Docket 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 RESPONDENT

Team R.57
Counsel for Respondent

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 petitioner is Tumbling Dice Inc., a holding company and the parent company of nine subsidiaries, collectively referred to as the Debtors. The Operating Debtors include: 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 ninth subsidiary, a license holder, is Tumbling Dice Development, LLC.

The respondent is Under My Thumb, Inc.

Corporate Disclosure Statement

Pursuant to this Court's Rule 29.6, respondent Under My Thumb, Inc. states that it has no parent corporation and that no publicly held company owns 10% or more of its stock. 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.

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The bankruptcy court entered an order in favor of the Debtors over the objections of Under My Thumb, Inc., noting the overwhelming creditor support that existed, concluding that Under My Thumb, Inc. was being asked to do nothing more than honor its existing contractual obligation with Development and held that Development could assume the Agreement in accordance with section 365 of the Bankruptcy Code. 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. The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the rulings of the bankruptcy court. The United States Court of Appeals for the Thirteenth Circuit, considering the appeal of Under My Thumb, Inc., reversed the bankruptcy court's ruling on both issues. The Supreme Court of the United States then granted the Debtors petition for writ of certiorari.

Statement of Jurisdiction

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

Statutory Provisions

The relevant statutory provisions involved in this case are listed below and reproduced in Appendices A through F.

Appendix A: 11 U.S.C. § 102(7)

Appendix B: 11 U.S.C § 365

Appendix C: 11 U.S.C. § 1106

Appendix D: 11 U.S.C. § 1107

Appendix E: 11 U.S.C. § 1129

Appendix F: Federal Rules of Bankruptcy Procedure, Rule 1015

Statement of the Facts

Tumbling Dice, Inc. ("TDI") is a holding company formed to own membership interests of its nine wholly owned subsidiaries (collectively with TDI, the "Debtors") for the purpose of a gaming operation business. R. at 4. Eight of TDI's subsidiaries, the "Operating Debtors", operate a luxury casino and resort. R. at 4. TDI's remaining subsidiary, "Development", serves a limited purpose as the licensee under a non-exclusive software license agreement with Under My Thumb, Inc. ("Under My Thumb") R. at 4.

In 2008, seeking to revamp its outdated casino loyalty program, Development contracted with Under My Thumb, a leading software designer specializing in customer loyalty and reservations programs for the hospitality industry, to create a comprehensive and modernized software system for the Debtor's business. R. at 4. Under My Thumb incurred approximately ten million dollars to create the software ("Software") and Development agreed to reimburse portion of these costs pursuant to an unsecured seven million dollars promissory note (the "R&D Note"). R. at 4.

Following completion of the Software, Development and Under My Thumb entered into a license agreement (the "License") that granted Development a non-exclusive to use the copyrighted and patented Software. R. at 5. The License permitted Development to extend the benefits of the License to its affiliated entities only. R. at 5. In addition, the Debtors could not assign or sublease the License without the express written consent of Under My Thumb. R. at 5. Development agreed to pay a monthly fee for the License, an obligation separate from the R&D Note. R. at 5 n. 4.

In June 2015, although Debtors experienced remarkable success due to the new Software, Debtors abruptly stopped making payments on the R&D Note. R. at 6. Further, TDI and the

Operating Debtors granted a first priority lien on their assets to a group of syndicated lenders (the "Lenders") in exchange for a loan in the amount of three billion dollars. R. at 6.

On January 11, 2016, facing overwhelming financial distress, the Debtors commenced voluntary cases under chapter 11 of the bankruptcy Code. R. at 3. Consistent with many large, complex, multi-debtor chapter 11 proceedings, the Debtors' cases were jointly administered for convenience of the parties and the court pursuant to bankruptcy rule 1015(b). R. at 3. Aiming to negotiate a deal to restructure or refinance its debt load was the primary goal of the Debtors. R. at 6.

In August 2016, the Debtors filed their reorganization plan. R. at 7. The plan expressly stated the estates are not being substantively consolidated and no debtor will be liable for obligations of another. R. at 7. The plan proposed to assume the License under sections 354 and 1123(b)(2) and Under My Thumb would continue to receive monthly payments for use of the Software. According to the plan, a private equity group, Sympathy for the Devil, would receive 51% of the voting shares of the reorganized company. R. at 8. Sympathy for the Devil is Under My Thumb's direct competitor. R. at 8.

After creditor ballots were reviewed, Development did not have an impaired accepting class of creditors. R. at 8. Under My Thumb voted to reject the plan and timely objected to the plan. R. at 8. Under My Thumb's objections were: (1) the proposed assumption of the Agreement was not permitted according to section 365(c)(1) of the bankruptcy code, and (2) the plan is not confirmable according to section 1129(a) of the bankruptcy code because no impaired class of creditors of Development had voted to accept it. R. at 8.

The bankruptcy court held that Development is permitted to assume the executory contract, pursuant to section 365(c)(1) of the bankruptcy code. R. at 9. The bankruptcy court also held that

Development, fulfilled all the requirements under section1129(a)(10) of the bankruptcy Code, 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 rulings of the bankruptcy court. The United States Court of Appeals for the Thirteenth Circuit, considering the appeal of Under My Thumb, Inc., reversed the bankruptcy court's ruling on both issues. The Supreme Court of the United States then granted the Debtors petition for writ of certiorari. R. at 9.

Summary of the Argument

First, Development is prevented from assuming the non-exclusive license because it violates the express language of section 365(c)(1) of the bankruptcy code.

Section 365(c)(1)(A) does not create any conflict with other provisions of section 365. When a statute does not create conflict, it is clear. When the express language in the statute is clear, it is unnecessary to go further. The plain language of section 365(c)(1)(A) specifies the requirements a trustee, or debtor-in-possession, must meet in order to be precluded from assuming an executory contract. Recognized as the hypothetical test ("Hypothetical Test") among many circuit courts, a debtor-in-possession cannot assume any executory contract, if (i) an applicable non-bankruptcy law prevents the debtor-in-possession from assuming or assigning the executory contract and (ii) there is a potential assignee.

Section 365(c)(1)(B) further conditions assumption and assignment on consent of the non-debtor party to the executory contract. Under My Thumb, the licensor, granted a non-exclusive license (the "License") to Development which extended to its affiliated entities only. Under My Thumb restricted assignment or subleasing to others without its express written consent. Under My Thumb did not provide consent for the reorganized debtor company to assume the License. Rather, Under My Thumb objected to the reorganization plan whereby Debtors proposed to assume the License.

Notwithstanding the express language of the statute, permitting Debtors to assume or assign the License would create a distinct conflict between bankruptcy laws and non-bankruptcy laws. Bankruptcy laws cannot override other sources of law because it positions bankruptcy in direct opposition with other state and federal laws. This Court has ruled that bankruptcy courts are only permitted to rule on core bankruptcy matters. Permitting Debtors to assume the License, over the licensor's consent, will undermine applicable non-bankruptcy laws, such as, in this case, federal intellectual property law, which strictly prohibits assignment and assumption over a licensor's consent. Debtors may not assume or assign the License.

Second, Debtors reorganization plan may not be confirmed because all of the requirements under section 1129(a)(10) of the bankruptcy code were not satisfied.

Development had an obligation before the joint administration was granted. The obligation was for Development to present a plan and if the plan impaired a creditor, at least one impaired class of creditors was required to accept the plan. After joint administration was granted, Under My Thumb, as Development's only creditor, rejected the plan. This left Development without the vote of an impaired class of creditors. Thus, all of the requirements under section 1129(a)(10) of the bankruptcy code were not met.

The requirements under section 1129(a) should be assessed on a "per debtor" approach, consistent with the plain language of the statute. This approach requires each debtor to independently fulfill each requirement set forth therein.

Pursuant to the rules of construction, under section 102(7) of the bankruptcy code, Congress intended for singular terms in the bankruptcy code to include the plural. The plural version of "plans" is in alignment with the doctrine that each bankruptcy estate is separate and that bankruptcy rules cannot rewrite bankruptcy codes. Bankruptcy rule 1015(b)(4) allows a court to administer separate debtors under one case. This convenience provided does not alter the rights of the parties. A debtor that is obligated to submit a plan *before* using bankruptcy rule 1015 will be obligated to submit a plan *after* using bankruptcy rule 1015. Otherwise, rule 1015 would be rewriting the bankruptcy code.

If a debtor must have one impaired class of creditors accept the plan before applying bankruptcy rule 1015, they must also have one impaired class of creditors accept the plan after applying bankruptcy rule 1015. This result in consistent with Congress' intent. In 1978, Congress enacted section 1129(a)(10) to overturn cases that did not require any amount of creditor support. Congress' act indicates that some amount of support had to be gained for a plan to be confirmed. Without it, even if the debtor only had one creditor, the creditor could stop the bankruptcy.

Application of the per debtor approach will prevent debtors from circumventing rules as a way of lessening difficulty of bankruptcy. The purpose of joint administration is to be efficient as a means of keeping costs low and distributions high. A debtor that does not act in accordance with the rules, however, will experience a prolonged and difficult bankruptcy. The per debtor approach ensures that creditors can sit at the negotiation table with a degree of power. This is beneficial to all of bankruptcy and the parties involved.

Since the Debtors are precluded from assuming this executory contract pursuant to section 365(c)(1) of the bankruptcy code, and TDI did not fulfill the requirements under section 1129(a)(10), the thirteenth circuits' decision should be affirmed, and the bankruptcy court's decision should be reversed.

Argument

The facts in this case are undisputed. R. at 3. n. 1. Here, the Petitioners raise the legal questions of whether a non-exclusive license may be assumed under section 365(c)(1), and whether the requirements under section 1129(a)(10) were satisfied by each debtor. R. at 9. The issues addressed in this case are questions of law, thus a de novo review is applicable. *Pierce v. Underwood*, 487 U.S. 552 (1988). "When a court reviews an issue under a de novo standard of review, the court decides the issue without regard to the lower court's holding." *Bd. of Cty. Comm'rs v. L. Robert Kimball & Assocs.,* 860 F.2d 683, 686 (6th Cir. 1988).

(I) Section 365(c)(1) of the Bankruptcy Code Precludes a Trustee or Debtor-in-Possession from Assuming or Assigning a Non-Exclusive License as an Executory Contract

To define a word that is not in a statute, the common interpretation should be used. *In re Leefers*, 101 B.R. 24 (Bankr. C.D. Ill. 1989). The common interpretation of an executory contract is a contract requiring an obligation to be fulfilled by both parties. *In re Terrell,* 892 F.2d 469 (6th Cir. 1989). For example, imagine a family of five ("Family"). The Family consists of a mother, father, and three children. The Family enjoys riding the subway in New York City. For convenience, the Family decided to purchase a group subway ticket which they had to pay for on a monthly basis. The group ticket would be considered an executory contract because both parties owe an obligation to the contract. On the one hand, the transit company is obligated to provide the group ticket for the Family to ride the subway, while on the other hand, the Family is obligated to pay every month in order to use the group ticket.

Many circuit courts have also adopted the "Countryman's Test" to determine if a contract is executory within the scope of bankruptcy. *In re Texscan Corp.*, 107 B.R. 227 (9th Cir. 1989); *In re Crippin*, 877 F.2d 594 (7th Cir. 1989); *Lubrizol Enters. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985). According to the Countryman's Test, a contract is analyzed to determine if it is a executory contract at the time the bankruptcy petition is filed. *In re Magness*, 972 F.2d 689 (6th Cir. 1992). At the time of petition, the contract is executory if the debtor and the non-debtor had an obligation to fulfill on the contract (which if not fulfilled it would be considered a material breach). *Id.* Executory contracts may be recognized in many different forms.

For instance, equipment leases, rental agreements, service contracts, and non-exclusive licenses are examples of an executory contracts. *In re Texscan Corp.*, 107 B.R. 227 (9th Cir. 1989); *In re Crippin*, 877 F.2d 594 (7th Cir. 1989); *Lubrizol Enters. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985).

Here, the Debtors commenced chapter 11 cases in January 2016. R. at 6. In 2008, Under My Thumb and Development entered into an agreement for use of a software program as a non-exclusive license. R. at 5. Like the Family's group ticket, this agreement is an executory contract. As of the petition date, Under My Thumb and Development each had an obligation to fulfill according to the agreement. Under My Thumb was obligated to provide continued use of the software program to Development, while Development was obligated to pay a monthly fee for use of the software program. R. at 5. It would be a material breach of the agreement if either Under My Thumb or Development failed to satisfy their respective obligations under the agreement. As an executory contract, the agreement between Under My Thumb and Development is subject to section 365 of the bankruptcy code. Thus, the agreement between Development, a subsidiary of TDI, and Under My Thumb is an executory contract.

(A) Section 365(c)(1) of the Bankruptcy Code Prevents the Trustee from Assuming or Assigning a Non-Exclusive License

Section 365 of the Bankruptcy Code governs executory contracts. The express language of section 365(c)(1) is a specific provision that limits a trustee's or debtor-in-possession's general power to assume or assign an executory contract. Under section 365(c)(1), a trustee or debtor-in-possession is prevented from assuming or assigning an executory contract if two requirements are met. First, if there is an applicable law excusing the non-debtor party from performing to an entity other than the debtor or debtor-in-possession, the trustee is barred from assuming or assigning.

Second, if the non-debtor party does not consent to the assumption or assignment, the trustee is barred from assuming or assigning.

While the express language of the section 365(c)(1) simply provides a guideline when assumption or assignment is barred. Section 365(c)(1) also does not render other statutory provisions superfluous. A statute is clear when it does not render other provisions superfluous or cause conflict. *Surburban Teamsters of N. Ill. Welfare Fund v. C. H. Heist Corp.,* No. 86 C 5878, 1988 U.S. Dist. LEXIS 10374, 1988 WL 96326 (E.D. Ill. Sept. 8, 1988). The express language of section 365(c)(1) is clear because it does not create conflict with other provisions, nor does it create inconsistencies with other subsections of 365.

1. Section 365(c)(1)(A) Prevents Conflict with Other Sections under 365

The first requirement under section 365(c)(1), specifically section 365(c)(1)(A), is clear and any application outside this literal language would be an inaccurate interpretation of the statute. Section 365(c)(1)(A) is clear because it works in unison with other statutory provisions such as 365(a), 365(f), and 365(e).

The relationship between section 365(a) and section 365(c)(1)(A) displays the harmony created with the express language of the statute. Section 365(a) governs executory contracts as whole. 11 U.S.C. § 365(a). Section 365(a) permits a trustee to assume or reject any executory contract or unexpired lease. 11 U.S.C. § 365(a). Under section 365(a), there are only two options containing an executory contract: assume or reject. 11 U.S.C. § 365(a). However, section 365(a) is subject to the limitation under section 365(c). Section 365(c) prevents the trustee from assuming or assigning an executory contract if the requirements under section 365(c)(1)(A) are met. 11 U.S.C. § 365(c). *Ohio Skill Games, Inc. v. Pace-O-Matic, Inc.,* 2010 Bankr. Lexis 2220 (Bankr. N.D. Ohio 2010).

When the Family obtained their group ticket, the subway company specified that each Family member had to pay an individual activation fee. The general rule governing group tickets, while payment of the activation fee is the exception to this general rule. This does not create a conflict or cause confusion. Instead, this creates harmony as both the general rule and the exception are necessary for full understanding.

Similarly, 365(c)(1)(A) and 365(a) operate in the same capacity to render full understanding. Section 365(a) is a general provision permitting a trustee to assume an executory contract. Section 365(c)(1)(A) is an exception to this general rule. For clear understanding, "statutes must be read as a whole", including provisions that are exceptions to the general rules. *U.S. v. Atl. Research Corp.*, 551 U.S. 128, 135 (2007). Section 365(c)(1)(A) is an exception because it provides a restraint on the trustee's or debtor-in-possession's general power to assume an executory contract. If Section 365(c)(1)(A) is applicable, then a trustee or debtor-in-possession may be prevented from assuming an executory contract if the requirements are not met.

Therefore, construing section 365 as a whole provides a clear understanding of the guideline when a trustee is permitted to assume an executory contract. Due to section 365(c)(1)(A) operating as an exception to the general rule in section 365(a), the two provisions are not in conflict with each other. Instead, both sections are required for full understanding when interpreting section 365 as a whole. Recognizing section 365(c)(1)(A) as an exception to Section 365(a), there is no conflict or inconsistency created rendering either provision superfluous.

Additionally, section 365(c)(1)(A) and section 365(f) are not in conflict. Section 365(f) generally permits a trustee to assign an executory contract. 11 U.S.C. § 365(f). Section 365(c)(1)(A) stops a trustee from assigning an executory contract. Similar to the relationship to 365(a), section 365(c)(1)(A) is an exception to section 365(f).

Within the express language of section 365(f), Congress displayed their intent to exclude section 365(c). The express language of section 365(f) contains the phrase, "except as provided in subsections (b) and (c)". 11 U.S.C. 365(f). Applying the plain language meaning shows Congress' intent in including the phrase "except as provided". The plain meaning of except is to exclude from a whole. *Camelot LLC v. AMC ShowPlace Theatres, Inc.*, Civil No. 10-4255 ADM/JJK, 2011 U.S. Dist. LEXIS 22605, 2011 WL 825681(Dist. Minn. Mar. 7, 2011). *Dinnerware Plus Holdings, Inc. v. Silverthorne Factory Stores, LLC,* 128 P.3d 245 (Colo. App. 2004). Congress included this phrase in the statute in order to prevent any anticipated inconsistencies with other provisions. *Murray v. Franke-Misal Techs. Group, L.L.C. (In re Supernatural Foods)*, 268 B.R. 759 (M.D. La. 2001). The phrase "except as provided", excludes subsection (c) from the remaining language of section 365(f). Thus, any applicable rule that is stated under section 365(f) is only effective if section 365(c) is not. *Id.* Section 365(c) operates as an exception to section 365(f) and does not create a conflict between the two provisions.

Further, Section 365(c)(1)(A) also does not conflict with section 365(e). Section 365(e) invalidates ipso facto clauses. 11 U.S.C. § 365(e). "An ipso facto clause is a clause that modifies or terminates the rights of a trustee or debtor-in-possession as a result of the debtor's bankruptcy filing." *Milford Power Co., LLC v. PDC Milford Power, LLC*, 866 A.2d 738 (Del. Ch. 2004). Pursuant to section 365(e)(1), ipso facto clauses are usually not enforceable and are rendered inoperative. 11 U.S.C. § 365(e)(1). However, an express exception is carved out of this general rule under section 365(e)(2)(A). Under section 365(e)(2)(A), if the contract involves an applicable law that excuses the non-debtor from performing to the debtor, the ipso facto clause is valid. Jennifer Ying, *The plain meaning of Section 365(c): Tension between bankruptcy and patent law in patent licensing*, Vol. 158: 1225, March 17, 2010. The express language under 365(e)(2)(A) explicitly states that the first paragraph in section 365(e)(1) is not applicable to executory contracts involving an applicable law barring assignment. The language in 365(e)(2)(A) exactly mirrors the language in 365(c)(1)(A). Thus, 365(c)(1)(A) is applicable when section 365(e) is not. This is significant because it displays Congress' intent for the two provisions not to conflict with the other. *Nw. Wholesale, Inc. v. Pac Organic Fruit, LLC*, 184 Wn. 2d 176 (Wash. 2015). Congress made this intent clear as they utilized the exact language from 365(c)(1)(A) to include it in 365(e)(2)(A), in order to prevent any ambiguities. *Id.*

Thus, section 365(c)(1)(A) is not subject to multiple interpretations or misinterpretations as it does not render other provisions of the bankruptcy code inconsistent or superfluous; and, further, it does not cause conflict with other provisions of the bankruptcy code. Rudolph J. Di Massa Jr., Duane Morris LLP & Matthew E. Hoffman, *Assumption and Assignment of IP License Agreements in Bankruptcy: Circuit Split Continues*, 27-2 ABIJ 20, March 2008.

2. A Licensor's Consent is Required under Section 365(c)(1)(B)

Section 365(c)(1)(B) requires a non-debtor's consent to the assumption or assignment of an executory contract. The application of this statute is simple, if the non-debtor party to the contract does not consent, the contract shall not be assumed or assigned.

A licensor may be a non-debtor party to an executory contract. *In re Sunterra*, 361 F.3d 257 (4th Cir. 2004). A licensor has the power to decipher the terms the license may contain, pursuant to the licensee's consent. Christopher M. Newman, *An Exclusive License Is Not an Assignment: Disentangling Divisibility and Transferability of Ownership in Copyright* (Aug. 13, 2013)*,* La. L. Rev., Vol. 74 No. 1, 2013. Licensors may determine who may receive the license, who may use the license, the manner the license may be used in, and even who the license may be given to. Similarly, licensors also have the right to consent or object to a licensee's assumption or assignment of a license. John S. Leibovitz, *Iventing a Nonexclusive Patent Systemt,* 111 Yale L.J. 225, June 2002. Thus, new licensees, such as a reorganized debtor entity, must receive a licensor's consent to use a license.

A reorganized debtor is a new entity. *ASARCO LLC v. Union Pac. R.R. Co.*, 755 F.3d 1183 (10th Cir. 2014). Although a debtor company may have obtained the consent of the licensor prior to filing for bankruptcy, a licensor has the right to prevent a reorganized debtor from using the license. John S. Leibovitz, *Inventing a Nonexclusive Patent System,* 111 Yale L.J. 225, June 2002. Once a reorganization plan has been confirmed and is effective, the debtor no longer exists for the purpose of bankruptcy. *ASARCO LLC v. Union Pac. R.R. Co.*, 755 F.3d 1183 (10th Cir. 2014). After the new entity is created, the new entity is no longer subject to the jurisdiction of the bankruptcy court. *In re Briscoe Enters.,* 138 B.R. 795 (Bankr. N.D. Tex. 1992). Essentially, the reorganized debtor replaces the debtor once the plan is confirmed and effective. *In re Elec. Maint. & Constr., Inc.,* No. 8:11-bk-18670-CED, 2016 Bankr. LEXIS 2054 (M.D. Fla. 2016). It is a goal of bankruptcy, for the reorganized debtor to enjoy a fresh start as a new company and not suffer the obligation of paying the debtor company's deficiencies. *In re Omni Lion's Run, L.P.*, 578 B.R 394 (W.D. Tex. 2017). The reorganized debtor company is considered a separate and distinct new entity, regardless if the overall structure of the company is the same. As a new entity, separate from the prior company, the consent from a licensor must be given in order to assume or assign a license.

While registering for the Family's group subway ticket, a problem arose. According to Federal Transit Laws, each individual is required to provide their own driver's license in order to be listed on the group ticket registration form. Two of the children in the Family are identical twins. While the identical twins physically look the same, they are still two different people and are not permitted to share the same license. As such, they are each required to provide their own driver's license in order to receive their own individual registration form to complete for the Family's group ticket. Similarly, regardless of how similar a reorganized debtor is to the prior bankrupt entity, consent must be obtained from licensor in order to use the license.

Just as the identical twins were prevented from sharing the same license, the reorganized debtor in this case may not use the same license as the Debtors, or its subsidiaries. In this case, the Debtors proposed a chapter 11 reorganization plan which, if confirmed, will result in the new reorganized debtor company being a new and distinct entity. R. at 7. The reorganized company will enjoy new shares and interest. R. at 6. While it may operate in the same manner, the reorganized debtor company still requires the consent of the licensor to use the Software because it is a new entity. After a close reading of the reorganization plan proposal, Under My Thumb became aware that Sympathy for the Devil would receive majority voting shares. R. at 7. Under My Thumb also learned Sympathy for the Devil would receive several seats on the reorganized debtor company's board. R. at 7. After learning this information, Under My Thumb objected the reorganization plan, which proposed to assume the software license. R. at 8. Under My Thumb's objection showed that consent was not given to the reorganized debtor company. Thus, the reorganized debtor company is prevented from using the License.

The court of *In re Catapult* addressed whether a new entity is required to obtain a licensor's consent. In the *In re Catapult* case, a California corporation created an online gaming network, and entered into a license agreement with Pearlman. *In re Catapult Ent.*, 165 F.3d 747 (9th Cir. 1999). Pearlman granted the right to exploit certain relevant technologies, including patents. *Id.* Catapult filed for a Chapter 11 Bankruptcy, and as part of the reorganization plain, sought to include the Pearlman license over Pearlman's objections. *Id.* The *In re Catapult* court analyzed the license itself, holding it is an executory contract that is subject to section 365(c). *Id.* The court held that a licensor's consent is required for the contract to be transferred. *Id.* The court reasoned that the licensor has the power to determine if the license may be transferred within its rights as a licensor. *Id.* The court also found the license could not be assumed over the licensor's objections. *Id*.

The facts of *In re Catapult* are analogous to this case. Under My Thumb granted the non-exclusive license to use the software program. R. at 5. As such, Under My Thumb is the licensor and the non-debtor party. R. at 5. Development, a subsidiary of Tumbling Dice, Inc., was granted the non-exclusive license to use the Software and was permitted to extend the benefits to its affiliated entities only. R. at 5. Thus, Development is the licensee. R. at 5. The Debtors filed a chapter 11 bankruptcy and filed a reorganization plan proposing to assume the executory contract. R. at 7. However, upon confirmation of the reorganization plan, each Debtor will be a new reorganized debtor company. The consent of Under My Thumb is required for the reorganized debtor company to use, assume, or assign the License. However, Under My Thumb objected to the reorganization plan. R. at 8. As the court held in *Catapult*, without consent, a reorganized entity is barred from assuming or assigning the License. Consent was not given by Under My Thumb, as the licensor, to the Debtors to assume, assign, or use the license as a reorganized debtor company. Thus, the Debtors, and its subsidiaries, are prevented from assuming or assigning the license.

(B) The "Hypothetical Test" Recognized under Section 365(c)(1)(A) Prevents the Debtors from Assuming or Assigning a Non-Exclusive License

Section 365(c)(1)(A) has been widely recognized by the majority of circuit courts as the Hypothetical Test, which is also synonymous with the Literal Test. *In re Catapult Ent.,* 165 F.3d 747 (9th Cir. 1999); *In re West Elect., Inc.,* 852 F.2d 79 (3rd Cir. 1988); *In re Techdyn Sys. Corp.*, 235 B.R. 857 (Bankr. E.D. Va. 1999). Generally, the express language of 365(c) limits a trustee's power to assume or assign any executory contract. Under section 365(c)(1)(A), the express language includes a requirement that must be met in order for a trustee to be prevented from assumption or assignment. The requirements under section 365(c)(1)(A) are "there is an applicable law … that excuses performance to an entity other than the debtor or debtor-in-possession." 11 U.S.C. § 365(c)(1)(A).

In re Techdyn explained the Hypothetical Test is derived from the literal language of section 365(c)(1)(A). Under the Hypothetical Test, a debtor-in-possession may not assume an executory contract over the non-debtor's objection if applicable law would stop assignment to a hypothetical party. *In re Techdyn Sys. Corp.*, at 857. This is true even where the debtor-in-possession has no intention of assigning the contract in question. *Id*. The application of the Hypothetical Test directs the courts to determine whether there is a non-bankruptcy applicable law that contains a prohibition on assignment. The Hypothetical Test must also assume the existence of a hypothetical assignee who is able to perform the contract. *Id*. The same requirements presented in section 365(c)(1)(A) must also be met in the application of the Hypothetical Test. One, is there an applicable law? Two, does the applicable law contain an absolute prohibition against assignment without consent?

1. The Applicable Law is Federal Intellectual Property Law

The first question is a determination of whether there is an applicable law available. For purposes of section 365 of the bankruptcy code, "applicable law" means applicable non-bankruptcy law. *In re Pioneer Ford Sales*, 729 F.2d 27 (1st Cir. 1984). If there is an applicable law available, it is appropriate under section 365(c)(1)(A).

Under My Thumb granted Development a non-exclusive license to the Software. R. at 5. The Software consisted of Under My Thumb's creation of a comprehensive, integrated software system to modernize the Debtors casino loyalty program. R. at 4. Under My Thumb specializes in creating software programs specific to reservations and customer loyalty for the hospitality industry. R. at 4. After Under My Thumb invented this program, an agreement regarding the License was entered between the parties. R. at 5. The agreement specified that Under My Thumb granted Development a non-exclusive license to use the Software for itself and its affiliates only. R. at 5. The Software is a patented and copyrighted software program. R. at 5.

Copyright is considered intellectual property. Copyright is a protection of original authored work, including literary, musical, and artistic interest. *IQ Grp v. Wiesner Publ'g, Inc.*, 409 F. Supp. 2d 587 (D.N.J. 2006). "Copyright law focuses on the value of creativity and protects against misappropriation." *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772 (5th Cir. 1999). A copyright license is a license to use the copyrighted artistic work. *Point Prods. A.G. v. Sony Music Entm't*, 93 Civ. 4001, 2000 U.S. Dist. LEXIS 10066 (S.D.N.Y. July 19, 2000). The plain meaning provides it is a right to use protected work or information.

Patent is considered intellectual property. 11 U.S.C. § 101(35A)(c). The Patent Act of 1952 governs patents, and their assignability. A patent is a right, privilege, or an authority granted. Black's Law Dictionary 1300 (10th ed. 2014). Patent law is the right to exclude others from using a particular invention. *Mylan Pharms., Inc. v. U.S. FDA*, 594 Fed. Appx. 791 (4th Cir. 2014). "A Patent license is a specific policy of federal patent law … federal law applies to the question of the assignability of the patent license in question." *Troxel Mfg. Co. v. Schwinn Bicycle Co.*, 465 F.2d 1253 (6th Cir. 1972). Application of the plain meaning provides a patent license is the permission granted to use a particular invention.

Article I, Section 8 of the U.S. Constitution gives Congress the authority to grant authors and inventors copyright and patent rights. U.S. Const. art. I, § 8. Federal intellectual property law governs both patents and copyrights. Federal intellectual property law is a combination of well-established state and federal laws intended to protect intellectual property. *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008). In order to weigh author's interests and inventions, intellectual property law has produced many rules over the past few centuries. One of the rules that have been developed over decades limits a federal intellectual property license and its assignability without the licensor's consent. Under Federal Intellectual Property Law, copyright and patent holders must provide consent for certain licenses to be transferred. *Evolution, Inc. v. Prime Rate Premium Fin. Corp.*, No. 03-2315-KHV, 2004 U.S. Dist. LEXIS 25017 (D. Kan. Aug. 13, 2004). Here, the software is patented and copyrighted and thus it is appropriate to apply federal intellectual property law as the applicable law.

2. Federal Intellectual Property Law Prohibits Assignment of a Non-Exclusive licenses

The second inquiry is determining if the applicable law contains a prohibition against assignment. An exclusive license is restricted to one person or entity to use the particular license; however, a non-exclusive license is a license granting permission for more than one person or entity to use one license. Under federal intellectual property law, non-exclusive licenses are not transferrable without the licensor's consent. 35 U.S.C. § 261.

Federal intellectual property law focuses on the nature of a license itself and has deemed licenses as personal and non-delegable. *Everex Sys. v. Cadtrak Corp. (In re CFLC, Inc.)*, 89 F.3d 673 (9th Cir. 1996). A license is simply permission to use or do something in particular. *In re Catapult Ent.,* 165 F.3d 747 (9th Cir. 1999). Since licenses are a personal right and not a property right, licenses are granted on a personal basis by the licensor. *Everex Sys. v. Cadtrak Corp. (In re CFLC, Inc.)*, 89 F.3d 673 (9th Cir. 1996). The long-standing federal rule of law with respect to the assignability of patent license agreements provides, license agreements are personal to the licensee and not assignable unless expressly made so. *Unarco Indus. v. Kelley Co.*, 465 F.2d 1303 (7th Cir. 1972). A license without the express words stating it is transferable is only an allowance for the licensee to use. *Troy Iron & Nail Factory v. Corning*, 55 U.S. 193 (1852). As a personal right, in order for others to be permitted to use the license, the licensor must provide consent. While a license may be exclusive or non-exclusive, it does not change the nature of the license itself.

For example, if one individual in the Family purchased an individual subway ticket, this would be considered an exclusive license. The individual ticket is an exclusive license because the use of the ticket is only permitted for one individual, the purchaser of the ticket. In contrast, the Family's group ticket is a non-exclusive license. The group ticket is a non-exclusive license because each member of the Family is permitted to use the license. While each member is permitted to use the license, the rules and terms regarding use of the license must still be followed by each individual. Though the license is non-exclusive, it is still a personal license to each individual who is permitted to use the license. The group ticket simply encourages a more convenient means to use the subway.

The record is clear that the Software license granted to Development by Under My Thumb is a non-exclusive license, the benefits of which extended to Development's affiliated entities only. R. at 5. The chapter 11 reorganization plan (the "Plan") filed by the Debtors proposed to assume the license. R. at 6. Thus, upon confirmation of the Plan, the reorganized debtor, Development, and its affiliated entities, would continue to make monthly payments for the use of the Software to Under My Thumb. R. at 7. In accordance with the terms of the Agreement, Under My Thumb was excused from rendering performance to an entity other than Development and its affiliates. R. at 8. After confirmation of the Plan, the reorganized debtor will essentially be a new entity. *ASARCO LLC v. Union Pac. R.R. Co.*, 755 F.3d 1183 (10th Cir. 2014). As a new entity, assumption of the

Agreement is impermissible without the express consent from Under My Thumb, as the licensor. Under My Thumb did not consent. R. at. 8. The non-exclusive license did not, by its terms, grant the reorganized debtor a personal right to assume the Software. R. at 8. Since the license to use the software was a personal license granted to the Debtors, the reorganized debtors are prevented from assuming, assigning, or using this non-exclusive license altogether.

In addition, when a debtor has the ability to assign the license, the Hypothetical Test prohibits assumption or assignment due to the applicable law's prohibition. "A debtor-in-possession may not assume an executory contract over a non-debtor's objection if applicable law would bar assignment to a hypothetical party, even where the debtor-in-possession has no intention of assigning the contract in question to any such party." *In re Neuhoff Farms, Inc.*, 258 B.R. 343, 350 (Bankr. E.D. N.C. 2000). The Hypothetical Test must anticipate the existence of an assignee who has the ability to perform the contract. *Id* at 343. It must be determined if there is a party who may receive and perform this non-exclusive license. If there is, the party is considered a hypothetical party because they are a potential assignee. *In re Hernandez*, 285 B.R. 435 (D. Ariz. 2002). It is immaterial if there is actually a third-party available desiring to receive the assignment. *Id*. Intent of the hypothetical assignee is not the determining factor in this prong. If it is determined that a third party may receive the assignment of the license, both assumption and assignment of the license is prohibited under the Hypothetical Test.

As holder of the license, Development has the ability to assign the license to many potential third parties. First, Development may assign the license to the new reorganized company. The reorganized company has the ability to perform the license, and although it is not required, they also have the intent to take over the license. The intent of the reorganized company to assume the license is illustrated in the proposed Plan to assume the License. R. at 7. Second, the license may be assigned to a competitor of Under My Thumb, listed in Sympathy for the Devil's portfolio. R. at 8. Sympathy for the Devil will own the majority of the reorganized debtor's company voting shares. R. at 8. Sympathy for the Devil's portfolio of companies includes a direct competitor of Under My Thumb, who has tried to replicate the Software for years. R. at 8. Sympathy for the Devil, as a new investor in the reorganized company, would have the ability to receive assignment of the license. Third, Start Me Up has the capability to receive the assignment of the license. Start Me Up, a hedge fund, acquired the stock of TDI. R. at 6. Investing in the new reorganized company, Start Me Up has the ability to receive the assignment of the license. There are multiple parties and entities that have the ability to receive assignment of the license, deeming them a hypothetical party. Accordingly, with each prong of the Hypothetic Test having been met, the trustee or debtor-in-possession is precluded from assuming the executory contract.

(C) Bankruptcy Laws Shall Not Circumvent Other State and Federal Laws

The Family agreed to the terms of the group ticket. Those terms included each individual paying their own registration fee, and only the five registered Family members were permitted to use this non-exclusive license. However, the Family broke those terms. The Family permitted their longtime friend to use the group ticket which is a direct violation of the license. While this seems minuscule, the repercussions of this violation are significant. If the Family's friend is permitted to use this license without the licensor's consent, this will enable others to do the same. The friend using this ticket may give the ticket to a co-worker. The co-worker may give the ticket to a neighbor. The neighbor may give the ticket to a stranger. While this group ticket is being assigned to multiple people without the licensor's consent, Federal Transit Laws, as well as the express language of the contract, are being completely ignored and disregarded. This will cause licensor's rights to be abused, and licensees will continue to take advantage of a personal license.

The same effect will occur in this case if the Debtors are permitted to assume this non-exclusive license. Under My Thumb did not consent to Development sharing this non-exclusive license with anyone other than its affiliates. R. at 5. The reorganized debtor company is not an affiliate. Development is attempting to circumvent this covenant in the agreement, which may incentivize other licensees to do the same. Permitting reorganized debtors, and its reorganized debtor affiliates, to assume this non-exclusive license will override a licensor's rights. The licensor's terms would be invalidated and completely ignored. The Debtors cannot be allowed to simply file for bankruptcy and ignore the terms they agreed to prior to filing a petition.

Federal intellectual property laws have expressly ruled that non-exclusive licenses are not delegable. *Unarco Indus. v. Kelley Co.*, 465 F.2d 1303 (7th Cir. 1972). These laws have singled out non-exclusive licenses specifically, ruling that non-exclusive license must not be assigned without a licensor's consent. *Id.* Bankruptcy courts cannot simply rule that the Debtors may ignore the Federal Laws and permit them to assume the license for the software program. *Stern v. Marshall*, 564 U.S. 462 (2011). Permitting the Debtors to do so will undermine the federal intellectual property law established since 1952. Bankruptcy courts may not be used in order to circumvent other laws that have been set. Applicable non-bankruptcy law has established a red line rule regarding non-exclusive licenses. 35 U.S.C. § 261 (2019). Non-exclusive licenses cannot be assigned without a licensor's consent, otherwise federal intellectual property law would be violated. 35 U.S.C. § 261 (2019).

The Family had responsibilities to comply with the terms of their agreements and failing to fulfill those terms permitted the licensors to deny access to the license. The identical twins were not permitted to trump the Federal Transit Laws and share the same identification card to register for the group ticket. The Family was not permitted to trump the contract laws and permit a friend to use their group ticket to enter the subway. Equally so, the Debtors, and all of its subsidiaries, are not permitted to circumvent the federal intellectual property law and assume or assign the non-exclusive license as an executory contract.

The Debtors, including all of its subsidiaries, shall be prevented from assuming or assigning this non-exclusive license as an executory contract. Thus, pursuant to section 365(c)(1) of the bankruptcy code, the Thirteenth Circuit's decision should be affirmed.

(II) Development Did Not Satisfy Section 1129(a)(10) and Cannot Confirm the Plan

The facts in this case are not disputed. R. at 3. The only issues on appeal are interpretations of a statute. A question of statutory interpretation is a question of law, which the Court reviews *de novo*. *Rael v. Wells Fargo Bank, N.A (In re Rael)*, 527 B.R. 799 (B.A.P. 10th Cir. 2015). "De novo review requires an independent determination of the issues, giving no special weight to the bankruptcy court's decision." *Id.* Therefore, when the court reviews an issue *de novo*, the court disregards the lower court's holding and considers the case anew. *Id.*

(A) Jointly Administered Estates Remain Separate Estates Each Accountable for Meeting Their Own Requirements

"Joint administration allows closely related debtors, such as subsidiaries and affiliated companies, to file joint bankruptcy petitions." *In re* Coles, 14 B.R. 5 (E.D. Pa. 1981). Joint administration is simply a tool used for procedural efficiency in the court system. *In re Reider,* 31 F. 3d 1102 (11th Cir. 1994). The purpose of joint administration is to encourage easier administration aspects and to eliminate multiple filing fees. *Id.* While joint administration creates ease, it does not create substantive rights in bankruptcy. In addition, joint administration does not eliminate requirements that must be fulfilled within the bankruptcy code.

For example, when a debtor files for bankruptcy there are a list of requirements that a debtor (or a debtor-in-possession) must fulfill in order to receive a discharge. *Czyewski v. Jevic Holding*

Corp., 137 S. Ct. 973 (2017). A requirement of the trustee (or debtor-in-possession) to file a reorganization plan. 11 U.S.C. § 1106(a)(5). Pursuant to section 1107(a), a debtor-in-possession will have the same duties and responsibilities as a trustee. 11 U.S.C. § 1107. Thus, a debtor-in-possession is also required to file a reorganization plan and must do so after joint administration.

This requirement does not differ when a case is jointly administered. Joint administration is simply another means to encourage judicial economy, not change the requirements each debtor is obligated to fulfill. Separate estates that use the efficiency procedural tool of joint administration are still required to meet their own sperate requirements. The purpose of joint administration is solely for judicial economy.

1. The Purpose of Bankruptcy Rule 1015 is Only for Judicial Economy

Cases are jointly administered under bankruptcy rule 1015. When a case involves closely related debtors, bankruptcy rule 1015 permits the case to be jointly administered. Fed. R. Bankr. P. 1015. This method removes the requirement to submit the same documents multiple times, regarding the same case or the same debtors. Fed. R. Bankr. P. 1015. This method also removes the strain of having to pay multiple filing fees for similar situated cases. Fed. R. Bankr. P. 1015.

The bankruptcy rules were created so that bankruptcy courts could administer bankruptcy cases with greater efficiency. Fed. R. Bankr. P. 1001. Bankruptcy rule 1015 is used to serve judicial economy by procedurally combining the estate. *In re Reider*, 31 F.3d at 1102. While the procedural matters are combined, the substantive rights of both the debtors and the creditors remain the same. Fed. R. Bankr. P. 1015.

The court of *In re Hemingway Transp. Inc.* held that courts may grant joint administration after a debtor files an application to the court. *In re Hemingway Transp. Inc.*, 954 F.2d 1 (1st Cir. 1992). Usually, these motions are submitted and heard during the first day hearings. *Id*. In the case *In re Hemingway Transp. Inc.*, the debtors filed for bankruptcy and each debtor filed their own application for joint administration. *Id*. If approved, the court will issue a single order that applies to each of the debtors and will post it to the new joint docket. *Id.* As a result, all of the court's announcements or rulings and any creditors' applications or motions will be posted in the same place for each debtor. Through this method, the administrative costs may be lowered bankruptcy, which will result in an estate receiving more money to pay its creditors. However, this cannot alter or change the rights of any party in bankruptcy. *In re Rider*, 31 F.3d at 1102. Joint administration is purely an administrative option to consolidate the case management system. *Id.* Thus, the estates remain separate estates. *Id.*

In re Hemingway is analogous to this case in order to ensure judicial economy. In this case, there are ten debtors. R. at 2 n. 1. All ten Debtors are involved in the same bankruptcy case. R. at 2 n. 1. The Debtors are all operated by the same company. R. 4. All of the Debtors filed the same chapter of bankruptcy. R. at 6. Since this case involves multiple debtors in the same case, joint administration under bankruptcy rule 1015 is encouraged. However, application of bankruptcy rule 1015 is only encouraged for purposes of judicial efficiency in order to prevent additional court cost and permit all debtors to be informed about the progress of their case.

Consider this scenario. For a single subway ticket, a single individual is required to submit the registration form, pay a registration fee, agree and sign to the terms to use the ticket, and provide identification. This process has to be completed for each individual every time they purchase an individual subway ticket. Imagine if this process took one hour to complete for one individual. If the Family, as a group of five people, attempted to complete this task at the same time, this could take up to five hours. It simply would be more efficient to process all the documents of each individual at one time. Purchasing a group ticket will eliminate four hours of hassle. Thus, every individual will still be able to register and receive a ticket, however it will be processed as a group in a more efficient manner.

The same analogy is applicable in comparison to bankruptcy rule 1015. A party's use of bankruptcy rule 1015 does not change the debtors' rights or obligations. *In re Reider*, 31 F.3d at 1102 (11th Cir. 1994). This rule operates to provide more efficient methods when there are multiple debtors involved in one case. Bankruptcy rule 1015 is used to consolidate the procedural aspects of a case to serve judicial economy. *In re Reider*, 31 F.3d at 1102 (11th Cir. 1994). Through this method, the court can lower the administrative cost of bankruptcy. Lower administrative cost will lead to an estate having more money. In this case, Development had an obligation to submit a plan for its reorganization. 11 U.S.C. § 1106(a)(5). When Development filed its bankruptcy in January 2016, the bankruptcy code tasked Development with filing a plan under section 1106. Application of bankruptcy rule 1015 does not change Development's obligations. Relieving Development from filing their own plan would mean that bankruptcy rule 1015 would be altering Development's obligations.

Joint administration is also encouraged because it aligns with the doctrine of separateness. The doctrine of separateness is the necessity to keep each estate separate from the others to maintain the legal borders that each respective debtor possesses. *In re Reider*, 31 F.3d at 1102. When multiple estates are administratively combined, nothing should change between each debtor's obligations or rights. *Id.* Joint administration is a protection for each party. After joint administration, entities remain separate and each debtor is only answerable to their own creditor. Through this method, no debtor is subjected to the claim of another creditor and its assets are safe from a foreign creditor's reach. The benefit to the creditors is that competition is eliminated from foreign creditors. Accordingly, the debtor's assets are protected from creditors of a different debtor. *In re Las Torres Dev., LLC.*, 413 B.R. 687 (Bankr. S.D. Tex. 2009).

Here, the Debtors have procedurally combined their estate using bankruptcy rule 1015. R. at 3. As such, each debtor remains their own separate bankruptcy case. Under My Thumb has an unsecured claim only against Development. R. at 7. The doctrine of separateness ensures that Development is liable to its only creditor, Under My Thumb. R. at 7. The clear distinction of estate division ensures that Development is not at risk of losing assets to a creditor it did not transact with. As the only creditor, Under My Thumb does not have to compete with foreign creditors. The only change is the location and the system for managing the proof of claims, notices, and other hearings. Due to their individual status, their obligations do not change.

However, even after application of bankruptcy rule 1015, every debtor in each estate is still required to meet all the requirements under section 1129 of the bankruptcy code. Bankruptcy rule 1015 does not create one estate, and the estates remain separate estates. *In re Goldstein,* 383 B.R. 496 (C.D. Cal. 2007).

2. Development is a Separate Estate Required to Satisfy Section 1129

Section 1129 specifies the requirements that each debtor is required to fulfill before a reorganization plan is confirmed. Application of bankruptcy rule 1015 does not negate those requirements. If Development is tasked with satisfying a requirement under section 1106 *before* rule 1015 is used, then that debtor should have the same obligations *after* rule 1015 is used.

For example, a jointly administered debtor is not responsible to pay for another debtor's administrative expenses. *In re Las Torres Dev., LLC.*, 413 B.R. 687 (Bankr. S.D. Tex. 2009). The *Las Torres* court rejected the non-operating debtor's motion to use the operating debtor's cash collateral to pay its attorney fees. *Id.* In denying the debtor's motion, the court found that the obligations of the first debtor would only remain to that debtor as joint administration did not alter the rights or obligations of the debtors. *Id.* Breaking down the barriers between the two debtors was beyond the scope of joint administration, the court ruled that each debtor was accountable for their own bankruptcy. *Id.*

The sixth circuit Bankruptcy Appellate Panel agrees with *In re Reider* and *Las Torres* in holding that joint administration is nothing more than a procedural tool. *In re Appalachian Fuels, LLC*, 493 B.R. 1 (B.A.P. 6th Cir. 2013) (*In re Reider,* 31 F. 3d 1102 (11th Cir. 1994). The court in *Appalachian* rejected a creditor's administrative claim against one of the co-debtors because the creditor's claim could not extend past the creditor's own debtor in a jointly administered estate. *Id.* The court ruled that the joint administration did not alter the obligations or liabilities of the debtors. *Id*

Similar to the *Las Torres* and the sixth circuit's ruling, Development is a separate estate. However, all the requirements under section 1129 were not met by Development. When Development filed for bankruptcy in January 2016, the bankruptcy code tasked Development with investigating itself and filing a plan. The fact that Development is a joint debtor cannot change these obligations. Otherwise, bankruptcy rule 1015 would be rewriting the requirements under section 1106. The only legal way for debtors to circumvent the individual nature of section 1129(a) is to mold their estates together using a doctrine known as "substantive consolidation." However, this estate was not substantially consolidated.

Substantive consolidation is not defined or construed in the bankruptcy code. Substantial consolidation is a doctrine created by the courts under their powers to rule in equity. *Alexander v. Compton (In re Bonham)*, 229 F.3d 750 (9th Cir. 2000). A court's order to substantively consolidate debtors will break down the legal boundaries separating distinct entities in order to combine the debtors' assets, creating a single fund from which all the claims are paid. *Id.* The court of *In re Flora Mir Candy Corp* has held that substantive consolidation should be used sparingly. *In re Flora Mir Candy Corp.*, 432 F.2d 1060 (2nd Cir. 1970). Substantial consolidation shall be used sparingly because it treats creditors unfairly. *Id.* Creditors are treated unfairly because substantive consolidation forces them to interact with entities other than their original business partners. *Id.* The test for whether substantive consolidation is appropriate is: (1) whether the creditors dealt with the entities as a single unit or (2) whether the debtors are so entangled that consolidation will benefit all creditors. *Id.* at 766.

In this case, the estate is not substantially consolidated. The plan expressly states, "the Debtors' estates are not being substantively consolidated, and no Debtor is to become liable for the obligations of another." R. at 7. This is the quintessential language to emphatically dispel any notions of substantive consolidation. The individual estates remain separate estates with their own, individual obligations to be satisfied under section 1129.

(B) A Debtor or Debtor-in-Possession is Required to Satisfy All the Requirements Under Section 1129 Per Debtor Approach

Section 1129 of the bankruptcy code provides the requirements that all debtors must satisfy before a reorganization plan is confirmed. This section provides debtors with these guiding measures in the form of a checklist. The prefatory language of bankruptcy code section 1129(a) requires the proponent of a plan to prove that the plan satisfies the requirements under section 1129(a). *Buffalo Sav. Bank v. Marston Enters.*, 13 B.R. 514 (Bankr. E.D.N.Y. 1981) (Duberstein, J.). Persons who file petitions and notices are considered proponents in bankruptcy cases. *Id.* A debtor in bankruptcy who proposes a plan will be a "proponent" of a plan and will be tasked with proving the elements necessary for confirmation. In a separate estate, each individual debtor must meet every requirement before confirmation.

Section 1129 governs the requirements a debtor must meet to receive confirmation of a plan. 11 U.S.C. § 1129(a). Within section 1129, there are sixteen requirements that must be met. *Id.* Here, only section 1129(a)(10) is at issue because it is the only objection being reviewed. Under section 1129(a)(10) "if a class of claims is impaired under the plan, at least one of the impaired classes under the plan has accepted the plan, determined without including any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(10).

A class is a collection of similarly situated claims. 11 U.S.C. § 1122. The class of claims is deemed to have accepted the plan if more than half of the number claimants in the class accept the plan, and their total value of claims is equal to or greater than two-thirds of the amount. 11 U.S.C. § 1126(c). The term cramdown is often used in relation to section 1129(a)(10). A "cramdown" plan means that the plan may be confirmed even though some classes rejected the plan. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639 (2012). Under a cramdown, a debtor must have at least one class of claims to accept the plan according to requirements under 1129. Section 1129(a)(10) supports a per debtor approach.

1. Section 1129 as a Whole Requires the Per Debtor Approach

Statutory interpretation begins with the express language of the statute. *King v. St. Vincent's Hosp.*, 502 U.S. 215 (1992). Statute cannot be read to create an absurd result. *Lamie v. U.S. Tr.*, 540 U.S. 526 (2004). Interpreting section 1129 as a whole requires the per debtor approach. *In re Tribune Co.*, 464 B.R. 126 (Bankr. D. Del. 2011). The per debtor approach prevents an absurd result, requiring only some debtors to follow the bankruptcy code. Congress's intent to ensure a per debtor approach may be shown in many different statutory provisions, such as sections 1129(a)(2), 1129(a)(3), and 1129(a)(11).

For instance, section 1129(a)(2) states that "the proponent of the plan complies with the applicable provisions of this title." 11 U.S.C. § 1129(a)(2). Development is treated as the proponent. Development is required to submit a plan under section 1106(a). If Development did not submit a plan, then it failed to meet a requirement under 1106(a)(5). If the requirement under section 1106(a)(5) is not met, neither is section 1129(a)(2) preventing confirmation of the plan. In order to prevent failing section 1129(a)(2), the joint plan must be considered Development's own plan. Based on Development's independent obligation to submit a plan, Congress intended section 1129(a)(2) to be read as a per debtor requirement.

Additionally, section 1129(a)(3) requires a per debtor approach. The code requires that "[t]he plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). The issue presented by this statute is that Congress wrote it in the passive voice. The words "has been proposed" indicates that someone has presented the plan. The actors, "debtor" or "proponent" are inherent nouns within the statute. *In re Las Torres Dev., LLC.*, 413 B.R. 687 (Bankr. S.D. Tex. 2009). Applying a per debtor approach to section 1129(a)(3) is in accordance with the language of the statute because each debtor is required to act in good faith. Requiring each debtor to be tested for good faith under section 1129(a)(3) ensures other debtors to act in good faith. Every debtor is individually tested to ensure that each debtor proposed the plan in good faith.

Lastly, section 1129(a)(11) requires that "[c]onfirmation is not likely to be followed by the liquidation…of the debtor." 11 U.S.C. § 1129(a)(11). This liquidation analysis test requires the plan's proponents to show proof that the bankruptcy is likely to be successful based on the plan. *In re Toy & Sports Warehouse, Inc.*, 37 B.R. 141 (Bankr. S.D.N.Y. 1984). The express language under section 1129(a)(11) includes the word "debtor". Using the singular form of debtor, also includes the plural interpretation. 11 U.S.C. § 102(7). Thus, the word debtor means debtors.

Reading the entire statute reveals that in order for a jointly administered bankruptcy to meet the requirements of the bankruptcy code, the joint plan must be treated as if it was each debtor's own plan. Further, because each debtor has their own plan to submit, they should be tested independently against the bankruptcy code's requirements. Section 1129 as a whole represents the per debtor approach. A per debtor approach will ensure that Development's plan must comply with the title's provisions, section 1129(a)(2); that Debtors plan was presented in good faith, section 1129(a)(3); that Development's plan is not likely to lead to Development's liquidation, section 1129(a)(11). As such, section 1129(a)(10) also requires a per debtor approach.

2. Section 1129(a)(10) Specifically Requires the Per Debtor Approach

Section 1129 of the bankruptcy code states, "if the plan impairs a class of creditors, then at least one class of creditors approves the plan." 11 U.S.C. § 1129(a)(10). Thus, a debtor who wishes to confirm a plan must have at least one class of impaired claims to accept the plan. If no class of impaired claims accepts the plan, then section 1129(a)(10) fails. When estates are separate estates, each estate must meet its own requirements. Debtors who cannot meet the requirements of the section 1129(a)(10) cannot not confirm a plan. *In re Wash. Assocs.*, 147 B.R. 827 (E.D.N.Y. 1992).

An impaired class is a class of claims that has had their legal, equity, or contractual claims altered. 11 U.S.C. § 1124. A creditor becomes impaired if a debtor presents a plan that proposes to pay only half of what a creditor was due under their contract. *Keystone Gas Gathering, L.L.C. v. Ad Hoc Comm. (In re Ultra Petroleum Corp.)*, 943 F.3d 758 (5th Cir. 2019). An impaired creditor will have a statutory right to accept or reject the plan. *Id.* Conversely, creditors that are paid in full do not have a right to vote on the plan. *Id.*

The members of the Family, while operating on a group ticket, is required to fulfill their own individual obligations. These obligations include completing their individual registration forms and paying their individual activation fees. If a family member does not complete the obligations, they are prohibited from being added to the group ticket.

Similarly, if a debtor does not fulfill the obligations that are required for plan confirmation, the debtor's plan shall not be confirmed. Each debtor is required to fulfill its own requirements under section 1129(a)(10). If no class of impaired claims accepts the plan, then the debtor failed to satisfy the statute's requirement, and the plan is not confirmable. *In re Wash. Assocs.*, 147 B.R. 827 (E.D.N.Y. 1992. The requirement for at least one class to accept the plan, as provided by section 1129(a)(10), is to ensure that a debtor has a modicum of support for its plan. *In re Bataa/Kierland, LLC*, 476 B.R. 558 (Bankr. D. Ariz. 2012).

Here, Development, only has one creditor, Under My Thumb. R. at 8. Development's plan proposes to pay its only creditor, Under My Thumb only fifty-five percent of what Under My Thumb is due. R. at 7. This cut in payment impairs Under My Thumb, giving it a legal right to vote on Development's plan. As soon as Under My Thumb understood the plan, it rejected the plan. R. at 7-8. Without Under My Thumb's acceptance, Development will not have a class of impaired creditors accepting the plan, which would cause Development to fail the section 1129(a)(10) requirement.

(C) The Per Debtor Approach Ensures All Debtors Meet the Requirements

A per debtor approach, which ensures every debtor has the required support from its creditors, will prevent debtors from manipulating the bankruptcy code.

A member of the family met all of the requirements to use the group ticket. However, they also permitted a family friend to abuse this convenience. As the father scanned his group ticket, a family friend walked in the entrance gate. The family friend used the group ticket as a means to abuse the transit system. The family friend shall not be allowed to sneak into the entrance of the subway without fulfilling its own requirement~~s~~, by purchasing his own ticket.

The same correlation is applicable here. Development cannot satisfy section 1129(a)(10). As established, the whole text of section 1129(a) indicates that Development must individually satisfy the requirements mentioned within section 1129(a)(10). Development should not be allowed to hide beneath the cloak of another debtor who is able to meet those requirements and receive the same benefits that comes with a plan's confirmation. Congress would not have designed a requirement that allowed a party to go through the bankruptcy process in either bad faith or without complying with all the other bankruptcy provisions. In the same way, Development cannot hide in the shadows of its counterparts when being tested on whether an impaired class has accepted the plan. Development must have its own impaired creditor class to accept the plan or the plan cannot be confirmed. Such a requirement follows Congress's intent for a mutually beneficial bankruptcy.

Congress intended to test each debtor that proposes a plan for its reorganization. *In re Tribune Co.*, 464 B.R. 126 (Bankr. D. Del. 2011). Section 1129(a)(10) was different when it was first introduced. The first draft of the House of Representatives bankruptcy code did not include a required number of classes to accept the plan. After review, the Senate added section 1129(a)(10) to this draft; which, in its 1978 rendition, required every unsecured creditor under section 507 to be paid in full absent an agreed settlement. 11 U.S.C. (a)(10), S. REP. NO. 95-989. Congress later settled on a new requirement, which stated, "at least one class must accept the plan determined without counting insiders' votes." 124 CONG. REC. H 11102-H11105, H 11114-H 11115 (Sept. 28, 1978). Congress intended for each debtor to meet its own requirements, not to hide behind others who did.

Further, the fundamental goal of the bankruptcy code is to facilitate negotiation and consensus between the debtor and creditors in devising a reorganization plan. If a plan gained no support, then the debtor failed to negotiate effectively with its creditors and should not have their plan confirmed. If the purpose~~s~~ of bankruptcy are to facilitate a restart for the business, then ensuring that the debtor has negotiated well with its creditors should be one of the first steps to securing a profitable future.

Separate estates that have separate obligations will ensure that debtors are held accountable to the code. With this accountability, debtors and creditors will be incentivized to cooperate in the pursuit of establishing a solid foundation for the debtor's successful reorganization and future. Requiring each debtor to have an accepting class of impaired creditors would ensure that debtors are not able to completely void the impaired creditor's vote. For example, customers avoid buying a carton of eggs if one egg is broken. Customers will inspect each egg to ensure it is uncracked and suitable for cooking. If an egg is cracked, it does not meet the standard, and the carton is not purchased. Similarly, the per debtor approach inspects each debtor to ensure that each of the debtors satisfies the requirements under section 1129. If the requirements have not been met by each debtor, a reorganization plan must not be confirmed.

Debtors are imbued with protections on the onset of their bankruptcy. In exchange, the debtors will take on certain obligations from the bankruptcy code that will walk them through the bankruptcy process. A debtor that jointly administers its estate will not alter these obligations. Charging each debtor with the tasks of satisfying section 1129(a) is consistent with balancing negotiation principles. Debtors that have an obligation to satisfy 1129(a) *before* using bankruptcy rule 1015 will have the same obligations *after* using 1015.

The per debtor approach embodies this requirement to negotiate and will encourage debtors and creditors to cooperate in finding an amicable solution. This was Congress's intent in 1978 and should be followed today.

The Debtors reorganization plan shall not be confirmed for failing to meet the required obligation under section 1129(a)(10). Thus, the Thirteenth Circuit's decision should be affirmed.

Prayer

For these reasons, Under My Thumb requests that the Supreme Court of the United States AFFIRM the Thirteenth Court of Appeals and hold that Development cannot assume the license and did not satisfy the requirements for confirmation.

Respectfully submitted,

R.57
Counsel for Respondent

APPENDIX A

11 U.S.C. 102(7)

In this title—

(7) the singular includes the plural

APPENDIX B

11 U.S.C § 365

(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) [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) [omitted]

(3) [omitted]

(d) [omitted]

(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.

(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.

APPENDIX C

11 U.S.C. § 1106

(a) A trustee shall--

(1) perform the duties of the trustee, as specified in paragraphs (2), (5), (7), (8), (9), (10), (11), and (12) of section 704(a);

(2) if the debtor has not done so, file the list, schedule, and statement required under section 521(a)(1) of this title;

(3) except to the extent that the court orders otherwise, investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;

(4) as soon as practicable--

(A) file a statement of any investigation conducted under paragraph (3) of this subsection, including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate; and

(B) transmit a copy or a summary of any such statement to any creditors' committee or equity security holders' committee, to any indenture trustee, and to such other entity as the court designates;

(5) as soon as practicable, file a plan under section 1121 of this title, file a report of why the trustee will not file a plan, or recommend conversion of the case to a case under chapter 7, 12, or 13 of this title or dismissal of the case;

(6) for any year for which the debtor has not filed a tax return required by law, furnish, without personal liability, such information as may be required by the governmental unit with which such

tax return was to be filed, in light of the condition of the debtor's books and records and the availability of such information;

(7) after confirmation of a plan, file such reports as are necessary or as the court orders; and

(8) if with respect to the debtor there is a claim for a domestic support obligation, provide the applicable notice specified in sub (c)

APPENDIX D

11 U.S.C. § 1107

(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.

APPENDIX E

11 U.S.C. 1129

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

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

(2) 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) [omitted]

(5) [omitted]

(6) [omitted]

(7) [omitted]

(8) [omitted]

(9) [omitted]

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

(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) [omitted];

(13) [omitted]

(14) [omitted]

(15) [omitted]

(16) [omitted]

APPENDIX F

Federal Rule of Bankruptcy Procedure, Rule 1015

In all joint petitions filed with the court, the case will be administered through joint administration of the estates without further court order unless the trustee or other interested party files an objection to joint administration within 14 days after the conclusion of the first meeting of creditors. Pursuant to section 302, a joint petition may only be commenced by the filing of a single petition that includes both debtors. A petition filed by an individual debtor may not be amended at a later time to add a spouse as a debtor.