therefore look to why the applicable law prohibits assignment. *Sunterra Corp.*, 361 F.3d at 266. (citing *Catapult*, 165 F.3d at 752 (citing *Magness*, 972 F.2d at 700 (Guy, J., concurring). If the anti-assignment law is predicated on the rationale that the identity of the contract is material to the agreement, then 365(c)(1) must be revived. *Id.* Based on this interpretation, the *Sunterra* court found that 365(c) and 365(f) were not at odds and thus, the plain language reading should be preserved. *Id.*

In the case at hand, Under My Thumb, the licensor, granted Development, the licensee, a non-exclusive license to use its intellectual property which is protected under federal intellectual property law. (R. at 5). For contracts made to protect intellectual property law, the identity of the contract is material to the agreement, since "but for" the protection of the intellectual property the contract would not have been made. Thus, since the anti-assignment law in this case was material to the agreement, the "applicable law" contemplated in 365(c) is revived, and must apply with its plain language interpretation.

C. Bankruptcy Courts Must Rule Based on the Bankruptcy Code.

While many commentators and academics describe Bankruptcy courts as courts of equity, "what the Bankruptcy Code provides, a judge cannot override by declaring that enforcement would be "inequitable." *See, e.g.*, *Toibb v. Radloff*, 501 U.S. 157 (1991); *Kmart*, 359 F.3d at 871; *In re Sinclair*, 870 F.2d 1340 (7th Cir.1989). There are numerous bankruptcy judges, all of whom have a distinct opinion about what should be equitable in a given situation. *Sunbeam Products, Inc. v. Chicago American, Mfg.*, LLC, 686 F.3d 372, 376 (7th Cir. 2012). However, the rights of the creditor and debtor depend entirely upon what the code provides, and not notions of equity. *Id.* The Supreme Court recently emphasized this tenet of Bankruptcy law, and emphasized that arguments based on the purposes behind the code and wise public policy cannot be used to supersede the codes provisions. *Id.* (quoting *RadLAX*, 566 U.S. at 649.)

The case at hand demonstrates why American jurisprudence follows this rule of law. This is the case of a creditor-licensor that invested millions of dollars to develop and patent a technology which they

understood the law would protect. (R. at 4). Under applicable intellectual property law, contract law, and bankruptcy law, their investment is protected. However, because of the licensee with whom they contracted has fallen under the control of a third party, and not the ownership with whom they originally contracted, their investment is at risk of being destroyed despite the laws that they understand protect them. (R. at 6-7). Bankruptcy courts have regularly deviated from the code and applied the "actual test" in order to achieve better policy outcomes --that policy generally being to give debtors the chance to resurrect their business or personal finances. However, this is the case of a third party who is attempting to capitalize on a wavering business. While this is fully within the rights of any party under the law, good policy would protect the creditors who had no control over fate of debtors, except through the terms of their agreement and the applicable laws. The plain language of the code achieves this policy outcome, and the drafters of the code undoubtedly had similar situations in mind when they drafted the code in its current form. Courts should not deviate from the plain language of the code. Not only does deviation contravene rulings of the Supreme Court, it directly contradicts the policies the drafters set out to achieve.

II. 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.

A. Joint Administration Preserves Entity Separateness While Substantive Consolidation Alters Substantive Rights of the Parties.

Joint administration and substantive consolidation serve substantially different purposes in a multi-debtor chapter 11 bankruptcy case. Pursuant to the rule under 11 U.S.C. § 1015(b), if two or more petitions are pending in the same court by affiliates the court may order a joint administration of the estates. Joint administration has been described as merely a "creature of procedural convenience." *Matter of Steury*, 94 B.R. 553, 553 (Bankr. N.D. Ind. 1988). Joint administration does not create substantive rights, instead it offers potential cost savings and administrative conveniences by, for example, permitting the use of a single docket, and combining notices to creditors of other estates for the purpose of expediting the cases. *See Unsecured Creditors Comm. v. Leavitt Structural Tubing Co.*, 55 B.R. 710, 711 (N.D. Ill. 1985); *See also* 11 U.S.C. § 1015, Advisory Committee Note (1983).

By contrast, courts agree with the general principle that substantive consolidation "is no mere instrument of procedural convenience. . . but a measure vitally affecting substantial rights." *In re Flora Mir Candy Corp.*, 432 F.2d 1060, 1062 (2d Cir.1970). The Code does not explicitly grant the court a right to order substantive consolidation, rather the court relies on its general equity powers granted in §105(a), and §1123(a)(5)(C) in a chapter 11 plan. *In re Bonham*, 229 F.3d 750, 764 (9th Cir. 2000). Substantive consolidation disregards corporate law's foundational doctrine of separate entities by "combin[ing] the assets and liabilities of separate and distinct- but related- legal entities into a single pool and treat[ing] them as though they belong to a single entity." *In re Bonham*, 229 F.3d at 764.

The Second and Third Circuits have identified limited situations in which it may be appropriate to disrupt the legal significance of separate entities through an order of substantive consolidation. Courts recognize that an order of substantive consolidation should only be used "to ensure the equitable treatment of all creditors." *In re Augie/Restivo Baking Co., Ltd.*, 860 F.2d 515, 518 (2d Cir. 1988). Courts will look for one of two situations: whether pre-petition, a creditor dealt with a debtor's multiple entities as a single unit, or whether post-petition, the assets and liabilities of the multiple debtor entities are mixed in such a way that would harm creditors. *See In re Owens Corning*, 419 F.3d 195, 211 (3d Cir. 2005); *See also In re Augie/Restivo Baking,* 860 F.2d at 518. A court may order substantive consolidation of a debtor's cases if either situation exists.

In this case, the Petitioner did not seek substantive consolidation. Instead, the Petitioner's cases were jointly administered for the convenience of the parties and the court. R. at 3. The order of joint administration permitted the Petitioner to file one plan on behalf of all ten debtors for administrative convenience purposes. Joint administration does not alter substantive rights of the parties, therefore despite one joint plan being filed, the ten Debtors remain separate entities, as do their assets and liabilities.

The distinct consequences of an order of joint administration versus an order of substantive consolidation set the foundation for properly interpreting §1129(a)(10). Courts that apply a per-plan approach to §1129(a)(10) in a jointly administered multi-debtor case improperly conflate the results of an order of substantive consolidation with an order of joint administration. A per-debtor approach should be used in such a case.

B. Rules of Statutory Construction Support a Per-Debtor Approach of § 1129(a)(10) In a Jointly Administered Case.

Courts note that a key rule of statutory interpretation is to examine the plain language of a statute as well as the broader context of the statutory language. *See In re Tribune Co.*, 464 B.R. 126, 183 (Bankr. D. Del. 2011). Section 102 of the Bankruptcy Code also provides rules of construction meant to be utilized throughout the Code. With these two tools of statutory construction § 1129(a)(10) can be properly understood in the context of a jointly administered case.

i. The Rule of Statutory Construction in §102 (7) Must be Applied to § 1129(a)(10) in a Jointly Administered Case to Preserve Entity Separateness.

Interpreting § 1129(a)(10) in the context of a jointly administered case requires the use of §102(7) which states that "the singular includes the plural." Section 1129(a) sets forth the requirements that must be met before a plan can be confirmed. The plain language of the requirement in § 1129(a)(10) reads "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." In the *Tribune* case, the Delaware Bankruptcy Court properly stated that § 1129(a)(10)'s singular use of "plan" is not a sufficient reason "to conclude that, in a multiple debtor case, only one debtor- or any number fewer than all debtors- must satisfy [§ 1129(a)(10)'s] standard." *In re Tribune* 464 B.R. at 182. The court's reasoning takes into account that in a jointly administered case the debtors remain separate entities and the substantive rights of the parties are not altered despite the existence of a joint plan.

In contrast, the court in *In re Transwest* determined that a per-plan approach to § 1129(a)(10) in a jointly administered multi-debtor case was appropriate. *See JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props.(In re Transwest Resort Props.)*, 881 F.3d 724 (9th Cir. 2018). The *In re Transwest* court improperly focused on the plain language of the statute, stating that the singular use of "plan" was dispositive. *In re Transwest Resort Props.*, 881 F.3d at 729. The Court disregarded the preservation of entity separateness following an order of joint administration, and as a result failed to apply the Code's applicable rule of construction set forth in § 102(7).

In our case, the Petitioner's joint plan explicitly recognizes the implications of joint administration

by including a provision that states, "the Debtor's estates are not being substantively consolidated, and no Debtor is to become liable for the obligations of another." R. at 7. The practical effect of a "non-substantive consolidation" clause, such as the one in the Petitioner's Plan, is that a joint plan actually consists of a separate plan for each Debtor. *In re Tribune* 464 B.R. at 182. Absent substantive consolidation, a joint plan serves administrative purposes only and actually represents a plan for each debtor in a multi-debtor case.

The Code accounts for the possibility of multiple debtors filing a joint plan following an order of joint administration. The Code's Rule of Construction that "the singular includes the plural" allows the singular use of "plan" in § 1129(a)(10) to be read as "plans", which accurately represents the multiple plans that exist on behalf of multiple debtors in a jointly administered case.

ii. Only a Per Debtor Approach Allows § 1129(a)(10) to Serve It's Intended Purpose as a Statutory Gatekeeper to a Cramdown under § 1129(b).

The per-debtor approach is further supported with an understanding of the context of § 1129(a)(10) as it relates to the purpose of the § 1129(a) requirements. Section 1129(b) allows for a plan to be confirmed over the objection of dissenting creditors, often referred to as a "cramdown". A cramdown serves as a powerful tool for debtors. Consistent with Bankruptcy Law's goal of balancing debtor and creditor rights, the Code states that a cramdown may not "unfairly discriminate" against, and must provide "fair and equitable" treatment to dissenting creditor classes. 11 U.S.C. § 1129(b)(1). Section 1129(a)(10) promotes this balance of debtor and creditor rights and acts as a "statutory gatekeeper" by preventing a cramdown if there is not an accepting impaired class. *In re 266 Washington Assocs.*, 141 B.R. 275, 287 (Bankr. E.D.N.Y. 1992). Congress intended for § 1129(a)(10) to serve this purpose. Following a series of cases that allowed cramdowns without the consent of any creditors, Congress amended the text of the statute to include that the accepting class of creditors had to be impaired. *See* Peter E. Meltzer, *Disenfranchising the Dissenting Creditor*, 66 Am. Bankr. L.J. 281 (1992). If applied on a per-plan basis, § 1129(a)(10) would fail to serve its purpose as a statutory gatekeeper.

To illustrate this point, one can imagine a hypothetical situation where a corporation files for bankruptcy along with its fourteen subsidiaries and the court orders joint administration, but not substantive consolidation. Each of the fifteen debtors has three impaired classes of creditors. Under a per-plan approach,

the requirement of § 1129(a)(10) would be met if only one debtor has a single impaired class of creditors that votes to accept the jointly administered plan while the remaining fourteen debtors' impaired classes of creditors dissent to the plan. Alternatively, under a per-debtor approach, the requirements of § 1129(a)(10) would be met only if one impaired class of each of the fifteen debtors voted to approve the plan. In this hypothetical, § 1129(a)(10) is satisfied under the per-plan approach with only one out of forty-five impaired classes accepting the plan, while the per-debtor approach requires fifteen out of forty-five impaired classes to accept the plan. It follows that the per-debtor approach allows § 1129(a)(10) to serve its purpose as a statutory gatekeeper to a cramdown under § 1129(b) by furthering Bankruptcy Law's goal of providing "fair and equitable" treatment to dissenting creditors.

iii. Applying a Per-Plan Approach to the Requirements of § 1129(a) Yields Absurd Results.

Section 1129(a) sets forth sixteen requirements that must be met for a plan to be confirmed. The requirements collectively aim to ensure that if a plan is ultimately crammed down, the plan treats creditors with a baseline level of fairness. Applying a per-plan, rather than a per-debtor approach to the requirements of § 1129(a) in a jointly administered case yields absurd results that strip creditors of equitable treatment.

§ 1129(a)(3) requires that a plan be proposed in good faith and not by any means prohibited by the law. Using the hypothetical situation applied above, the absurd result created by a per-plan approach is evident. Under a per-plan approach § 1129(a)(3) is satisfied if the jointly administered plan is not prohibited by law as it relates to one debtor, even if the plan would constitute a violation of the law for the fourteen other debtors. Clearly § 1129(a)(3) would not be satisfied if some, but not all, of the debtors to a joint plan met the requirement. Alternatively, a per-debtor approach requires that a joint plan must satisfy the requirement of § 1129(a)(3) as it relates to each legally separate debtor in a multi-debtor case.

Likewise, the best interests test under § 1129(a)(7) yields absurd results when applied on a per-plan basis. §1129(a)(7) requires that a dissenting creditor receive under the plan "not less than the amount" of what the creditor would receive in a chapter 7 liquidation. A per-plan application only requires that one debtor's creditors receive at least what they would receive in a liquidation, while all other creditors could receive much less. The goal of treating creditors fairly and equitably is diminished under a per-plan

application. A per-debtor application consistently yields results that balance Bankruptcy Law's goals of promoting successful restructurings and treating debtors and creditors equitably.

C. Promoting Successful Reorganizations Must Be Balanced With Preserving Creditor and Debtor Rights.

Bankruptcy Law's goals of promoting successful restructurings and balancing creditor and debtor rights are woven throughout the text of the Bankruptcy Code. *See In re Cordes*, 147 B.R. 498, 504 (Bankr. D. Minn. 1992). Achieving one goal cannot come at the at the expense of the other. The Supreme Court has made clear that "bankruptcy courts are essentially courts of equity, and their proceedings inherently proceedings in equity." *Local Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934). Therefore, the policy goal favoring successful reorganization of business debtors must be balanced against the substantive rights granted to creditors under the Bankruptcy Code. Applying a per-debtor approach to § 1129(a)(10) in jointly administered chapter 11 cases is the only way to balance the goals of Bankruptcy Law.

CONCLUSION

For the foregoing reasons, the Respondent, Under My Thumb, Inc., respectfully requests that this Court affirm the appellate court's holding for respondent.