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. *ET AL.*,

Petitioner,

v.

UNDER MY THUMB, INC.,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Thirteenth Circuit

BRIEF FOR PETITIONER

Team 56P
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether 11 U.S.C. § 365(c)(1) permits a debtor in possession to assume an executory contract over the objection of the non-debtor party to such contract when applicable non-bankruptcy law excuses the non-debtor party from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession?

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

LIST OF THE PARTIES

The Debtor and Petitioner is Tumbling Dice, Inc., is a parent company with nine wholly owned subsidiaries. Eight of the subsidiaries are: Tumbling Dice Atlantic City, LLC, Tumbling Dice Chicagoland, LLC, Tumbling Dice Detroit, LLC, Tumbling Dice Lake Tahoe, LLC, Tumbling Dice Las Vegas, LLC, Tumbling Dice New Orleans, LLC, Tumbling Dice Palm Springs, LLC, and Tumbling Dice Tunica, LLC. The remaining subsidiary is Tumbling Dice Development, LLC, a licensee holder. The Respondent is Under My Thumb, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Petitioner, Tumbling Dice, Inc., ("TDI") states it has no parent company and that no publicly held company owns 10% or more of its stock. TDI is the parent company of nine wholly owned subsidiaries. Under My Thumb, Inc. does not have a parent and is privately owned.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

United States Federal Circuit Court Cases

United States Bankruptcy Appellate Panel Cases

United States District Court Cases

United States Bankruptcy Court Cases

United States Statutes

Secondary Sources

Legislative History

OPINIONS BELOW

The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court on both issues. (R. at 3). On the first issue, the bankruptcy court held section 365(c)(1) of the Bankruptcy Code does not preclude a debtor-in-possession from assuming a non-exclusive software license over the objection of the licensor where applicable non-bankruptcy law excuses the licensor from accepting performance from, or rendering performance to, an entity other than the debtor or the debtor-in-possession. (R. at 3). On the second issue, the bankruptcy court held the acceptance of a single impaired class of creditors under the plan (i.e., per plan approach) is sufficient to satisfy section 1129(a)(10). (R. at 3). The Respondent appealed to the United States Court of Appeals for the Thirteenth Circuit which reversed the bankruptcy court's ruling on both issues. (R. at 2-3). This Court then granted Petitioner's writ of certiorari.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

The relevant federal laws controlling this case are 11 U.S.C. §§ 102(7), 365, 1123(b)(2), 1129 of the United States Bankruptcy Code. The text of these provisions are attached in their entirety in Appendices A through D.

STATEMENT OF THE FACTS

Tumbling Dice, Inc. ("TDI"), is the parent company of nine debtor-subsidiaries, (collectively, with TDI, the "Debtors"), eight of which operate a luxury casino and resort (each an "Operating Debtor" and, collectively, the "Operating Debtors"). (R. at 4). The remaining debtor-subsidiary, Tumbling Dice Development, LLC ("Development"), only serves as the licensee under a non-exclusive software license agreement with Under My Thumb, Inc. ("Under My Thumb"). (R. at 4).

Under My Thumb and Development entered into a license agreement (the "Agreement"). (R. at 5). The Agreement granted Development a non-exclusive license to use its copyrighted and patented Software. (R. at 5). The Agreement also permitted Development to "extend the benefits of the Agreement to its affiliated entities only". (R. at 5). In exchange for the license, Development agreed to pay Under My Thumb a monthly fee. (R. at 5). The Debtors acknowledged the Software is an essential part of its ongoing business model. (R. at 5).

In December 2011, TDI was acquired through a leveraged buy-out by Start Me Up, Inc., a hedge fund. (R. at 6). As part of the transaction, TDI and the Operating Debtors granted first priority liens on their assets to a syndicated group of lenders in exchange for a loan in the amount of $3 billion. (R. at 6).

On January 11, 2016, saddled with debt from the leveraged buy-out transaction, the Debtors commenced voluntary cases under chapter 11 of the Bankruptcy Code. (R. at 6). The Debtors' cases were jointly administered for the convenience of the parties and the court pursuant to bankruptcy rule 1015(b). (R. at 3).

The plan support agreement was negotiated and contemplated that the Debtors would restructure all of the secured indebtedness owed. (R. at 6-7). Start Me Up was required to inject

new capital in exchange, it would be entitled to retain its equity interest in the Debtors. (R. at 7). The overall corporate structure remained the same. (R. at 7).

The Debtors filed a joint plan ("Plan") on behalf of all the Debtors and disclosure statement in August 2016. (R. at 7). The Plan expressly stated that "the Debtors' estates are not being substantively consolidated, and no Debtor is to become liable for the obligations of another." (R. at 7). The Plan proposed to assume the Agreement for the use of the Software under sections 365 and 1123(b)(2). (R. at 7). Under My Thumb would therefore continue to receive the monthly payments. (R. at 7).

Under My Thumb initially viewed the Plan favorably. (R. at 7). In addition to receiving the monthly payments from the assumed Agreement, it would also receive payments on its accounts from the pro rata distribution of the $66 million allocated for all unsecured debt. (R. at 7). This resulted in its unsecured claim greatly exceeding the value of Development's assets. (R. at 7).

Under My Thumb's perception of the Plan quickly changed upon learning Sympathy for the Devil, LP ("SFD"), a private equity group, was included in the Plan. (R. at 7-8). Under My Thumb was immediately suspicious of SFD's involvement as its portfolio of companies includes a direct competitor of Under My Thumb. (R. at 8).

The Plan enjoyed near universal support from all creditor groups. (R. at 8). After creditor ballots were reviewed and tallied, each of TDI and the Operating Debtors had at least one impaired accepting class of creditors. (R. at 8). Concerned with SFD's potential access to the Software, Under My Thumb, who controlled Development's only class of creditors, voted to reject the Plan. (R. at 8). Thus, Development had no impaired accepting class of creditors. (R. at 8).

Under My Thumb timely objected to the plan. (R. at 8). Under My Thumb argued that the proposed assumption of the agreement was impermissible under section 365(c)(1). (R. at 8). The Agreement was impermissible because applicable non-bankruptcy law excused performance by Under My Thumb in the absence of its consent. (R. at 8). Under My Thumb also argued that the Plan was not confirmable under section 1129(a)(10) because no impaired class of creditors of Development had voted to accept it. (R. at 8).

Noting the overwhelming creditor support that existed, the bankruptcy court overruled the objections and confirmed the Plan. (R. at 8). The bankruptcy court adopted the actual test and held that section 365(c)(1) contemplates a case-by-case inquiry. (R. at 8-9). The Court concluded that Under My Thumb was asked to do nothing more than honor its existing contractual obligation with Development and held that Development could assume the Agreement. (R. at 9). The bankruptcy court further held that section 1129(a)(10) is satisfied where at least one impaired class in a joint, multi-debtor plan accepts the plan. (R. at 9). The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court on both issues. (R. at 9). Under My Thumb timely appealed the ruling from the to the United States Court of Appeals for the Thirteenth Circuit, which reversed on both issues. (R. at 9). Petitioner now appeals to the Supreme Court of the United States.

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Thirteenth Circuit improperly held that section 365(c)(1) precludes Development from assuming the Agreement absent the consent of Under My Thumb ("Respondent"). Section 365(c)(1) does not preclude a trustee from assuming or assigning a non-exclusive license when the nondebtor is not asked to perform outside the contract. The plain meaning of section 365(c)(1) is ambiguous. The express language of section 365(c)(1) creates a distinction between the trustee and debtor-in-possession; as well as creates conflicts with the

express language of subsections (f). Additionally, the plain meaning of section 365(c)(1) provides for more than one plausible interpretation resulting in a circuit split.

A majority of bankruptcy courts, as well as the First Circuit Court of Appeals, have adopted the actual test. The actual test is a case-by-case analysis, consistent with the legislative history in that Congress did not intend to prohibit a debtor-in-possession from assumption and the underlying purpose of chapter 11. This Court should adopt the actual test.

Furthermore, the United States Court of Appeals for the Thirteenth Circuit improperly held that the per plan approach does not meet § 1129(a)(10) requirements. Section 1129(a)(10) provides that 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. 11 U.S.C § 1129(a)(10). The statute requires plan confirmation when at least one impaired class has approved the plan. Similarly, the per plan approach requires one impaired class to approve the plan for it to be confirmed.

The statute requires adoption of an approach that renders the same result. Under both the statute and the per plan approach, the Debtor's plan will be confirmed. Because both the statute and the per plan approach allows plan confirmation, section 1129(a)(10) requires the per plan approach. Further, the statute prioritizes a class that has approved the plan over a class that has rejected the plan. This is evidenced by section 1129(a)(10) inclusion of and requirement for "at least one" impaired class to "accept the plan". Congress' intent is determined by the language that is used in the statute. Since section 1129(a)(10) does not discuss a class that has approved the plan but does discuss a class that has rejected the plan, the power of plan confirmation lies with the class that is included in the statute: the class who has accepted the plan. Also, the per plan approach allows plan confirmation and this is in the best interest of bankruptcy since the estate has been

maximized. This Court should adopt the per plan approach because it is consistent with the statute as well as the goals of bankruptcy.

ARGUMENT

The facts of this case are not in dispute by the parties. (R. at 2 n.3). The United States Court of Appeals for the Thirteenth Circuit's holding that section 365(c)(1) precludes the debtor from assuming a non-exclusive license of intellectual property absent the consent of the non-debtor is a question of law. A *de novo* standard of review applies when a court assesses a lower court's conclusions of law. *Texas v. Soileau (In re Soileau),* 488 F.3d 302, 305 (5th Cir. 2007).

I. THE THIRTEENTH CIRCUIT IMPROPERLY HELD THAT DEVELOPMENT IS PRECLUDED FROM ASSUMING THE AGREEMENT.

The United States Court of Appeals for the Thirteenth Circuit improperly concluded that the language of section 365(c)(1) is unambiguous. This Court has noted the circuit split on the issue of whether an executory contract can be assumed or assigned where applicable law excuses performance of the nondebtor. *N.C.P. Mktg. Grp., Inc. v. BG Star Prods.*, 556 U.S. 1145 (2009). This signifies that section 365(c)(1) is ambiguous resulting in more than one plausible interpretation.

When a bankruptcy petition is filed, the debtor may have contracts that require ongoing performance with non-debtors that such debtor wishes to retain after the bankruptcy is complete. Contracts requiring ongoing performance of both parties are executory contracts. *In re Kmart Corp.*, 290 B.R. 614 (Bankr. N.D. Ill. 2003). Executory contracts are governed by § 365 of the Bankruptcy Code. 11 U.S.C. § 365. Executory contracts can be assumed or rejected. 11 U.S.C. § 365(a). Executory contracts can also be assumed and assigned. 11 U.S.C. § 365(f).

The Bankruptcy Code does not define assume, reject, assign or executory contract.[1] When

[1] The ordinary meaning of reject is the act to refuse. BLACK'S LAW DICTIONARY 1477 (10th ed. 2014).

a term is not defined by Congress, courts give undefined terms their ordinary meaning. DAVID S. ROMANTZ & KATHLEEN ELLOIT VINSON, LEGAL ANALYSIS: THE FUNDAMENTAL SKILLS 86-87 (2nd ed. 2209). The ordinary meaning of assume is to undertake or to take to or upon one's self the obligation. BLACK'S LAW DICTIONARY 142 (10th ed. 2014). The ordinary meaning of assign is to transfer or to appoint to another. BLACK'S LAW DICTIONARY 148 (10th ed. 2014).

An executory contract is defined by case law. Executory contracts are contracts where each party has not fully performed their obligation. *In re Kmart Corp.*, 290 B.R. 614 (Bankr. N.D. Ill. 2003). "A license agreement is an executory contract where a licensor permits a licensee the right to use property of the licensor." *Novon Int'l v. Novamont S.p.A.,* 2000 U.S. Dist. LEXIS 5169 (W.D.N.Y. Mar. 31, 2000).

A. The plain language of section 365(c)(1) is ambiguous.

Section 365(c) has two requirements: (1) applicable law which excuses performance of a party other than the debtor and (2) consent from the excused party. 11 U.S.C. § 365(c). Section 365(c) prevents assumption or assignment of an executory contract. 11 U.S.C. § 365(c). The plain language of section 365(c) is not clear because it renders an absurd result. The distinction created between the trustee and the debtor-in-possession, results in no one available to assume an executory contract where the debtor-in-possession is the trustee. The plain language also creates inconsistencies between subsection (c) and subsection (f) of section 365. Additionally, the plain language provides for more than one plausible interpretation which has led to a circuit split.

This Court has constantly held that courts must analyze the statute itself to determine if the statutory language is unclear. *United States v. Ron Pair Enters.*, 489 U.S. 235 (1989).

1. Renders an absurd result

Section 365 (c)(1)(A) states: "a trustee may not assume or assign any executory contract if applicable law excuses a party other than the debtor from accepting or rendering performance to an entity other than the debtor or debtor-in-possession". 11 U.S.C. § 365(c)(1). When applying the plain meaning of a statute, the court must give every word effect. *Setser v. United States*, 566 U.S. 231 (2012). When giving every word effect in section 365(c)(1), the result is absurd because the distinction between the trustee and debtor-in-possession ignores instances where the debtor-in-possession is the trustee as provided by section 1107. 11 U.S.C. § 1107(a).

In a chapter 11 case, a debtor-in-possession has the same powers, rights and performs the same functions and duties as a trustee. 11 U.S.C. § 1107(a). The debtor-in-possession is "subject to any limitations on the trustee." *Id*. This results in interpretation of trustee and debtor-in-possession as interchangeable. *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery (In re Cybergenics Corp.)*, 226 F.3d 237 (3d Cir. 2000).

The distinction made by the literal language is improper because the debtor-in-possession will be precluded from assuming or assigning any executory contract. When applicable law excuses the nondebtor from accepting or rendering performance to the debtor or debtor-in-possession and the executory contract is with the debtor-in-possession, no one would be left to assume or assign the executory contract. The plain meaning of section 365(c)(1)(A) destroys the entire statute because it completely removes the power to assume or assign from a debtor-in-possession. Removing the power to assume any executory contract in subsection (c)(1)(A), will prevent a debtor-in-possession from being able to cure an executory contract, which is permitted in subsection (b). Section 365(b)(1)(A) states that a trustee may not assume unless the trustee cures the default and provides adequate assurance. 11 U.S.C. § 365(b)(1)(A).

Under section 365(c)(1)(A), the Debtors are precluded from assuming when applicable law excuses the Respondent from rendering performance to an entity other than the Debtors. However, the contract is only with the Debtors. (R. at 5). Since the contract is with the Debtors and the Respondent is excused from rendering performance to the Debtors, no one is left to assume the contract. A straightforward application of section 365(c)(1)(A), precludes assumption. Here, the Debtors maintain possession of their property and no trustee was appointed; therefore, they are a debtor-in-possession. Development and the Debtors will always be barred from assuming the Agreement because the Respondent will only be able to accept or render performance to the entity precluded.

Additionally, section 365(c)(1)(A) is ambiguous because it is in conflict with section 365(f), rendering an absurd result. 11 U.S.C. §§ 365(c)(1)(A) and 365(f). The conflict between subsection (c) and subsection (f) arises is the direction to the court. In subsection (c)(1)(A) a court is directed to consider applicable law, while subsection (f) a court is directed to ignore applicable law. It renders an absurd result because courts are forced to disregard the express language. *Breeden v. Catron (In re Catron)*, 158 B.R. 629 (E.D. Va. 1993).

The court of *In re Catron* held that when applicable law in section 365(c)(1)(A) precludes assignment of a contract section 365(f) is rendered surplusage. *Breeden v. Catron (In re Catron)*, 158 B.R. 629 (E.D. Va. 1993). The *Catron* court completed a detailed analysis of the interplay of section 365(c)(1)(A) and section 365(f). *Id.* at 636. The court reasoned that the contradictory language found at the beginning of section 365(f)(1), specifically the exception carved out for § 365(c) creates the conflict between the subsections. *Id*. It further found that the conflict continues with the reference to "applicable law" that immediately follows it. *Id*. The court found the conflict inescapable. *Id*. The court concluded that section 365(c) explicitly directs the court to consider

whether applicable law prohibits assignment, while the language of section 365(f) explicitly directs the court to ignore the applicable law. *Id*. at 637. The court held the only resolve was to ignore the express language of the statute. *Id*.

The express language of section 365(c)(1)(A) prevents the trustee from assumption or assignment of any executory contract of the debtor, if applicable law excuses a non-debtor from accepting performance from or rendering performance to an entity other than the debtor or the debtor-in-possession. 11 U.S.C. § 365(c)(1)(A). However, the express language of section 365(f) permits a trustee to assign an executory contract regardless of applicable law. To assign an executory contract under section 365(f), the trustee must assume the contract and provide adequate assurance. 11 U.S.C. § 365(f). The language in section 365(c)(1)(A) renders the language in section 365(f) superfluous. *Breeden v. Catron (In re Catron)*, 158 B.R. 629 (E.D. Va. 1993).

Consistent with *In re Catron*, this Court should scrutinize the express language because of the conflicting provisions. However, instead of ignoring the express language as the court *In re Catron*, this Court should adopt the actual test, which is compatible with express language and resolves the conflicting provisions. The actual test considers the intent of the debtor. If the debtor does not intend to assign the contract, then the debtor may assume the contract. The adoption of the actual test does not render the applicable law language superfluous, instead it applies it specifically to the actual facts, considering if the nondebtor is required to accept or render performance to an entity other than the debtor or debtor-in-possession.

2. Section 365(c)(1)(A) provides for more than one plausible interpretation.

A majority of bankruptcy courts have adopted the actual test. *In re Cajun Elec. Power Coop., Inc.*, 230 B.R. 693 (Bankr. M.D. La. 1999*); Texaco Inc. v. Louisiana Land & Expl. Co.*, 136 B.R. 658 (M.D. La. 1992); *In re GP Express Airlines, Inc.*, 200 B.R. 222 (Bankr. N. Neb.

1996); *In re Am. Ship Bldg. Co.*, 164 B.R. 358 (Bankr. M.D. Fla. 1994); *In re Cardinal Indus., Inc.*, 116 B.R. 964 (Bankr. S.D. Ohio 1990), *In re Footstar, Inc.*, 323 B.R. 566 (Bankr. S.D.N.Y. 2005), *In re Adelphia Communs. Corp.*, 359 B.R. 65 (Bankr. S.D.N.Y. 2007), *In re Edison Mission Energy*, 2013 Bankr. LEXIS 3872 (Bankr. N.D. Ill. 2013). While a majority of circuits have not applied the actual test. *In re Footstar, Inc.*, 323 B.R. 566 (Bankr. S.D.N.Y. 2005). Considering some courts apply one test and others do not, it is reasonable to believe that there is more than one plausible interpretation of section 365(c)(1)(A). This Court in the *N.C.P. Mktg. Grp., Inc.* case, acknowledged the circuit split and identified the plausible interpretations of section 365(c)(1)(A). *N.C.P. Mktg. Grp., Inc. v. BG Star Prods.*, 556 U.S. 1145 (2009).

Statutory interpretation is strictly for the courts with their sole function being the enforcement of the statute according to its terms. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995). But this can only be accomplished when a statute's language is plain. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000). The ambiguity in section 365(c)(1)(A) arises from the internal conflict where the distinction created between trustee and debtor-in-possession, as well as the conflict between the applicable law language in subsection (f).

Section 365(c)(1)(A) provides two distinct activities, to assume or assign. The actual test considers the intent of the debtor to assume or assign in conjunction with applicable law. If the debtor does not intend to assign the contract and applicable law does prevent assignment, then the debtor may assume the contract. Although the applicable law may prevent assignment, the debtor-in-possession has no intention to assign, thus it should not be precluded from assuming. Especially since the applicable law precludes assignment. When the debtor-in-possession intends to assign and applicable law prevents assignment, the debtor-in-possession must seek consent from the

nondebtor. However, a straightforward application of the literal language is a complete bar of assumption or assignment. Application of the literal language does not consider the intent of the debtor-in-possession or if the nondebtor is required to perform to a third party. It stops at applicable law.

The actual test is compatible with the literal language of section 365(c)(1)(A). It considers if the debtor intends to assign the contract. *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489 (1st Cir. 1997). If the debtor does not intend to assign the contract, then the debtor may assume the contract. *Id.* The actual test analyzes the applicable law and determines if the nondebtor is required to accept or render performance to an entity other than the debtor or debtor-in-possession. *In re Mirant Corp.*, 303 B.R. 319 (Bankr. N.D. Tex. 2003). The actual test examines the real consequences to the non-debtor. It determines if the applicable law requires the nondebtor to accept performance or render performance to an entity other than the debtor or debtor-in-possession.

In applying the actual test to our facts, the applicable law is Federal law on intellectual property. (R. at 11). Generally, this law excuses a licensor from rendering performance to an entity different from its original licensee. (R. at 12). Here, the Agreement is governed by Federal Intellectual Property law because the Software is copyrighted and patented. (R. at 5, 11). The Respondent entered the Agreement with Development. (R. at 5). The Agreement granted Development and its affiliated entities the right to use the non-exclusive license. (R. at 5). The original licensee has not changed. This Court in *NLRB v. Bildisco & Bildisco*, held that the debtor-in-possession is the same entity which existed before the filing of the petition as proscribed by the Bankruptcy code. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984). The debtor-in-possession is empowered to handle its contracts and property in a manner it could not have absent the

bankruptcy. *Id.* Here, the Debtors are still comprised of the same nine subsidiaries.[2] The overall corporate structure has not changed. The Debtors are seeking to assume the Agreement and continue to use it as it did prior to the bankruptcy. (R. at 7). The Respondent is not required to accept or render performance to a third party. The Respondent is not asked to perform the Agreement in any different manner. It is only expected to perform under the contract already agreed upon. Consequently, the Respondent is not excused from rendering performance to the Debtors, because the Debtors are the original licensee, the Debtors do not have intent to assign and the Respondent is not required to render performance to a third party.

When the strict literal language of section 365(c)(1)(A) is applied it will result in preventing debtors-in-possession from continuing to exercise their rights under other types of contracts. *N.C.P. Mktg. Grp., Inc. v. BG Star Prods.*, 556 U.S. 1145 (2009). It also provides a windfall to a nondebtor. *Id.* If the debtor is outside the bankruptcy, then the nondebtor is obligated to perform. *Id.* However, if the debtor seeks to reorganize through bankruptcy, then the nondebtor obtains the right to go back on the agreement and take its business elsewhere. *Id.* Courts that have applied the literal language to preclude a debtor-in-possession from assuming an executory contract have effectively rendered the phrase, *or assign*, superfluous. Michelle Morgan Harner, Carl E. Black and Eric R. Goodman, *Debtors Beware: The Expanding Universe of Non-Assumable/Non-Assignable Contracts in Bankruptcy*, 13 AM. BANKR. INST. L. REV. 187, 235 (2005). The intent of the debtor-in-possession is never considered. Those courts only look to see if there is a possibility to assign.

[2] Tumbling Dice Atlantic City, LLC, Tumbling Dice Chicagoland, LLC, Tumbling Dice Detroit, LLC, Tumbling Dice Lake Tahoe, LLC, Tumbling Dice Las Vegas, LLC, Tumbling Dice New Orleans, LLC, Tumbling Dice Palm Springs, LLC, Tumbling Dice Tunica, LLC, and Tumbling Dice Development, LLC.

The adoption of the actual test allows courts to consider the actual consequences of the application of the applicable law. Following the majority of bankruptcy courts in the adoption of the actual test resolves the circuit split. Bankruptcy courts have a first-hand look at the results of the application of the actual test and how it resolves the ambiguities in section 365.

B. The actual test is compatible with section 365.

The actual test is compatible with section 365 because it gives effect to the applicable law. Michelle Morgan Harner, Carl E. Black and Eric R. Goodman, *Debtors Beware: The Expanding Universe of Non-Assumable/Non-Assignable Contracts in Bankruptcy*, 13 AM. BANKR. INST. L. REV. 187, 237 (2005). It logically applies applicable law to the action of the debtor-in-possession. *Id.* at 237. If the debtor-in-possession only seeks to assume and the applicable law does not bar this action, then the debtor-in-possession may assume. The actual test is aligned with the purpose of Section 365 and chapter 11 cases.

1. The Actual Test is aligned with the purpose of Section 365

The legislative history shows that Congress did not intend to prohibit a debtor-in-possession from assumption. In the Senate Report No. 95-989, Congress stated that section 365 was created to provide limitations on the trustee's powers, specifically subsections (b), (c), (d). S. REP. NO. 95-989 at 5747 (1978). The prohibition in subsection (c) applies only in the situation in which applicable law excuses the other party from performance. *Id.* Congress was concerned that a trustee may attempt to acquire new advances based upon the financial strength of the debtor, which do not require new credit. *Id.* Congress wanted to protect both parties. *In re Centrix Fin., LLC*, the court completed a comprehensive examination of the fundamental purpose of section 365. *Weinman v. Allison Payment Sys., LLC (In re Centrix Fin., LLC),* 434 B.R. 880 (Bankr. D. Colo. 2010). The court concluded that the purpose of section 365 was to make a nondebtor whole

in the event of assumption of the executory contract, ensuring that the nondebtor received the full benefit of the bargain. *Id.* at 885-86. The court held that legislative history supports an interpretation that allows the trustees to assume a contract where the nondebtor continues to receive the full benefit of the bargain. *Id.* at 886. In other words, a trustee, debtor-in-possession may assume a contract as long as the non-debtor receives what was agreed upon in the contract.

Courts that have adopted the actual test have considered Congress' intent of section 365. Which is to apply to contracts where significant underperformed obligations remain on both sides and prevent unlawful assignment. *In re Footstar, Inc.*, 323 B.R. 566 (Bankr. S.D.N.Y. 2005). Here, the Agreement between Development and the Respondent allowed the Debtors to use the Software in exchange for monthly payments to the Respondent. (R. at 5). The obligations of TDI and the Respondent are significant. The Software is an essential part of the Debtors' ongoing business model. (R. at 5). If either party underperformed the result would be detrimental. The Debtors were saddled with significant and unserviceable debt prior to bankruptcy. (R. at 6). The loss of the Software would prevent them from maintaining their customer satisfaction program and negatively affect their ongoing business model.

The actual test was established and based on the 1984 amendments. *Summit Inv. & Dev. Corp. v. Leroux*, 69 F.3d 608 (1st Cir. 1995). In the 1984 amendments Congress indicated it did not intend to prohibit the assumption by a debtor-in-possession. The court stated, "where a debtor or debtor-in-possession bears the burden of performance under an executory contract, the nondebtor party to whom performance is due must make an individualized showing." *Id*. at 613. It must show "that it would not receive the 'full benefit of its bargain' where an entity to be substituted for the debtor from whom performance is due." *Id*. at 613. The court held that the actual test allows for a case-by-case analysis into the actual consequences to the non-debtor. *Id*.

In the present case, Development and the Debtors bear the burden of performance under the Agreement. They are required to make monthly payments to the Respondent for the use of the Software. (R. at 5). The Software is necessary for their ongoing business model. (R. at 5). Since performance is due in the form of payment to the Respondent, the Respondent must make a showing that it would not receive the full benefit of its bargain. The full benefit of its bargain is the payment for use of the Software, which was required under the Agreement. (R. at 5). The assumption of the Agreement would allow the Debtors to continue its business and use the license as it had before the bankruptcy.

This is similar to the debtor-licensee in *Institut Pasteur v. Cambridge Biotech Corp.*, where the court permitted debtor to assume a license. *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489 (1st Cir. 1997). In *Institut Pasteur v. Cambridge Biotech Corp.*, the debtor filed a chapter 11 bankruptcy. *Id.* Its proposed plan required the assumption of licenses. *Id.* The non-debtor asserted applicable law precluded the debtor from assumption. *Id.* The court decided to apply a case-by-case approach that would prevent the debtor from losing its option to assume where there was no intent to assign. *Id.* The court applied the actual test to determine if the nondebtor was actually being forced to accept performance under the contract. *Id.* The court cited the Senate Report. *Id.* It concluded it must focus on the performance actually rendered to the debtor-in-possession while ensuring the non-debtor will receive the full benefit of the bargain. *Id.* The court held that the debtor-in-possession was permitted to assume because its obligations did not change, and it did not intend to assign. *Id.* The court further held the non-debtor failed to show that is was or will be deprived of the full benefit of the bargain. *Id.*

Similar to the court in *Institut Pasteur v. Cambridge Biotech Corp.*, this Court should adopt the actual test and apply a case-by-case approach. The obligations of Development and the

Respondent have not changed. Additionally, the Respondent has failed to show that it is or would be deprived of the full benefit of its bargain. The performance required by both parties has not changed. Under the Agreement, the Debtors were required to make monthly payments to the Respondent. (R. at 5). The Respondent bargained for monthly payments in exchange for use of the Software. The payments would continue after bankruptcy. (R. at 7). Therefore, since the payments due under the Agreement were not going to be stopped, the Respondent would not have been deprived of the full benefit of its bargain.

2. Applicable law does not completely bar the power to assume or assign.

Applicable law is not defined in the Bankruptcy Code. When applying the ordinary meaning any law that is not bankruptcy law is applicable law. *Everex Sys. v. Cadtrak Corp. (In re CFLC, Inc.)*, 89 F.3d 673 (9th Cir. 1996). Section 365(c) turns on whether the applicable law excuses the nondebtor from accepting or rendering performance only to the debtor or debtor-in-possession. *Id.* "The basic objective of 365 (c)(1) is to protect the contract counterparty from unlawful assignment." *In re Footstar, Inc.*, 323 B.R. 566, 573 (Bankr. S.D.N.Y. 2005). This protection comes from applicable law that specifically bars assignment.

The applicable law in this case is Federal law on intellectual property. Generally, Federal intellectual property law prohibits assignment over the licensor's consent. *In re Golden Books Family Entm't*, 269 B.R. 311 (Bankr. D. Del. 2001). The non-exclusive license agreement, between Development and the Respondent, is governed by Federal law on intellectual property. (R. at 11). The Agreement is for the use of copyrighted and patented software created by the Respondent. (R. at 5-6). The dispute is over the Debtors assuming the Agreement, thus the core issue is not bankruptcy related. Generally, this law excuses a licensor from rendering performance to an entity different from its original licensee. (R. at 12).

Federal law on intellectual property licenses does not excuse the Respondent from rendering performance to Development. Development is not an entity different from the Respondent's original licensee. There is no third party and there is not an entity different from the original licensee. The Respondent granted Development and its affiliated entities the right to use the Software. (R. at 5). The overall corporate structure had not changed. (R. at 7).

The actual test considers the trustee's intent to assign an executory contract and if applicable law requires the non-debtor to accept or render performance to a third party. *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489 (1st Cir. 1997); *In re Footstar, Inc.*, 323 B.R. 566 (Bankr. S.D.N.Y. 2005). If the trustee does not have intent to assign, the trustee may assume the executory contract because applicable law would not excuse performance of the non-debtor. However, the applicable law would require the non-debtor to perform under the contract. It matters whether the trustee intends to assign an executory contract because the intent combined with the applicable law determines if consent is required.

Here, the Debtors are not required to seek consent from the Respondent because the applicable law does not prohibit assumption. Federal intellectual property law prohibits assignment; however, the Debtors are not attempting nor do they intend to assign. The Debtors are only seeking to assume. (R. at 6).

C. The actual test is a better for bankruptcy.

"The actual test balances the concerns of both bankruptcy law and intellectual property law." Laura D. Steele, *Actual or Hypothetical: Determine the Proper Test for Trademark Licensee Rights in Bankruptcy*, 14 INTELLECTUAL PROPERTY L. REV. 411 (2010). This balance is needed for business reorganizations, without it businesses would be prevented from the benefits of bankruptcy. This would result in a complete destruction of reorganizations with licenses governed

by intellectual property law or applicable law that bars assignment. Additionally, the balance is needed because there will always be outside law that bankruptcy courts will need to give deference to, because Congress has only authorized bankruptcy courts to rule on bankruptcy issues. Other issues, where the core is not bankruptcy, are governed by applicable law, such as Federal intellectual property law or state law. With the adoption of the actual test, both the debtor-licensees and nondebtor-licensors will receive the benefit of their bargain. *Id*. at 440.

Courts that have not applied the actual test have effectively sacrificed sound Bankruptcy policy. *N.C.P. Mktg. Grp., Inc. v. BG Star Prods.*, 556 U.S. 1145 (2009). This is because a debtor-in-possession will be prevented from assuming contracts that are essential to its reorganization. A strict application of the literal language is a complete bar to assumption or assignment, regardless if the debtor-in-possession only seeks to assume the executory contract. An activity that is not even barred by the applicable law.

Congress did not intend to bar assumption of any contract as long as it will be performed by the debtor or debtor-in-possession. *In re Ontario Locomotive & Indus. Ry. Supplies, Inc.*, 126 B.R. 146 (Bankr. W.D.N.Y. 1990); *In re Neuhoff Farms, Inc.*, 258 B.R. 343 (Bankr. E.D.N.C. 2000). It is not sensible to prevent a debtor-in-possession from the power to assume a contract it had prior to bankruptcy, just because it filed for bankruptcy. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984). The actual test prevents a debtor from losing its option to assume because it is aligned with Congress' intent of section 365.

A majority of bankruptcy courts have deciphered the ambiguous language and adopted the actual test to determine whether the non-debtor will actually be required to accept or render performance to a third party. Bankruptcy courts have adopted the actual test over any other test because it is an application of a case-by-case analysis, which it is consistent with the legislative

history and the underlying purpose of chapter 11. The underlying purpose of chapter 11 is rehabilitation of debtors through reorganization and to prevent the debtor from going into liquidation. *In re No Place Like Home, Inc.*, 559 B.R. 863 (Bankr. W.D. Tenn. 2016); *Moody v. Amoco Oil Co.*, 734 F.2d 1200 (7th Cir. 1984).

The actual test is better for bankruptcy. It is logical, sensible and compatible with the language of the statute, code and respective purposes. It requires a "showing that the non-debtor's contract will actually be assigned or that the non-debtor will in fact be asked to accept performance from or render performance to a party other than the party with whom it originally contracted." *Bonneville Power Admin. v. Mirant Corp. (In re Mirant Corp.)*, 440 F.3d 238, 248 (5th Cir. 2006). *In re Mirant Corp.*, the court held that a case-by-case analysis was required and applied the actual test. *Id*. at 251. The court reasoned that section 365(e)(2)(A) mandated an actual test because the law that releases a nondebtor from preventing the enforcement of an ipso facto clause must apply to something and must excuse the nondebtor from some specific performance or acceptance. *Id*. at 250. Consequently, if the debtor demonstrates that no application exists or that no excuse is obtained, then the congressional language makes the section 365(e)(2)(A) exception unavailable. *Id*. The applicability of the law that releases the nondebtor must be determined on a fact-based showing. *Id*. The court held that the actual test must be used to determine applicability of the law to the case at hand. *Id*. at 251.

The actual test is better for bankruptcy because it is harmonious with the objective of Section 365(c)(1) and the Bankruptcy Code. *In re Footstar, Inc.*, 323 B.R. 566 (Bankr. S.D.N.Y. 2005). It is the only test that can be construed in accordance with its plain meaning. *Id*. Additionally, it is the only test that can be construed without construing "or" to mean "and". *Id*. The actual test can be applied to more than one provision in section 365. The court *In re Footstar,*

Inc. determined whether applicable law excused the nondebtor from accepting or rendering performance to a third party where the executory contract was non-assignable. *Id*. at 569. The debtor sought to assume executory contracts that were critical to its reorganization. *Id*. at 566. The court adopted the actual test and concluded that section 365(c)(1) does not apply to a debtor-in-possession which seeks to assume, but not assign. *Id*. at 570.

This Court should adopt the actual test because a case-by-cases analysis should be applied when determining whether a non-debtor is actually required to accept or render performance to a third party. The express language of section 365(c)(1) should not be applied literally. The express language of section 365(c)(1) does not support a debtor's rehabilitation. The express language of section 365(c)(1) yields more than one plausible interpretation and it results in the destruction of reorganizations. The decision of the Thirteenth Circuit should be reversed. The court improperly held that section 365(c)(1) precludes Development from assuming the Agreement absent the consent of the Respondent. The actual test is a better test for bankruptcy because it is harmonious with other sections of the code and with the Code's purpose. The actual test is based on actual intent and consequences; considering both parties to the contract and allowing for a determination based on a case-by-case analysis.

II. THE THIRTEENTH CIRCUIT IMPROPERLY HELD THAT THE PER PLAN APPROACH DOES NOT MEET 1129(A)(10) REQUIREMENTS.

The facts of this case are not in dispute by the parties. (R. at 2 n.3). The United States Court of Appeals for the Thirteenth Circuit's holding that section 1129(a)(10) requires jointly administered plans to be analyzed on a per debtor approach is a question of law. A *de novo* standard of review applies when a court assesses a lower court's conclusions of law. *Texas v. Soileau,* 488 F.3d 302, 305 (5th Cir. 2007).

Under a bankruptcy, the debtor is given a fresh financial start, while the creditor's interest is maximized through a strategic plan for repayment. This strategic repayment plan is governed by section 1129, titled confirmation of a plan. 11 U.S.C. § 1129. Section 1129 provides sixteen requirements that must meet before a court can confirm a plan. 11 U.S.C. § 1129. Section 1129(a)(10) addresses impaired claims. Under a plan, a claim is impaired if the holder of the claim does not receive the full amount of the claim. 11 U.S.C. § 1124. A group of similarly situated claims forms a class. *In re Motors Liquidation Co.*, 591 B.R. 501 (Bankr. S.D.N.Y. 2018). Here, the Debtors' proposed a strategic plan, which included pro rata distribution to creditors. (R. at 7).

A. Section 1129(a)(10) requires the per plan approach.

Bankruptcy courts are courts of equity. "Equity is equality --- equality is equity." *In re Rodolitz Holding Corp.*, 187 B.R. 72, 84 (Bankr. E.D.N.Y. 1995). Congress has created bankruptcy laws to uphold fairness and equity. *Young v. Higbee Co.*, 324 U.S. 204 (U.S. 1945). When a court abides by the express language of bankruptcy statutes it does its share in ensuring that the execution of a bankruptcy is beneficial to both parties.

The express language of section 1129(a)(10) requires the approval of at least one of the impaired class of creditors. 11 U.S.C. § 1129(a)(10). Approval of a plan is provided by a vote in support of the plan by the impaired class of creditors. 11 U.S.C. § 1129(a)(10). When courts adopt an approach based on the language in section 1129(a)(10), the approach should not render a different result. *JPMCC 200-C1 Grasslawn Lodging, LLC v. Transwest Resort Props.*, 881 F.3d 724 (9th Cir. 2018). This means if the court applies what is stated in section 1129(a)(10) and the plan is confirmed, then adoption of an approach must also result in plan confirmation.

Section 1129(a)(10) does not expressly give one impaired class the ability to force the plan to fail. Instead, it gives one class who has voted to approve the plan, the ability to cause the plan

to be confirmed. Section 1129(a)(10) allows one impaired class to meet its express requirement, because a chapter 11 uses "a system that gives the right to vote to most claim and equity holder and mandates a single vote on the plan of reorganization." Scott F. Norberg, *Debtor Incentives, Agency Costs, and Voting Theory in Chapter 11*, 46 U. KAN. L. REV. 507, 510 (1998). The per plan approach remains consistent with the statute. It does not let one class prevent plan confirmation when another class has approved the plan. Furthermore, the per plan approach is beneficial to the estate and upholds the pillars of bankruptcy. When the plan accounts for a maximized estate, the per plan approach abides by the language of section 1129(a)(10) and does not make plan confirmation more difficult than the statute requires. For these reasons this Court should adopt the per plan approach.

1. The per plan approach is consistent with § 1129(a)(10)

Section 1129(a)(10) provides "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…" 11 U.S.C. § 1129(a)(10). This means if there are classes of impaired creditors under a plan, section 1129(a)(10) requires a vote to approve the plan from at least one of these classes. Impaired creditors are grouped into separate classes based on the commonality of their interests. *In re Bd. of Dirs. of Hopewell Int'l Ins. Ltd.*, 238 B.R. 25 (Bankr. S.D.N.Y. 1999). Since impaired creditors will not receive full payment of their interest, bankruptcy does not presume that impaired creditors have approved the plan. To maintain the principle of equity, impaired creditors can review a plan and vote to either approve or reject the plan. Voting gives these impaired classes the ability to voice whether they believe their interest will be protected under the proposed plan. *JPMCC 200-C1 Grasslawn Lodging, LLC v. Transwest Resort Props.*, 881 F.3d 724 (9th Cir. 2018).

Imagine, after impaired creditors review the plan they meet to vote. After votes are collected, they are separated into two groups. Group one is affirmative, with the yes votes. Group two is negative, with the no votes. According to section 1129(a)(10), if there is at least one vote in the yes group, the requirement for plan approval has been met.

When analyzing a statute, courts determine Congress' intent from evidence. *In re LOOP 76, LLC,* 442 B.R. 713 (Bankr. D. Ariz. 2010). The first evidence that is viewed by courts come directly from the express language of the statute. *Id.* Words used in a statute and their plain meaning is where an analysis begins, because Congress says in a statute what it means and means in a statute what it says there. The language of section 1129(a)(10) includes: "at least one" and "has accepted the plan." The phrase, "at least", is used to determine a minimum amount. This means "at least", represents the smallest possible outcome. MERRIAM-WEBSTER DICTIONARY (11ed. 2004). When Congress used this phrase, Congress acknowledged that the smallest possible number of impaired creditors to approve the plan. To tie this more directly to the statute, the language would read: one impaired class is the smallest amount that is possible.

The second phrase for analysis is "has accepted the plan". Accepted means "to give admittance or approval to". MERRIAM-WEBSTER DICTIONARY (11ed. 2004). In the context of section 1129(a)(10), a plan is a document that is proposed by a chapter 11 debtor. *United States Courts,* https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics (last visited Jan. 18, 2020). The phrase "has accepted the plan" means give admittance or approval to the proposed document of reorganization. Overall the section 1129(a)(10) phrases "at least one" and "has accepted the plan", requires: one impaired class, the smallest amount that is possible, to give admittance or approval to the proposed document of reorganization.

Let's picture both scenarios, one for section 1129(a)(10) and the other for the per plan approach. Under section 1129(a)(10) we have a group of impaired creditors who have voted. We must separate their votes into either affirmative group one or rejection group two. After creditor ballots were reviewed and tallied, each of TDI and the Operating Debtors had at least one impaired accepting class of creditors. (R. at 8). The same was not true for Development. (R. at 8). Under My Thumb…voted to reject the Plan. (R. at 8). Since there are a total of ten debtors under the plan, (R. at 2), and only one of the Debtors' impaired classes voted to reject the Plan (R. at 8), there are nine votes in the affirmative group one and one vote in the rejection group two. Under section 1129(a)(10), we look to see if the affirmative group one has a at least of one vote. Here we have nine, which exceeds the minimum amount, and so the plan can be confirmed.

In our next scenario, we analyze the same facts but with the per plan approach. Again, there are nine votes in the affirmative group one and one vote in the rejection group two. The per plan approach tells us that all we need is one vote are in the affirmative group one for the plan to be confirmed. Therefore, we look to see how many votes are in affirmative group one. We have nine votes in affirmative group one. Under these facts with the per plan approach, the plan will also be confirmed because the affirmative votes exceed the minimum requirement. Using the same facts, both section 1129(a)(10) and the per plan approach render the same results: plan confirmation.

2. Section 1129(a)(10) applies on a per plan basis

An examination of express requirements and application under section 1129(a)(10) can be understood in three parts. First, section 1129(a)(10) requirements are limited to one plan. Second, section 1129(a)(10) requires plan approval from one impaired class. Third, the statute's requirements remain consistent in both single and multi-debtor plans.

i. Section 1129(a)(10) requirement is limited to one plan

Section 1129(a)(10) provides: "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. 11 U.S.C § 1129(a)(10). Courts must presume that legislatures say in a statute "what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992). If Congress intended for the provisions of the statute to be plural, Congress would have stated "plans" rather than "plan." Furthermore, all provisions of section 1129 refer to "plan" in the singular. "We should read federal statutes 'to give effect to each if we can do so while preserving their sense and purpose." *Pittsburgh & L. E. R. Co. v. Ry. Labor Executives' Ass'n*, 491 U.S. 490, 510 (1989). To truly understand a statute one must understand the statute as a whole. *Id.* This means that interpretation of a term in a statute must remain consistent throughout the statute. In doing so, each section of the statute is not rendered meaningless.

More specifically, section 1129(c) furnishes that the court may confirm only one plan. 11 U.S.C § 1129(c). In order for all of section 1129 provisions to be effective, all of the requirements of section 1129 must be fulfilled under one plan for confirmation. The per plan approach adopts the "singular plan" theme of section 1129, requiring the provisions of section 1129(a)(10) be fulfilled under one plan. When there is a plan with one impaired class' approval, then the plan must be confirmed. The per plan approach recognizes the plan as a singular plan.

Statutes such as section 102(7), which provides that the singular includes the plural, does not make every singular word in the bankruptcy code plural. 11 U.S.C. §102(7). Rather, its provisions must be considered in context with the provisions of a statue. Interpretation of a statute must not render other subsections of the statute void. *Pittsburgh & L. E. R. Co. v. Ry. Labor Executives' Ass'n*, 491 U.S. 490 (1989). Section 102(7) can only make a singular word plural

when such change to a term allows the overall meaning of the statute to remain effective and consistent. *Id.* Since section 1129(a)(10) governs plan confirmation, if "plan" in section 1129(a)(10) should be read as "plans" this would mean that more than one plan is being confirmed. However, such interpretation goes directly against section 1129(c) which establishes that the court confirms only one plan. To construe "plan" in section 1129(a)(10) as "plans" would render section 1129(c) meaningless.

If two statutes are capable of coexistence it is "the duty of the courts (…) to regard each as effective." *Id.* at 510. The court in *In re Net Pay Sols., Inc.,* completed a thorough analysis of section 1129 and section 102(7). *Slobodian v. United States IRS (In re Net Pay Sols., Inc.)*, 822 F.3d 144 (3d Cir. 2016). The court reasoned that any reliance on section 102(7) to make section 1129(a)(10) "plan" plural cannot bear the weight that is placed upon section 102(7) provisions. *Id.* at 153. The court concluded, if section 102(7) provisions render another section meaningless, void, or insignificant then it should not be used to make that section's singular word plural. *Id.* This Court should apply the same analysis and conclude that the plan in section 1129(a)(10) should be kept in the singular. Following this interpretation prevents section 1129(c) from being rendered meaningless, void, or insignificant. Therefore, it is more than reasonable to conclude that section 1129 plan must remain singular and section 1129(a)(10) is limited to one plan.

ii. Section 1129(a)(10) requires approval from one impaired class

In re Transwest, the court held that "11 U.S.C 1129(a)(10) applies on a 'per plan' not a 'per debtor' basis." *JPMCC 200-C1 Grasslawn Lodging, LLC v. Transwest Resort Props.*, 881 F.3d 724 (9th Cir. 2018). The court began its analysis with the express language of section 1129(a)(10). It reasoned that the statute applies on a per plan basis because of the express language. *Id.* at 729. The court stated, "section 1129(a)(10) requires that one impaired class 'under

the plan' approve 'the plan'[,] it makes no distinction concerning or reference to the creditors of different debtors under the plan." *Id.* "Under its plain language, once a single impaired class accepts a plan, section 1129(a)(10) is satisfied as to the entire plan." *Id.*

The *Transwest* court's analysis acknowledged that Congress is an intentional branch. Whatever is stated in a statute is placed there for a reason, and whatever is not stated was left out of the statute for a reason. The *Transwest* court correctly exercised its duty to interpret the statute. The court reasoned that "it is not its role to modify the plain language of a statute by interpretation." *Id.* at 729. Just as the *Transwest* court accepted the language of section 1129(a)(10), this Court must also refrain from adding any additional language to the statute that is not expressly stated.

An interpretation of section 1129(a)(10) must be limited to the statute's expressed language. Section 1129(a)(10) only requires one impaired creditor class' approval of the plan. The court must take what is stated in the statute and apply it directly to the facts of the present case. After creditor ballots were reviewed and tallied, TDI and the Operating Debtors each had at least one impaired accepting class of creditors. (R. at 8). In fact, the plan had overwhelming creditor support. (R. at 8). However, the statute does not require overwhelming support, it only requires support from one impaired class.

With ten debtors under the plan, nine of which having at least one impaired accepting class of creditors, the requirements of section 1129(a)(10) have overwhelmingly been met. To allow a plan with support from nine other impaired classes to fail to satisfy section 1129(a)(10), rewrites the statute in a way that Congress did not intend. If Congress expressly required all of the impaired classes under a plan to approve the plan, then plan confirmation would be extraneous, burdensome, and nearly impossible in multi-debtor and jointly administered plans. This is not what Congress intended and approval from every impaired class is not required by the language of section

1129(a)(10); the statute provides: when at least one class has approved the plan, the plan can be confirmed. What is stated in the statute, must be strictly applied.

iii. No distinction between multi and single debtor plans

Section 1129(a)(10) does not distinguish between multi- and single debtor plans. A single debtor plan means that one plan is filed on behalf of one debtor. When one plan contains several debtors, the plan is considered a multi-debtor plan. Multi-debtor plans occur when a plan is jointly administered. Joint administration means that one plan is filed on behalf of all of the Debtors. (R. at 7). Our plan is a joint plan. (R. at 7). There are ten debtors and one plan will be filed for all ten debtors. (R. at 2).

The one class approval requirement of section 1129(a)(10) does not have distinct requirements for a single-debtor and multi-debtor plan. *In re Transwest Resort Props.*, 881 F.3d 724 (9th Cir. 2018). The statute's language only requires that one impaired class of creditors approve the plan. Legislatures who create bankruptcy laws are aware that some plans have single debtors while others have several. If Congress wanted different requirements for single and multi-debtor plans, Congress could have expressly stated so in the statute. Since there is no distinction between single and multi-debtor plans, we must apply the requirements of the statute to both types of plans.

Let's imagine, then, how votes should be tallied when a plan is jointly administered. Since section 1129(a)(10) does not give us a different requirement under this type of plan, we must group our votes in a multi-debtor plan in the same manner as we would if this were a single debtor plan. All of the debtors' impaired creditor classes would come together and vote to accept or reject the single plan. Just as before, their votes would separate into two groups: the affirmative group one and the rejected group two.

There are ten debtors under one plan, so it is a multi-debtor plan. (R. at 2). The requirement that at least one impaired class under the plan, approve the plan, must be maintained, with no distinction to the number of debtors. Once any one of the impaired classes votes to affirm the plan, the statute's requirement is met as to all the debtors. The plan was accepted by all but one of the impaired classes under the plan. (R. at 8). Still there are nine votes in affirmative group one and one vote in rejected group two. Since group one's minimum amount of one vote has been met, the analysis ends. The requirement of section 1129(a)(10) is met.

The per plan approach's requirement does not differentiate between a multi or single debtor plan. Its requirement for one class' approval is unambiguous. The provisions of section 1129(a)(10) requires an approach whose requirement remains consistent between a single or multi debtor plan. The statute requires an approach whose provisions do not add any additional requirements to its language. *In re LOOP 76, LLC,* 442 B.R. 713 (Bankr. D. Ariz. 2010). The per plan approach respects the statute's requirement and does not add to its express language.

B. <u>One of several impaired classes should not have veto power.</u>

The express language of the statute only requires approval from at least one impaired class of creditors for plan confirmation. Section 1129(a)(10) was intended to give some indicia of creditor support, rather than veto power to one impaired creditor class. *In re SM 104 Ltd.*, 160 B.R. 202, 218 (Bankr. S.D. Fla. 1993).

1. Section 1129(a)(10) does not discuss a class who rejects the plan.

Section 1129(a)(10) requirement is met by the classes that have approved the plan. As a result, section 1129(a)(10) does not give one impaired class veto power over a plan. Veto power is the ability to allow a plan to fail. The expressed language of the statute does not give one impaired class of creditors the ability to cause an entire plan to fail. *In re LOOP 76, LLC,* 442

B.R. 713 (Bankr. D. Ariz. 2010). Section 1129(a)(10) does not contain language regarding a rejecting class. With no mention or consideration to a class that has rejected a plan, section 1129(a)(10) does not give one impaired class the power to fail a plan.

"It would be inappropriate to allow a single creditor with an entirely unique interest (…) to prevent other creditors from demonstrating their approval of the plan and therefore its satisfaction of section 1129(a)(10)." *In re LOOP 76, LLC,* 442 B.R. 713, 724. (Bankr. D. Ariz. 2010). The express language of section 1129(a)(10) indicates Congress' prioritization of an impaired class who has voted to approve the plan over an impaired class that has voted to reject the plan. *Id.* at 722. This is solely based on what is and is not included in the language of the statute. If Congress mentions it in the statute, this is what a court must consider. *Connecticut Nat'l Bank v. Germain,* 503 U.S. 249 (1992). When Congress does not mention it in the statute it is not a priority for interpretation and application of the law. *Id.* An application of section 1129(a)(10) indicates the order of what must be determined prior to a plan's confirmation.

Upon application of section 1129(a)(10), the first question is whether there are classes of impaired creditors under the plan? If no, this section does not apply. However, if there are impaired classes, then this section does apply. Next, the impaired classes must vote to either approve or reject the plan. Lastly, is there at least one class of impaired creditors that has accepted the plan? If yes, section 1129(a)(10) requirement has been met. Section 1129(a)(10) is one of the requirements that must be met for plan confirmation and specifically includes "at least one" and "has accepted the plan". 11 U.S.C § 1129(a)(10). By including "at least one" and "has accepted the plan" Congress shows its intent to prioritize one vote of acceptance over votes that have not accepted the plan. Since a class that has rejected the plan is not mentioned in the statute, there is

no evidence of Congress' intent to give this class the ability to veto the plan. *In re Greystone III Joint Venture,* 102 B.R. 560 (Bankr. W.D. Tex. 1989).

This is especially true if several other impaired classes have approved the plan. *In re LOOP 76, LLC,* 442 B.R. 713 (Bankr. D. Ariz. 2010). If Congress intended to give one impaired class veto power, the statute could have required all impaired classes of creditors to approve the plan. If this were the case, it would be logical to conclude that if one impaired class of creditors rejected the plan then the plan could not be confirmed. In other words, when votes are tallied and separated into group one and group two, all of the votes must be placed in the affirmative group one. If one vote is placed in rejected group two, the plan fails. This is not what section 1129(a)(10) indicates. Instead, section 1129(a)(10) language allows one impaired class' approval to overrule the rejection of several others. The statute expressly gives one impaired class the power to allow plan confirmation; its language does not give one impaired class the power to fail a plan.

If the court does not adopt the per plan approach, it would allow one impaired class to stop the bankruptcy when there is no evidence that this is what Congress intended for plan confirmation. *In re Greystone III Joint Venture,* 102 B.R. 560 (Bankr. W.D. Tex. 1989). Furthermore, there is no evidence that legislatures intended organization of creditors to defeat plan confirmation by allowing the plan to fail to satisfy section 1129(a)(10). *In re LOOP 76, LLC,* 442 B.R. 713 (Bankr. D. Ariz. 2010). Congress does not intend an approach to be adopted solely because it would cause the plan to fail to meet the requirements of 1129(a)(10). *Id.* at 722.

Moreover, with overwhelming support from the other impaired creditor classes, (R. at 8), it is reasonable to conclude that the plan is fair and reasonable even to the impaired creditor classes. Congress has created bankruptcy laws, which promote overall equity and fairness, that prevent one stakeholder's vote to reject an entire plan. *Young v. Higbee Co.,* 324 U.S. 204 (U.S. 1945). These

rules were "intended to apply to stockholders whose selfish purpose was to obstruct a fair and feasible reorganization in the hope that someone would pay them more." *Id.* at 211.

It is evident from the express language that it is not Congress' intent to give one impaired class the ability to veto an entire plan. The construction of section 1129(a)(10) remains consistent with other provisions of the Bankruptcy Code, and also serves to prevent one entity from causing the bankruptcy to fail. *Id.* at 211. In the present case, since the plan received substantial support from all of the other impaired classes, it is only logical to conclude that the plan is fair, reasonable, and confirmable. (R. at 8). To adopt an approach that would prohibit the plan from being confirmed, would be an act that completely contradicts the express language of section 1129(a)(10) as well as Congress' intent behind bankruptcy laws. *Id.* Therefore, not only is the per plan approach is consistent with section 1129(a)(10) prioritization of votes for plan approval, but adoption of the approach is the only means in which Congress' intent will be upheld.

C. The per plan approach maximizes the estate.

A plan that maximizes the estate repays creditors as much of their interest as possible. *Wells Fargo Bank, N.A. v. Guy F. Atkinson Co. (In re Guy F. Atkinson Co.)*, 242 B.R. 497 (B.A.P. 9th Cir. 1999). Maximization of the estate fuels the engines of a bankruptcy. It gives creditors repayment of their interest. *In re Calderon,* 501 B.R. 726 (Bankr. D. Colo. 2013). On the other hand, debtors receive a fresh financial start. *Id.* A maximized estate fuels the engines of bankruptcy by accumulating assets for reorganization. These assets are then considered for repayment to creditors and allow the bankruptcy to take off smoothly. The use of the assets provides funds for repayment to creditors during the bankruptcy, and thus helps a bankruptcy reach its destination successfully: repaid creditors and a clean slate for debtors. *Id.*

Bankruptcy begins when a petition is filed. *In re Sander,* 551 F.3d 397 (6th Cir. 2008). Confirmation of a plan occurs when all of the bankruptcy rules regarding plan confirmation have been met. 11 U.S.C § 1129(a). The per plan approach allows for easier repayment to creditors, because its requirements are simple and not extraneous for plan confirmation. This approach says that when one impaired class approves the plan, the plan can be confirmed. *JPMCC 200-C1 Grasslawn Lodging, LLC v. Transwest Resort Props.*, 881 F.3d 724, 729 (9th Cir. 2018). It is simple, in the fact that it does not add to or complicate what is expressly required by section 1129(a)(10): one impaired class' approval. Adoption of the per plan approach maximizes the creditor's estate by favoring plan confirmation.

In the current case, under the per plan approach the plan would be confirmed. The plan received more than one impaired class' approval. (R. at 8). In fact, the plan had overwhelming creditor support with near universal support from all creditors. (R. at 8). Since the plan was approved by all of the other impaired creditor classes it is safe to assume that the plan adequately accounts for the other creditors. Furthermore, under the plan the distribution to the objecting creditor greatly exceeds the value of its debtor's, Development, assets. (R. at 7). Thus, the plan has its fuel, a maximized estate, for a successful bankruptcy. Considering this, plan confirmation in our case is required.

Since a bankruptcy should be fair and equitable, we should consider the concerns of the objecting party. "When an entity is pursuing a claim (…), the entity's interests and incentives in settling the claims must be consistent with maximizing the estate for all creditors. At its base, the approval of a settlement turns on the question of whether the compromise is in the best interest of the estate." *In re Guy F. Atkinson Co.*, 242 B.R. 497, 502 (B.A.P. 9th Cir. 1999). If the objection is not made to maximize the estate, or ensure creditor payment, then the objection should not be

upheld. The objecting creditor is getting paid under the plan. In fact, when the Respondent initially read the plan it viewed the plan favorably. (R. at 7). The Respondent's objection to the plan is based only on its suspicions of Sympathy for the Devil, LLP's involvement. (R. at 8.) The Court must not allow for the plan to fail simply because of a creditor's suspicions. This is especially true when the requirements for plan confirmation have been met. Since the Respondent's only objection to the plan is based on suspicions, the court should not allow this creditor to stop the bankruptcy from taking off.

By favoring plan confirmation, the per plan approach upholds Legislature's intent. *In re Guy F. Atkinson Co.*, 242 B.R. 497 (B.A.P. 9th Cir. 1999). "The general purpose of a plan is to enable debtors to restructure their liabilities." *In re Calderon,* 501 B.R. 726, 735 (Bankr. D. Colo. 2013). This process should be done in a way that will maximize recoveries of creditors while enabling the reorganized debtors to maintain their international corporate structure and certain tax benefits." *In re SGPA, Inc.,* Case No. 1–01–026092, 2001 WL 34750646, 2001 Bankr. LEXIS 2291 (Bankr. M.D. Pa. Sept. 28, 2001). Joint administration, in our case, allows for maximization of creditor recovery. (R. at 7). Bankruptcy courts must interpret statutes in a way which encourages the maximization of estates. To accomplish this, courts must adopt approaches that not only abide by the language of bankruptcy laws but also upholds the bankruptcy pillars. Our plan has met the requirements of section 1129(a)(10) and has achieved the goals of bankruptcy. The plan must be confirmed. Adoption of the per plan approach ensures this.

Bankruptcy is like a plane. It holds several individuals for a set period of time, transporting them from one place to another. As a plane needs a pilot for guidance, bankruptcy needs a plan to guide it through the bankruptcy. A maximized estate fuels the bankruptcy like an airplane's aviation fuel. It provides it with the resources it needs to carry the bankruptcy throughout its flight.

Unfortunately, flights get delayed. Having to board a delayed flight is inconvenient to any excited or prepared passengers. It slows them down, forcing them to wait in a place that is simply not home or their anticipated vacation spot. TDI, the debtors, and all of the debtors' creditors are like passengers who are waiting to board a delayed flight. Most times a delayed flight is delayed due to bad weather or air traffic control. However, this bankruptcy flight is being delayed due to one passenger's suspicions. If all of the other passengers or creditors are on board, the plan is sufficient to guide the bankruptcy, and the estate is maximized to fuel the bankruptcy, one creditor should not delay the flight. The Court should not allow the Respondent to stop this bankruptcy.

The per plan approach is consistent with the expressed requirement of section 1129(a)(10). Section 1129(a)(10) provisions uphold confirmation under a singular plan, require one impaired class' approval, and does not distinguish between multi- or single-debtor plans. Similarly, the per plan approach requires these things. What is stated in the statute is upheld. In addition, confirmation of our plan maximizes the Debtor's estate, which upholds one of the pillars of bankruptcy. The per plan approach is beneficial to this bankruptcy, because it would allow for the plan to be confirmed which in result would maximize the debtor's estate. Since the per plan approach follows the express language of section 1129(a)(10) and maximizes the estate, this approach is beneficial and should be adopted by this Court.

PRAYER

For the foregoing reasons, the Petitioner respectfully requests this Court REVERSE the judgment of the United States Court of Appeals for the Thirteenth Circuit.

Respectfully submitted,

Team 56P
Counsel for Petitioner

APPENDIX A

11 U.S.C. § 102 (2017).

In this title—

(1) –(6) [omitted]

(7) the singular includes the plural;

(8)- (9) [omitted]

APPENDIX B

11 U.S.C. § 365 (2017).

(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.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;
>
> (B) - (C) [omitted]
>
> (2) –(4) [omitted]

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

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

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

(2)-(3) [omitted]

(d)- (e) [omitted]

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

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

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

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

(3) [omitted]

(g)-(p) [omitted]

APPENDIX C

11 U.S.C. § 1123 (2017).

(a) [omitted]

(b) Subject to subsection (a) of this section, a plan may—

(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

(2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(3) – (6)[omitted]

(c) –(d) [omitted]

APPENDIX D

11 U.S.C. § 1129 (2017).

(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.

(b) [omitted]

(c) Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127(b) of this title, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this title. If the requirements of subsections (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.

(d) – (e) [omitted]