Team 55R

No. 19-1004

IN THE

Supreme Court of the United States

October Term, 2019

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

Debtor,

TUMBLING DICE, INC.

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

55R
Counsel for Respondent

QUESTIONS PRESENTED

I. Whether the plain meaning of 11 U.S.C. § 365(c)(1) may be modified to permit a debtor in possession to assume an executory contract over the objection of a non-debtor party to such contract when applicable nonbankruptcy law would excuse the non-debtor party from rendering performance to a third party.

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 a sole impaired class of claims out of all of the debtors under the plan.

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OPINIONS BELOW

The United States Bankruptcy Court for the District of Moot held for Debtors, Tumbling Dice, Inc. *et al.*, on both issues. R. at 3. Specifically, the bankruptcy court found that: (I) Development could assume the software licensing agreement because Under My Thumb was not actually being forced to accept performance under the licensing agreement from someone other than the party with whom it originally contracted; and (II) the plan was confirmable because section 1129(a)(10) is satisfied where at least one impaired class in a joint, multi-debtor plan accepts the plan. *Id.* at 9. The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court on both issues. The Thirteenth Circuit Court of Appeals reversed on both issues, finding that: (I) section 365(c)(1) precludes the Development from assuming the licensing agreement with Under My Thumb, absent the consent of Under My Thumb; and (II) section 1129(a)(10) must be read to require each debtor in a jointly administered case to meet the requirements of that section in order to confirm a plan of reorganization. *Id.* at 15, 21. This Court then granted the Debtor's petition for writ of certiorari. *Id.* at 1.

STATEMENT OF JURISDICTION

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

STATUTES INVOLVED

The relevant federal laws controlling this case are 11 U.S.C. §§ 102; 365(a), (c), (e), & (f); 541(a); 1107; 1112(a), (b); and 1129(a) of the United States Bankruptcy Code. The text of these provisions are attached in their entirety hereto as **Appendix A**.

STATEMENT OF THE CASE

I. FACTS

Respondent, Under My Thumb, is a software designer that specializes in customer loyalty and reservations programs for the hospitality industry. R. at 4. In 2008, Respondent contracted with Tumbling Dice Development, LLC ("Development") to create a comprehensive, integrated software system (the "Software"). *Id.* Development is one of nine wholly-owned subsidiaries owned by it's holding company, Tumbling Dice, Inc. ("TDI"). *Id.* The remaining eight subsidiaries each operate a luxury casino and resort (each an "Operating Debtor" and, collectively, the "Operating Debtors"). *Id.* Together, TDI and its wholly-owned subsidiaries (collectively the "Debtors") constitute one of the largest gaming operations in the country. *Id.*

Respondent specifically designed the Software to modernize Club Satisfaction—the Debtors' casino loyalty program. *Id.* Pursuant to a Research and Development Agreement between the parties, Respondent incurred approximately $10 million in costs to create the Software, a process that took nearly a year. *Id.* Development agreed to reimburse Respondent for a portion of these costs pursuant to an unsecured $7 million promissory note (the "R&D Note"). *Id.* After the Software was completed, Respondent and Development entered into a licensing agreement (the "Licensing Agreement" or "Agreement") that granted Development a non-exclusive license to use its copyrighted and patented software. *Id.* at 5. Notably, the Agreement prohibited Debtors from assigning or sublicensing their rights under the license to others without Respondent's express written consent, with only one exception providing that Development was permitted to "extend the benefits of the Agreement to its affiliated entities only." *Id.*

Respondent was permitted to, and did, license similar versions of its proprietary software to third parties. *Id.* Respondent's software design was incredibly effective, as evidenced by the

success of Debtor's Club Satisfaction program. *Id*. Through the Software, the Debtors and other licensees are able to learn what games members are playing, how often and for how long, and what types of food and beverages they purchase. *Id*. Moreover, the Debtors and other licensees are able to track members habits and capture their preferences so they can entice the members to return frequently, play for longer, and spend more. *Id*. The effectiveness of Respondent's software therefore provided Respondent with a significant competitive advantage. Indeed, a direct competitor of Respondent had, for years, tried unsuccessfully to replicate the Software. *Id*. at 8. Thus, unsurprisingly, Respondent became immediately suspicious when it learned that Sympathy for the Devil ("SFD"), a third-party private equity group whose portfolio of companies includes said direct competitor of Under My Thumb, was attempting to acquire a significant voting stake in TDI in the course of TDI's Chapter 11 reorganization. *Id.* at 7–8.

The Chapter 11 bankruptcy filing came about shortly after TDI was acquired by a hedge fund, Start Me Up, Inc. ("SMU"), through a leveraged buy-out. *Id*. at 6. To facilitate the transaction, TDI and its subsidiaries granted first priority liens on their assets to a group of lenders (the "Lenders") to finance the leveraged buy-out. *Id.* Importantly, Development did not grant such a lien on its assets. *Id*. As of the petition date, TDI and the Operating Debtors—but not Development—jointly and severally owed the Lenders $2.8 billion. They also owed approximately $120 million in unsecured debt, including the $6 million owed to Respondent. *Id*.

In the months following the Petition Date, the Debtors and their creditors negotiated a plan support agreement. Respondent was excluded from the negotiating process. *Id*. The proposed plan (the "Plan") was jointly administered, but it expressly stated that the Debtors were not substantively consolidated. *Id*. at 7 ("the Debtors' estates are not being substantively consolidated

and no Debtor is to become liable for the obligations of another"). Pursuant to the Plan, all existing equity interest in the Debtors were to be cancelled, and new equity was to be issued. *Id*. at 7.

The Plan also called for a $66 million distribution to TDI's unsecured creditors. *Id*. Critically, under the Plan, SMU was only directly funding $31 million of the unsecured distribution. *Id*. The remaining $35 million was funded by SFD. *Id*. at 7–8. In return, SFD would receive 51% of the newly issued voting shares and control over multiple seats on the post-emergence board of directors of the reorganized Debtors. *Id*. at 8. TDI, as an affiliated entity of Development under the Agreement with Respondent, could provide SFD, and by extension, Respondent's direct competitor, with valuable information about the Software. Clearly this would be detrimental to Respondent's business. *Id*. Concerned with this material pecuniary threat, Respondent voted to reject the Plan. Because Development's only impaired class of creditors was controlled by Respondent, Development lacked, and continues to lack, an impaired accepting class of creditors. *Id*.

II. PROCEDURAL HISTORY

On January 11, 2016 (the "Petition Date"), the Debtors sought the protection of the court under Chapter 11 of the Bankruptcy Code (the "Code"). *Id.* at 3–4. Debtors' cases were jointly administered for the convenience of the parties and the court pursuant to Federal Rule of Bankruptcy Procedure 1015(b). *Id.* at 3. In August 2016, Debtors filed a joint plan of reorganization. *Id.* at 3. Under My Thumb timely objected to the plan on two grounds, two of which it timely appealed. *Id.* at 8. The bankruptcy court overruled the objections and confirmed the plan. *Id.* at 9. The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed. *Id.* Under My Thumb then appealed to the Thirteenth Circuit Court of Appeals which reversed the decisions of the bankruptcy court. *Id.* at 21.

STANDARD OF REVIEW

The facts in this case are not disputed by the parties. *Id.* at 3, n. 3. This case involves two questions of statutory interpretation. Statutory interpretation is a matter of law. As such, this Court's standard of review is *de novo*. *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit vindicated Under My Thumb's rights as a creditor by adhering to the plain meaning rule and faithfulness to statutory construction principles. First, the Thirteenth Circuit wisely declined to look beyond the plain meaning of section 365(c)(1) to determine Congress's intent. The Court correctly held that the plain language of section 365(c)(1) clearly and unambiguously establishes a hypothetical test under which a debtor in possession is barred from either assuming or assigning an executory contract without the non-debtor party's consent when applicable nonbankruptcy law would hypothetically excuse the non-debtor party from rendering performance to a party other than the debtor or the debtor in possession.

This literal interpretation of section 365(c)(1) gives full effect to the terms of the statute. First, the term "or," as used in the "assume or assign" language of section 365(c)(1)(A), must be interpreted in the disjunctive to mean that neither assumption *nor* assignment, independent of one another, may occur if the requirements of section 365(c)(1)(A) and (B) are satisfied. A reading of the statute that replaces the term "or" with the term "and" to modify the effect of the statute to preclude "assumption and assignment" is erroneous because it violates the plain meaning rule. Second, it is well-established that section 365(c)'s limitations on the rights of a trustee apply equally to a debtor in possession. Pursuant to section 1107, a debtor in possession has all of the rights and powers of a trustee, "subject to any limitations on a trustee." 11 U.S.C. § 1107. Section 365(c)(1) precludes a trustee from assuming any executory contract if the conditions set forth in

section 365(c)(1)(A) and (B) are satisfied. It follows that a debtor in possession is subject to the same limitations, i.e., both the limitation on assumption and the limitation on assignment. This result is not illogical, and it is mandated by the plain language of the statute. Section 365(c)(1)(A) sets forth a condition phrased as a hypothetical ("if applicable law excuses a party . . ."). Consequently, the condition applies irrespective of whether assumption by the debtor in possession actually excuses the non-debtor party—if the hypothetical condition is satisfied (i.e., applicable law would excuse the non-debtor party form accepting performance), then the debtor in possession may not assume the contract. Therefore, Development may not assume the Agreement without Under My Thumb's consent because applicable law—in this case, federal intellectual property law—would hypothetically excuse Under My Thumb from rendering performance to a third party.

Moreover, neither of the two extraordinarily rare exceptions to the plain meaning rule are triggered by a literal reading of section 365(c)(1). A literal reading of the statute does not produce a result that can truly be characterized as absurd, nor does it produce an outcome that is demonstrably at odds with clearly expressed congressional intent to the contrary. While the effect of the statute may seem to contradict traditional bankruptcy policies, it is axiomatic—as the Circuit Court recognized and as this Court has repeatedly emphasized—that achieving a better policy outcome is a task for Congress, not the courts. No matter how appealing the interpretation of the actual test may be from a policy standpoint, this Court cannot adopt such an interpretation without trespassing on a function reserved for the legislative branch.

Second, the Thirteenth Circuit correctly held that a plain language reading of section 1129(a) means that each debtor in a jointly administered plan must meet the requirement provided in section 1129(a)(10). Specifically, that requirement provides that when a class of claims is impaired under the plan, at least one accepting impaired class of creditors must exist. This

requirement may not be abridged by the cram down procedure, as outlined in section 1129(b). The Circuit Court correctly joined previous bankruptcy court rulings that found that, absent substantive consolidation, each debtor must satisfy the section 1129(a)(10) requirement.

Any plain language analysis begins with an ordinary reading of the words provided. "Plan," the word at issue here, is unambiguous, and its meaning is not disputed. But a plain language reading must incorporate express mandates provided by statute. Here, such an applicable rule exists in section 102(7) of the Code, which states that the singular includes the plural. It follows that "plans" may be appropriately substituted for "plan" in section 1129(a)(10). Accordingly, the multiple plans contained within a jointly administered plan must each comply with section 1129(a)(10).

If there exists any doubt beyond the plain language reading of a statute, courts must look to canons of statutory construction. One cardinal rule of statutory construction is that the statute must be read as a whole. Because each of the requirements listed in section 1129 is applied on a per debtor basis, it would run counter to a contextual reading of the statute to solely apply section 1129(a)(10) on a per plan basis. Policy considerations, including vindication of a crucial creditor right in the reorganization process, and avoidance of needless breaking down of corporate barriers, further support a per debtor approach. The convenience of a jointly administered plan cannot work to undermine explicit bankruptcy rights provided to creditors.

Furthermore, a per plan approach is unworkable because such a reading would constitute *ex post facto* substantive consolidation of the debtors under the jointly administered plan. Such a reading would make jointly administered plans a rare thing in Chapter 11 filings, since most of these plans fail to meet the stringent requirements for substantive consolidation. The net effect of such a reading would be to require either substantive consolidation of a multi-entity organization,

or a separate Chapter 11 proceeding for each of those entities. The enormous legal costs that such a reading would impose upon the honest debtor seeking a fresh start cannot be what Congress intended under section 1129(a)(10).

Because a per plan approach is *ex post facto* substantive consolidation, the plan here must be dismissed under section 1112 of the Code because the debtors lack a reasonable likelihood of rehabilitation. This is so because TDI meets neither of the possible tests which circuit courts have proposed for substantive consolidation. In addition, substantive consolidation is done for the purpose of achieving fairness to all creditors. Forcing substantive consolidation here would place one of Respondent's most valuable assets, their Software, in the hands of a direct competitor who would be able to easily replicate that Software. Since substantive consolidation would yield this inequitable result, it cannot be used here. For the reasons listed above, this Court should affirm the lower court's decision regarding the interpretation of section 1129(a)(10).

ARGUMENT

I. THE THIRTEENTH CIRCUIT PROPERLY HELD THAT THE PLAIN MEANING OF SECTION 365(c)(1) PRECLUDES DEVELOPMENT FROM ASSUMING THE AGREEMENT WITHOUT THE CONSENT OF UNDER MY THUMB.

When the terms of a statute are clear and unambiguous, a reviewing court must enforce the terms of the statute as Congress has drafted it, irrespective of "whether wisdom or logic suggests that Congress could have done better." *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 305, 308 (4th Cir. 2000) (*aff'd sub nom. Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002)). A court may ignore the terms of an unambiguous statute only when the plain language of the statute implicates one of two narrow exceptions. *Id.* "The first such exception, premised on absurdity, exists when literal application of the statutory language at issue results in an outcome that can truly be characterized as absurd, i.e., that is so gross as to shock the moral or common sense." *RCI Tech. Corp. v. Sunterra*

Corp. (In re Sunterra Corp.), 361 F.3d 257, 265 (4th Cir. 2004) (quoting *Hillman v. I.R.S.*, 226 F.3d 338, 342 (4th Cir. 2001)) (quotations omitted). The second exception, premised on legislative intent, "exists only when a literal reading of a statute produces an outcome that is 'demonstrably at odds' with clearly expressed congressional intent to the contrary." *Id.* For the reasons stated below, section 365(c)(1) is clear on its face and does not implicate either of these extraordinarily rare exceptions. Accordingly, the plain, clear, and unambiguous terms of section 365(c)(1) require this Court to affirm the Thirteenth Circuit's proper application of the statute to preclude Development from assuming the Agreement.

A. The plain language of section 365(c)(1) clearly and unambiguously precludes a debtor in possession from assuming an executory contract without the non-debtor party's consent where applicable nonbankruptcy law bars assignment of the contract to a third party.

"The starting point in discerning congressional intent . . . is the existing statutory text." *Lamie v. United States Trustee*. 540 U.S. 526, 534 (2004) (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999)). Section 365 of the Code gives a trustee in bankruptcy broad authority to assume, assign, or reject the debtor's executory contracts. 11 U.S.C. § 365(a) & (f); *Perlman v. Catapult Entm't, Inc.* (*In re Catapult Entm't, Inc.)*, 165 F.3d 747, 749 (9th Cir. 1999). Under subsection (a), the trustee may generally assume or reject any executory contract, subject to the court's approval. 11 U.S.C. § 365(a). After an executory contract has been assumed, subsection (f)(1) of section 365 generally permits the trustee to assign the debtor's executory contracts, notwithstanding any provisions in such contracts, or in applicable law, that prohibit, restrict, or condition the assignment of such contracts. 11 U.S.C. § 365(f)(1) & (2). "This extraordinary authority, however, is not absolute." *In re Catapult Entm't, Inc.*, 165 F.3d at 749. The trustee's authority to assume an executory contract under subsection (a), and to assign an executory contract

under subsection (f), is limited by, *inter alia*, specific reference to subsection (c)(1), which states a carefully crafted exception:

> The trustee may not assume or assign any executory contract[1] . . . if applicable law[2] excuses a [non-debtor] party . . . to the contract from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession . . .; and such party does not consent to such assumption or assignment.

11 U.S.C. § 365(c)(1) (emphasis added).

i. The literal language of section 365(c)(1) establishes a hypothetical test.

The majority of circuit courts that have addressed the meaning of section 365(c)(1) have held that a literal interpretation of the statue establishes a "hypothetical test." *See In re Sunterra Corp.*, 361 F.3d at 267 ("Although generally called the hypothetical test, the test is premised on a literal interpretation of section 365(c)(1)."); *In re Catapult Entm't, Inc.,* 165 F.3d at 750, *City of Jamestown v. James Cable Partners, L.P. (In re James Cable)*, 27 F.3d 534, 537 (11th Cir. 1994); *In re West Elecs., Inc.*, 852 F.2d 79, 83 (3d Cir. 1988). Under this interpretation, if applicable law excuses a non-debtor party to an executory contract from rendering performance to a party other than the debtor or the debtor in possession (i.e., a third party obligor), then the trustee (which includes the debtor in possession[3]) may not assume *or* assign *any* executory contract. In other

[1] The Bankruptcy Code does not define the term "executory contract," but courts traditionally have adopted the so-called "Countryman" definition, which defines an executory contract for bankruptcy purposes as a contract under which "the obligation of both the bankrupt and the other party are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other." *Olah v. Baird (In re Baird)*, 567 F.3d 1207, 1211 (10th Cir. 2009) (citations omitted). A nonexclusive patent license is, in essence "a mere waiver of the right to sue" the licensee for infringement. *In re CFLC, Inc.*, 89 F.3d 673, 677 (9th Cir. 1996) (citing *De Forest Radio Telephone Co. v. United States*, 273 U.S. 236, 242 (1927)). Therefore, because a licensor under a nonexclusive patent license must continue to refrain from suing the licensee for infringement, a nonexclusive patent license is an executory contract. *Id.*

[2] It is well-established that federal law on intellectual property licenses (e.g., federal patent and copyright law) constitutes "applicable law" within the meaning of section 365(c), and that nonexclusive intellectual property licenses are personal and assignable only with the consent of the licensor. *See, e.g., Unarco Indus., Inc. v. Kelley Co,. Inc.*, 465 F.2d 1303, 1306 (7th Cir. 1972); *In re Catapult Entm't, Inc.,* 165 F.3d at 750.

[3] *See* discussion *infra* at 11.

words, a trustee or debtor in possession's right to assume any executory contract is limited if the hypothetical condition in section 365(c)(1)(A) is satisfied, unless the non-debtor party gives its consent. *See, e.g.*, *In re West Elecs., Inc.*, 852 F.2d at 83 (explaining that the relevant inquiry is not whether applicable law would preclude an assignment from the debtor to the debtor in possession, but whether it would foreclose an assignment by the debtor to any other party).

In opposition to the hypothetical test, some courts (adopting the so-called "actual test") have attempted to achieve a result that, in their view, better comports with general bankruptcy policies by reading the term "or," as it is used in the phrase "assume or assign," to mean "and" in order to preclude "assumption and assignment." *See, e.g.*, *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997). Thus, rather than limiting a debtor in possession's ability both to assume and to assign executory contracts, these courts interpret section 365(c)(1) as limiting a debtor in possession only where the debtor in possession assumes and assigns the contract, such that the non-debtor party is actually forced to accept performance from someone other than the party with whom it originally contracted. *Id.* (citing *Summit Inv. & Dev. Corp. v. Leroux (In re Leroux)*, 69 F.3d 608, 613-14 (1st Cir. 1995)).

This Court should not adopt the actual test, interpreting the term "or" to mean "and," because such an approach fundamentally violates the plain meaning rule. The grammatical use of the term "or" as a disjunctive conjunction in section 365(c)(1) must be given effect. Indeed, this Court has recognized that "[t]he language and punctuation Congress used cannot be read in any other way." *United States v. Ron Pair Enterprises*, 489 U.S. 235, 242 (1989). From a plain reading of the language, Congress utilized "or" to mean that assumption *or* assignment, independent of one another, may not occur if the requirements of sections 365(c)(1)(A) and (B) are satisfied. *In re Catapult Entm't, Inc.*, 165 F.3d at 750. Thus, a debtor in possession "may not assume an

executory contract over a non-debtor party'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." *Id.*; *see also In re James Cable*, 27 F.3d at 537; *In re West Elecs.*, 852 F.2d at 83.

ii. The term "trustee," as used in section 365(c)(1), includes a debtor in possession.

Although section 365(c)(1) uses the term "trustee," it is well-established that section 365(c)(1) applies equally to a debtor in possession. *In re Catapult, Entm't, Inc.*, 165 F.3d at 749. Section 1107(a) of the Code defines the rights, powers, and duties of the debtor in possession. It states in pertinent part:

> Subject to any limitations on a trustee serving in a case under this chapter . . . a debtor in possession shall have the all the rights . . . and powers, and shall perform all of the functions and duties . . . of a trustee serving in a case under this chapter.

11 U.S.C. § 1107(a). "Section 1107(a) thus grants to the debtor in possession 'all the rights . . . and powers . . . of a trustee." *In re Footstar, Inc.*, 323 B.R. 566, 572 (Bankr. S.D.N.Y. 2005). "Under this grant, the debtor in possession has the right to assume contracts provided in (*sic*) section 365(a)." *Id.* Likewise, the debtor in possession has the right to assign such contracts as provided in section 365(f).

Further, "[c]onsistent with the prefatory clause in section 1107(a), many decisions have held that various statutory limitations on the powers of a Chapter 11 trustee apply to debtors in possession." *Id.* (listing illustrative cases). Notably, courts have consistently applied the limitations imposed on trustees by section 365(c)(2) (prohibiting assumption or assignment of any executory contract if such contract is a contract to make a loan, or extend other debtor financing or financial accommodations to or for the benefit of the debtor, or to issue a surety of the debtor) and section

365(c)(3) (prohibiting assumption or assignment of any unexpired lease if such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief) to debtors in possession. *Id.* (citing *In re United Airlines, Inc.*, 368 F.3d 720, 722 (7th Cir. 2004); *Hart Envtl. Mgmt. Corp. v. Sanshoe Worldwide Corp. (In re Sanshoe Worldwide Corp.)*, 993 F.2d 300, 302 (2d Cir. 1993)). It follows that a debtor in possession seeking to assume an executory contract pursuant to section 365(a), or assign an executory contract pursuant to section 365(f), is also subject to the limitation on these rights that section 365(c)(1) imposes on trustees. Thus, section 365(c)(1) may properly be read: if applicable law excuses a non-debtor party to any executory contract of the debtor from rendering performance to an entity other than the debtor or debtor in possession, then *the debtor in possession* may not assume or assign such contract without the consent of the non-debtor party. Indeed, all of the circuit courts that have addressed the meaning of section 365(c)(1) have agreed that the term "trustee" includes the debtor in possession. *See In re Sunterra Corp.*, 361 F.3d at n. 5 ("The term 'trustee,' as used in the Statute, includes a Chapter 11 debtor in possession."); *In re Catapult, Entm't, Inc.*, 165 F.3d at 749 (same); *Institut Pasteur*, 104 F.3d at n. 7 (same); *In re James Cable, L.P.*, 27 F.3d at 537 (same); *In re West Elecs., Inc.*, 852 F.2d 79, 82 (3d Cir. 1988) (same).

Notwithstanding this weight of authority, a handful of bankruptcy courts have concluded that "the constraint on assumption without assignment imposed on a trustee under section 365(c)(1) . . . by its own terms cannot apply to a debtor in possession." *See, e.g., In re Footstar, Inc.*, 323 B.R. at 573. These courts circumvent the plain language of section 365(c)(1) by resolving that the limitation on assignment by a trustee applies to a debtor in possession, but that the limitation on assumption by a trustee does not because it produces an illogical result.

In *In re Footstar*, the Court acknowledged that "the prefatory clause in section 1107(a) [undoubtedly] applies to the limitation on assumption and assignment prescribed in section 365(c)(1)." *Id.* at 573. However, dissatisfied with the outcome of a strict application of section 1107(a) to section 365(c)(1) (i.e., that the debtor in possession, like a trustee, *may not assume* . . .) the Court invoked a limiting principle on section 1107(a) to distinguish section 365(a)(1)'s limitation on assumption from its limitation on assignment: a particular statutory limitation on a trustee only applies to a debtor in possession when there is no basis to distinguish between a trustee and a debtor in possession. *Id.* In the context of section 365(c)(1)'s limitation on assignment, the Court found that the debtor in possession was indistinguishable from the trustee—the statute bars both the trustee and the debtor in possession from assuming in order to assign its contract to another entity because in both circumstances the non-debtor party would actually be required to render performance to an entity other than the debtor or the debtor in possession. *Id.* at 576. Yet, the court found that in the context of section 365(c)(1)'s limitation on assumption, a trustee is distinct from a debtor in possession. The court reasoned:

> A trustee is an 'entity other than the debtor in possession'—the trustee is an entirely different entity who has succeeded by operation of the Bankruptcy Code to all the debtor's property including contracts. Since this *de facto* statutory assignment of the contract is in derogation of the basic objective of section 365(c)(1), it makes perfect sense to say that the trustee may not assume the contract.

Id. A debtor in possession, however, is not an entity other than the debtor in possession—"it makes no sense to read 'trustee' to mean 'debtor in possession'" because such a reading "would render the provision a virtual oxymoron . . . ." According to the Court, because section 365(c)(1)'s limitation applies distinctly to a trustee, as an entity other than the debtor in possession, the limitation is inoperative as to a debtor in possession, which is not an entity other than the debtor in possession.

The *Footstar* Court's analysis is based on a fatal flaw: a literal reading of section 365(c)(1)(A)'s conditional language does not impose an as-applied condition, but, rather, a hypothetical condition. Hence, it is irrelevant that a debtor in possession is not an entity other than the debtor in possession; section 365(c)(1) prohibits assumption if—*even hypothetically*—applicable law excuses a non-debtor party from rendering performance to an entity other than the debtor in possession. *In re Catapult Entm't, Inc.*, 165 F.3d at 750; *see also In re James Cable*, 27 F.3d at 537; *In re West Elecs.*, 852 F.2d at 83. Indeed, a close reading of section 365(c) makes it clear that Congress did not intend subsection (1) to impose an as-applied condition. In both subsections (2) and (3), Congress imposed an as-applied condition by referring back to the prefatory clause in defining the condition that, if satisfied, would bar assumption or assignment. 11 U.S.C. § 365(C)(2) ("if *such* contract"); 11 U.S.C. § 365(c)(2) ("if *such* lease"). In contrast, section 365(c)(1)'s plain language does not say that a debtor in possession may not assume or assign any executory contract if under applicable law, *such assumption or assignment*, would excuse a non-debtor party from rendering performance to an entity other than the debtor in possession. Congress knew how to impose an as-applied condition and chose not to do so. Consequently, there is no basis to distinguish between a trustee and a debtor in possession when construing the limitation imposed on trustees by section 365(c)(1). The plain, clear, and unambiguous terms of section 365(c)(1) prohibit either a trustee or a debtor in possession, acting subject to the limitations on a trustee, from assuming any executory contract without the consent of the non-debtor party if applicable law would bar assignment to a third party. No matter how appealing the *Footstar* Court's interpretation may be from a policy standpoint, this Court cannot adopt such interpretation without trespassing on a function reserved for the legislative branch. *Sigmon Coal*, 226 F.3d at 308.

Therefore, the Thirteenth Circuit properly held that a straightforward application of the plain, clear, and unambiguous terms of section 365(c)(1) barred Development from assuming the Agreement over Under My Thumb's objection. It is incontrovertible that federal patent and copyright law excuse Under My Thumb, as the licensor of a nonexclusive intellectual property license, from rendering performance to an entity other than Development. Since Under My Thumb has not given its consent, Development is precluded from assuming the Agreement.

B. A literal application of section 365(c)(1) does not result in an outcome that can truly be characterized as absurd.

Petitioner contends that this Court may look beyond the plain meaning of section 365(c)(1) because a literal reading of the statute creates internal inconsistencies within section 365, and a result so inconsistent with bankruptcy policy, that the outcome can truly be characterized as absurd. Addressing each of these contentions in turn, it is clear that the Thirteenth Circuit did not err by refusing to look beyond the plain meaning of the statute.

i. A literal reading of section 365(c)(1) does not create internal inconsistencies.

The circuit courts have clearly and persuasively reconciled the allegedly inconsistent provisions of sections 365(c)(1) and section 365(f)(1). *See In re Sunterra Corp.*, 361 F.3d at 266–67; *In re Catapult*, 165 F.3d at 751–52; *accord In re James Cable*, 27 F.3d at 537–38. "The conflict between section 365(c)(1) and section 365(f)(1) is illusory because 'each subsection recognizes an applicable law of markedly different scope.'" *In re Sunterra Corp.*, 361 F.3d at 266 (quoting *In re Magness*, 972 F.2d 689, 695 (6th Cir. 1992)). As the Thirteenth Circuit properly recognized, section 365(f)(1) recites a broad rule prohibiting or restricting assignments as such, and section 365(c)(1) creates a carefully crafted exception to the broad rule, embracing legal excuses for refusing to render to an entity different from the one with which the party originally contracted.

Additionally, the Fourth and Ninth Circuits have clarified that a literal reading of section 365(c)(1) does not render the phrase "or the debtor in possession" found in section 365(c)(1)(A) inoperative and superfluous. In *In re Sunterra Corp.*, the Ninth Circuit explained:

> By its plain language, section 365(c)(1) addresses both assumption and assignment. An assumption and an assignment are two conceptually distinct events and the non-debtor must consent to each independently. Under the plain language of section 365(c)(1), therefore, two independent events must occur before a Chapter 11 debtor in possession is entitled to assign an executory contract. Therefore, where a non-debtor consents to the assumption of an executory contract, section 365(c)(1) will have to be applied a second time if the debtor in possession wishes to assign the contract in question.

In re Sunterra Corp., 361 F.3d at 267 (citing *In re Catapult*, 165 F.3d at 752) (internal quotations omitted). Thus, because the alleged internal inconsistencies in section 365 are illusory, they cannot be a basis for finding that a literal interpretation of section 365(c)(1) produces an absurd result.

ii. A literal application of section 365(c)(1) does not produce a result so grossly inconsistent with bankruptcy policy as to be absurd.

The Fourth Circuit specifically addressed the contention that section 365(c)(1) produces a result so grossly inconsistent with bankruptcy policy as to be absurd in *In re Sunterra Corp. Id.* at 268. There, the court admitted that, in general, bankruptcy policy is aimed at fostering a successful reorganization and maximizing the value of the debtor's assets. Yet, the circuit court recognized that "Congress did not sacrifice every right of a non-debtor party to the reorganization process." *Id.* Rather, "the Bankruptcy Code contains many provisions preserving the rights of non-debtor parties from the Code's general debtor-favorable application." *Id.*; *see, e.g.*, 11 U.S.C. §§ 362(b) (listing exceptions to automatic stay, authorizing non-debtor parties to exercise their nonbankruptcy rights notwithstanding section 362(a)), 555–557, 559, 560 (protecting rights of non-debtor party under securities contracts, commodities contracts, grain storage contracts, repurchase agreements, and swap agreements, from effects of automatic stay, avoidance powers,

and provisions of section 365). Consequently, the circuit court held that "the existence of these 'non-debtor provisions' makes is plausible that Congress meant what it said in section 365(c)(1)." *Id.* According to the circuit court, "if it is plausible that Congress intended the result compelled by the plain meaning rule, [a reviewing court] must reject an assertion that such application is absurd." *Id.* (quoting *Sigmon Coal*, 226 F.3d at 308). Thus, because it plausible that Congress intended to preclude assumption by the debtor in possession if applicable law would hypothetically excuse a non-debtor party to the contract from rendering performance to the debtor or the debtor in possession, a literal reading of the statute cannot be said to produce a result so grossly inconsistent with bankruptcy policy as to be absurd.

Therefore, the Thirteenth Circuit did not err by refusing to look beyond the plain language of the statute. Neither internal inconsistencies within the statute, nor results inconsistent with general bankruptcy policy, can be said to produce the level of absurdity necessary to permit this Court to disregard the plain meaning of the terms enacted by Congress.

C. A literal reading of section 365(c)(1) does not produce an outcome that is demonstrably at odds with clearly expressed congressional intent to the contrary.

This Court must adhere to the plain meaning of section 365(c)(1) unless Petitioner can demonstrate that a literal reading of the statute would produce a result contrary to that intended by Congress. *Id.* "Requiring a demonstration that the plain meaning of a statute is at odds with the intentions of its drafters is a more stringent mandate than requiring a showing that the statute's literal application is unreasonable in light of bankruptcy policy." *Id.*

As previously discussed, Congress intended to use the disjunctive conjunction "or," rather than "and" when it enacted section 365(c)(1). This Court must presume that Congress meant what it said. *Sigmon Coal*, 226 F.3d at 305. "Application of the actual test [or the *Footstar* approach]

effectively engrafts a narrow exception onto section 365(c)(1) for debtors in possession, providing that, as to them, the statute only prohibits assumption and assignment." *In re Sunterra Corp.*, 361 F.3d at 269 (quoting *In re Catapult*, 165 F.3d at 754) (quotations omitted).

Further, the available legislative history does not support a finding that the hypothetical test is at odds with Congress's intent. "[Section] 365, as it now reads, was added to the Bankruptcy Code in 1984." *Id.* at 270. While there is no relevant legislative history for the 1984 Act, Petitioner, as have other critics of the hypothetical test, contends that this Court may consider "a relatively obscure committee report" that accompanied an earlier House amendment to a Senate technical corrections bill (the "1980 Report"). *Id.* Importantly, however, "legislative history suggesting an interpretation contrary to a statute's plain meaning is not necessarily sufficient to override the plain meaning rule. *Id.* Indeed, the Fourth Circuit has succinctly stated three reasons that the 1980 Report is not conclusive on congressional intent concerning the 1984 Act.

> First, the 1980 Report relates to a 1980 proposal, which was never enacted, rather than to the 1984 Act; and . . . [c]ourts are not free to replace a statute's plain meaning with unenacted legislative intent. Second, the 1980 Report was prepared several years prior to the enactment of the [current statute]. Finally, [the 1980 Report] reflects the views of only a single House committee. [Consequently] the 1980 Report is not the sort of clear indication of contrary intent that would overcome the unambiguous language of [section 365(c)(1)].

Id. (quoting *United States v. Morison*, 844 F.2d 1057, 1064 (4th Cir. 1988); *In re Catapult*, 165 F.3d at 754) (quotations omitted). Consequently, this legislative history does not support a conclusion that a literal interpretation produces an outcome that is demonstrably at odds with clearly expressed congressional intent. Absent clear and convincing evidence that Congress intended a different outcome, this Court must conclude that Congress meant what it said when it

enacted section 365(c)(1). Therefore, the Thirteenth Circuit did not err by giving effect to the plain meaning of the statute.

Courts are bound to adhere to the plain meaning rule when neither of the two extraordinarily rare exceptions to the rule apply. Thus, the Thirteenth Circuit did not err by refusing to look behind the plain meaning of section 365(c)(1). The Thirteenth Circuit properly applied the clear and unambiguous limitation imposed by section 365(c)(1): Development may not assume the Agreement without the consent of Under My Thumb because federal intellectual property law bars the unilateral assignment of nonexclusive patent and trademark licenses. Therefore, this Court should affirm the decision of the Thirteenth Circuit.

II. THIS COURT SHOULD AFFIRM THE RULING OF THE CIRCUIT COURT IN FAVOR OF UNDER MY THUMB ON THE INTERPRETATION OF SECTION 1129(A)(10) BECAUSE THE PLAIN LANGUAGE OF THE STATUTE AND PRINCIPLES OF STATUTORY CONSTRUCTION REQUIRE THAT EACH DEBTOR HAVE AN IMPAIRED ACCEPTING CLASS OF CREDITORS.

The court below correctly held that section 1129(a)(10) requires either consensual agreement of the parties under the plan, substantive consolidation, or that at least one impaired class of creditors per debtor accept the plan. 11 U.S.C. § 1129(a)(10); *In re Tribune Co.*, 464 B.R. 126, 183 (Bankr. D. Del. 2011). The court below declined to follow the per plan approach, finding such an approach to be inconsistent with the plain language of the statute, explicit statutory construction rules of the Code, and canons of statutory construction.

A. The statutory language should be read plainly.

Statutory interpretation begins with a plain language reading of the statute. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240–41(1989). Provided a statute is unambiguous, a court's inquiry must end there, barring unusual circumstances. *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991). Courts should presume that Congress "says . . . what it means and means in a statute

what it says there . . .” *Conn. Natl’ Bank v. Germain*, 503 U.S. 249, 253–54 (1992). A plain language reading of section 1129(a)(10) makes clear that if a class of claims is impaired under each plan within a jointly administered plan, each plan that impairs a class of claims must have an accepting impaired class under that plan.

The difference between the “per plan” approach and the “per debtor” approach lies in the meaning of the word “plan” under section 1129(a)(10). As the court below explained, the fact that the word “plan” is used in its singular form does not preclude it from meaning its plural form “plans.” The basis for this comes from section 102(7) of the Code, which provides that the “singular includes the plural.” Accordingly, section 1129(a)(10) reads: “if a class of claims is impaired under the plans, at least one class of claims that is impaired under its plan has accepted the plan . . . .”

The lone circuit court to address this issue adopted the per plan approach, yet failed to correctly interpret section 1129(a)(10) in light of section 102(7). *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (In re Transwest Resort Props., Inc.)*, 881 F.3d 724, 729 (9th Cir. 2018). The court in *In re Transwest* read the statutory provision as: “at least one class of claims that is impaired under the plans has accepted the plans.” *Id.*

This reading is erroneous because a plain language reading cannot lead to an absurd result, which occurs wherever a reading produces a result “‘demonstrably at odds” with “congressional intent.” *RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257, 265 (4th Cir. 2004) (quoting *Hillman v. I.R.S.*, 226 F.3d 338, 342 (4th Cir. 2001)). This reading contradicts the principle codified in section 541(a), which defines debtors as having separate estates from which creditors receive their apportionment of assets. *See* U.S. § 541(a). Today’s common practice in a jointly administered Chapter 11 case is to distribute from a single pool of assets, and that does not

necessarily run counter to section 541(a). But when such a distribution scheme alters creditor rights with their respective debtor, that practice cannot be upheld. Rights provided by the Code, such as the one given in section 541(a), may not be altered by another bankruptcy provision unless expressly stated therein. That a case is jointly administered must have no effect on the right of creditors under the Code. *See In re Bunker*, 312 F.3d 145 (4th Cir. 2002).

The reading adopted by the lower court and by the court in *In re Tribune* is consistent with the statutory language of section 1129(a)(10). Words used in a legislative act carry with them a strong presumption of the "ordinary meaning of the words used." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). The interpretation of such a statute should not substantively alter the rights of parties that have been provided elsewhere in the Code. *RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra)*, 361 f.3d 257, 265 (4th Cir. 2004). Changing the balance of power between creditors by allowing one impaired class from one Debtor to speak for all impaired classes of all Debtors certainly alters the rights of creditors within those impaired classes. It follows that the lower court correctly determined the plain language reading of section 1129(a)(10). An examination of the context surrounding section 1129(a)(10) reflects this point further.

B. Principles of statutory construction and policy considerations support the per debtor interpretation of section 1129(a)(10).

When the plain meaning of a statute yields a sensible result, a court's inquiry stops there. *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991). However, if there exists any ambiguity in the statute, basic statutory rules of construction apply. One such "cardinal rule" is that "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 Hospital*, 502 U.S. 215, 221 (1991).

Section 1129(a)(10) must be read as applying to each debtor to conform with the readings of other confirmation requirements in section 1129. *See Credit Agricole Corporate and Inv. Bank*

v. American Home Mortg. Holdings, Inc., 637 F.3d 246, 255 (3d Cir. 2011) ("The Supreme Court has indicated a reluctance to declare provisions of the Bankruptcy Code ambiguous . . . courts [should] not be guided by a single sentence . . ., but look to the provision of the whole law, and to its object and policy.") The compliance with applicable provisions requirement under section 1129(a)(1), the good faith requirement under section 1129(a)(3), and the best interests of creditors under section 1129(a) is applied to each of the debtors. *In re Tribune Co.*, 464 B.R. 126, 183 (Bankr. D. Del. 2011) ("Could [any] of these requirements be met if only one or more—but fewer than all— debtors proposing a joint plan satisfies them?").

Section 1129(a)(8) further illustrates that each requirement be read on a per debtor basis. This section requires that, with respect to each class of claims, "such class has accepted the plan; or such class is not impaired under the plan." 11 U.S. § 1129(a)(8). This is the only 1129(a) requirement that may be excepted under the cram down procedure outlined in section 1129(b), but it must be noted that the section 1129(a)(8) requires that *every class of claims* accept the plan or be unimpaired by the plan. *In re Tribune Co.*, 464 B.R. 126, 183 (Bankr. D. Del. 2011). The provision further shows that 1129(a) applies as a whole to each debtor under a plan.

It is undisputed that "[t]here exists little decisional authority on whether [section] 1129(a)(10) is to be applied 'per debtor' or 'per plan.'" *In re Tribune Co.*, 464 B.R. 126, 181 (Bankr. D. Del. 2011). When there exist multiple reasonable interpretations of a statute, a court may consider congressional intent for the creation of such a statutory provision, and interpret the statute on its own. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) ("If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.") Policy rationales should be

consulted to weigh the benefits and drawbacks of the various interpretations. *United States v. Sisson*, 399 U.S. 267, 297–98 (1970).

The per debtor approach is supported by two policy considerations. First, section 1129(a)(10) plainly gives creditors a bankruptcy right: the ability to vote to reject a plan if impaired. This vote is among the most important rights granted in the Code. Though many Chapter 11 filings are confirmed on a consensual basis, section 1129(a)(10) plays a crucial background role in Chapter 11 negotiations between the debtor and creditors. Namely, the debtor understands that if it does not receive uniform acceptance from its impaired classes of creditors, it must have at least one accepting impaired class of creditors if the plan moves to a cram down process. *See In re Barakat*, 99 F.3d 1520, 1528 (9th Cir. 1996); *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639 (2012). Section 1129(a)(10) prevents a debtor's plan from bypassing all creditor support, and helps to achieve a fair outcome under the filing. The per debtor approach preserves that right, but the per plan approach eliminates the right for all but one of the debtors under a jointly administered plan, which destroys the purpose of section 1129(a)(10). *See In re Anderson Oaks (Phase I) Ltd. P'ship*, 77 B.R. 108, 112 (Bankr. W.D. Tex. 1987) ("there must be some one . . . who cares enough about the reorganization and whose rights must also be considered . . ."); *see also In re Windsor on the River Assoc's, Ltd.*, 7 F.3d 127 (8th Cir. 1993) ("To curb the inequities of such reorganization plans being 'crammed down' . . . Congress enacted section 1129(a)(10)."). The latter interpretation puts creditors in a vulnerable position, and that position grows worse the more debtors there are under the jointly administered plan. If section 1129(a)(10) requires the plan proponent to find one impaired class of claims from among tens or hundreds of separate entities, the "right" becomes nothing more than a formality easily bypassed.

Second, a per debtor approach avoids a needless destruction of corporate separateness. *See In re Owens Corning*, 419 F.3d 135, 211 (3d Cir. 2007). The Plan here expressly provided that "the Debtors' estates are not being substantively consolidated and no Debtor is to become liable for the obligations of another." Because substantive consolidation was not pursued, the case is undisputedly a jointly administered case, as authorized by Federal Rule of Bankruptcy Procedure 1015(b). Joint administration links two or more bankruptcy cases together and eases costs to the debtor through the creation of a single case file, combining notices regarding the estates, and other useful changes. It exists to make case administration easier, but it may not alter creditors' substantive legal rights. *See In re Reider*, 31 F.3d 1102, 1109 (11th Cir. 1994) ("Used as a matter of convenience and cost saving, [joint administration] does not create substantive rights"); *In re Parkway Calabasas Ltd.*, 89 B.R. 832, 836 (Bankr. C.D. Cal.). However, the per plan approach would alter creditors' rights by treating all debtors under the plan as a single debtor. In effect, this reading confuses joint administration with substantive consolidation. When substantive consolidation has not occurred, formal corporate boundaries must be respected. *See Kreisler v. Goldberg*, 478 F.3d 209, 213 (4th Cir. 2007).

It is acknowledged that a per debtor approach, while supported by plain language, statutory construction principles, and policy considerations, may increase the difficulty of the reorganization process under Chapter 11. However, it is not the court's role to question the clear intent of Congress. *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 967 (2017) ("[W]e cannot overrule Congress' judgment based on our own policy views."). In addition, such a ruling will not make the reorganization impossible or even substantially more challenging. Chapter 11, with the automatic stay and various provisions that ensure a certain amount of liquidity to debtors, allows debtors the resources to appropriately structure a successful reorganization. For

example, the per debtor approach may force out the dominant practice of a unitary distribution scheme under the jointly administered plan. If the per debtor approach creates a trend towards per-entity distribution schemes, so be it. Such a change would reflect an appropriate outworking of section 1129(a)(10) adequately protecting creditors.[4] In summary, despite the per debtor approach creating additional hurdles for a jointly administered case, "convenience alone is not sufficient reason to disturb the rights of impaired classes of creditors of a debtor not meeting confirmation standards." *In re Tribune Co.*, 464 B.R. 126, 183 (Bankr. D. Del. 2011).

The lower court correctly held that the plan could not move forward without approval from an impaired class of creditors from each debtor that had an impaired class. Ruling otherwise would deprive Respondent of a valuable right provided to creditors under the Code. This voting right has substantial value in the negotiating process, and cannot lightly be cast aside to make the reorganization process easier on the debtor.

III. THIS COURT SHOULD AFFIRM THE RULING OF THE CIRCUIT COURT IN FAVOR OF UNDER MY THUMB ON THE INTERPRETATION OF SECTION 1129(A)(1) BECAUSE THE PER PLAN APPROACH CONSTITUTES *EX POST FACTO* SUBSTANTIVE CONSOLIDATION, WHICH IS IMPERMISSIBLE UNDER THE FACTS.

It has already been shown that the per plan approach is inconsistent under a jointly administered plan because it impermissibly alters the substantive rights of creditors. Even if the per plan approach were adopted, it operates as *ex post facto* substantive consolidation of the separate plans under the jointly administered plan. *See, e.g., JP Morgan Chase Bank, N.A. v. Charter Commc'ns Operating, LLC (In re Charter Commc'ns, LLC)*, 419 B.R. 221 (Bankr.

[4] One other contention may be that such a reading is impracticable, as obtaining affirmative consent from an impaired class of creditors for each debtor is often impossible because of the lack of response by creditors. However, acceptance by default, termed "deemed acceptance," would avoid this difficulty. *See In re Ruti-Sweetwater, Inc.*, 836 F.2d 1263, 1267 (10th Cir. 1988) (holding that non-voting creditors would be deemed as having accepted the plan for the purpose of a cram down).

S.D.N.Y. 2009); *In re Enron Corp*, No. 01-16034, 2004 Bank. LEXIS 2549 (Bankr. S.D.N.Y. July 15, 2004); and *In re SGPA Inc.,* No. 01-026096, 2001 Bankr. LEXIS 2291 (Bankr. M.D. Pa., Sept. 28, 2001). Because of this fact, the per plan approach cannot be adopted because of the low likelihood of rehabilitation that it creates. *In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293, 302 (Bankr. D. Del.).

Most Chapter 11 cases utilizing joint administration will not meet the stringent requirements for substantive consolidation. Since substantive consolidation is unlikely to be met, these cases will not meet the section 1129(a)(10) requirement. Assuming there is one debtor under the plan who cannot obtain an impaired accepting class of claims vote, the plan must be scrapped, and separate plans for each debtor would have to be filed. The enormous added cost to debtors that this approach would create cannot have been the intention of Congress in enacting section 1129(a)(10).

In the rare case where substantive consolidation requirements are met, *ex post facto* substantive consolidation requires a court to conduct an interlocutory evaluation as to whether it is fair to creditors to proceed on a consolidated basis. *In re Bonham*, 229 F.3d 750, 765 (9th Cir. 2000); *In re Auto-Train*, 810 F.2d 270, 276 (D.C. Cir. 1987). As it is unfair to creditors here to do so, substantive consolidation is an impossibility, which would require conversion of the case to a Chapter 7 because the debtors lack a reasonable likelihood of rehabilitation. 11 U.S. § 1112; *In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293, 302 (Bankr. D. Del.) ("[I]n the absence of substantive consolidation, [one of the debtors under the plan] does not have any chance of confirming a plan.").

Substantive consolidation is a judicial doctrine to be invoked to ensure "equality of distribution." *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215, 219 (1941). It is a resort

that should only be used "sparingly." *In re Flora Mir*, 432 F.2d 1060, 1062 (2d Cir. 1970). Orders of substantive consolidation "combine the assets and liabilities of separate and distinct—but related—legal entities into a single pool and treat them as though they belong to a single entity." *In re Bonham*, 229 F.3d 750, 764 (9th Cir. 2000). The doctrine is used on a case-by-case basis to ensure fairness to creditors. *F.D.I.C. v. Colonial Realty Co.*, 966 F.2d 57 (2d Cir. 1992). In a substantive consolidation order, a court must consider two factors: (1) whether there is a disregard of corporate formalities and commingling of assets by various entities; and (2) balance the benefits that substantive consolidation would bring against the harms that it would cause. *See In re Reider*, 31 F.3d 1102, 1106 (11th Cir. 1994).

Two tests among the circuit courts have emerged to determine whether substantive consolidation is appropriate. The first test requires a proponent of substantive consolidation to show that "(1) there is a substantial identity between the entities to be consolidated; and (2) consolidation is necessary to avoid some harm or to realize some benefit." *Eastgroup Property v. Southern Motel Ass'n, Ltd.*, 935 F.2d 245 (11th Cir. 1991). Proving both elements shifts the burden to any objecting creditor to show that "(1) it has relied on the separate credit of one of the entities to be consolidated; and (2) it will be prejudiced by substantive consolidation." *Matter of G.V. Lewellyn & Co., Inc., 26 B.R. 246, 251-52 (Bankr. S.D. Iowa 1982)*. Even if the objecting creditor makes the required showing, the court may still order substantive consolidation, but only if it determines that the benefits of consolidation severely outweigh the harm. *In re Auto-Train*, 810 F.2d 270, 276 (D.C. Cir. 1987).

Under this first test, an order for substantive consolidation (that is, what a per plan approach assumes) is inappropriate at each of the first two stages. At the first level, while Development serves a single purpose within the larger framework of Tumbling Dice's operations, the debtors

fail to show that consolidation is necessary to avoid some harm. It is imperative to note that the harm must be to some creditor, not the debtor, as the doctrine exists to ensure fairness to all creditors. *In re Augie/Restivo*, 860 F.2d 515, 518 (2d Cir. 1988). Thus, meeting the section 1129(a)(10) requirement is not a sufficient justification for substantive consolidation, since it would benefit the debtor or a selective group of creditors.

Even if the first two requirements are shown by the TDI, Respondent can show reliance solely on Development for payment. Respondent can also show it has been prejudiced under the plan. The plan gives control of TDI equity to SFD, which owns in its portfolio a company in direct competition with Respondent for its Software. As TDI may be granted the right to assume its Licensing Agreement with Respondent for the Software, Respondent is subject to unfair treatment where it will lose significant value on its Software by having a direct competitor gain access to the Software for replication.

The second possible test for substantive consolidation requires consideration of two factors: "(1) whether creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit; or (2) whether the affairs of the debtor are so entangled that consolidation will benefit all creditors." *In re Reider*, 31 F.3d 1102, 1108 (11th Cir. 1994). Here, neither requirements are met. Respondent relied upon the individual nature of Development in extending credit to it. This is shown by the negotiations of the leveraged buyout that precipitated TDI's Chapter 11 filing. TDI, along with each of its subsidiaries except for Development, granted liens on their assets to the lenders who would extend credit to SMU. Development is indeed a subsidiary to Tumbling Dice, but it is not a single economic unit with it.

As to the second factor, the assets here are not so entangled that consolidation will benefit all creditors. Commingling requires that there be no "clear demarcation" between the affairs of the

respective corporations. *In re Bonham*, 229 F.3d 750, 767 (9th Cir. 2000). Were this the case, the proposed plan would not have claimed non-consolidation, nor would it have expressly stated liability independence for each of the debtors under the plan.

As previously noted, an overarching concern in substantive consolidation is that every creditor be treated fairly. Not surprisingly, many cases where substantive consolidation was ordered to avoid fraudulent transfers. *See, e.g., In re Bonham*, 229 F.3d 750, 759 (9th Cir. 2000). Respondent is singularly being treated unfairly under the plan, a fact that runs counter to an application of substantive consolidation. Because substantive consolidation is a necessary condition of a per plan reading of section 1129(a)(10), yet the equitable doctrine cannot be ordered here, it follows that the plan has no reasonable likelihood of rehabilitation, and so must be dismissed under section 1112. *In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293, 302 (Bankr. D. Del.).

CONCLUSION

For the foregoing reasons, the decision of the Thirteenth Circuit should be affirmed. The court properly held that section 365(c)(1) precludes Development from assuming the licensing agreement absent the consent of Under My Thumb. Furthermore, the court properly held that Debtors' plan of reorganization cannot be confirmed because section 1129(a)(10) must be read to require each debtor in a jointly administered case to have an accepting impaired class of claims, assuming that the proposed plan impairs a class. Therefore, Respondent respectfully requests that this Court affirm the decision of the Thirteenth Circuit.

APPENDIX A

11 U.S.C. § 102. Rules of construction.

In this title—

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(7) the singular includes the plural;

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11 U.S.C. § 365. Executory contracts and unexpired leases.

(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.

***

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

(1)

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

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

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

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(e)

(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an 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—

(A)

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

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

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(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.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

11 U.S.C. § 541. Property of the estate.

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property . . . .

11 U.S.C. § 1107. Rights, powers, and duties of debtor in possession.

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

(b) Notwithstanding section 327(a) of this title, a person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case.

11 U.S.C. § 1112. Conversion or dismissal.

(a) The debtor may convert a case under this chapter to a case under chapter 7 of this title unless—

(1) the debtor is not a debtor in possession;

(2) the case originally was commenced as an involuntary case under this chapter; or

(3) the case was converted to a case under this chapter other than on the debtor's request.

(b)

(1) Except as provided in paragraph (2) and subsection (c), on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

(2) The court may not convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter if the court finds and specifically identifies unusual circumstances establishing that converting or dismissing the case is not in the best interests of creditors and the estate, and the debtor or any other party in interest establishes that—

(A) there is a reasonable likelihood that a plan will be confirmed within the timeframes established in sections 1121(e) and 1129(e) of this title, or if such sections do not apply, within a reasonable period of time; and

(B) the grounds for converting or dismissing the case include an act or omission of the debtor other than under paragraph (4)(A)—

(i) for which there exists a reasonable justification for the act or omission; and

(ii) that will be cured within a reasonable period of time fixed by the court.

11 U.S.C. § 1129. Confirmation of plan.

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

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

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

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

(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

(5)

(A)

(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

(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) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that—

(A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

(B) with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive—

(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;

(C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim regular installment payments in cash—

(i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;

(ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and

(iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)); and

(D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

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

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(12) All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

(14) If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.

(15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan—

(A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

(16) All transfers of property under the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.