No. 17-1657

In the Supreme Court of the United States

MISSION PRODUCT HOLDINGS, INC., PETITIONER

v.

TEMPNOLOGY, LLC, N/K/A OLD COLD LLC

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

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

Bankruptcy Code Section 365(a) gives the trustee the choice to assume or reject executory contracts. In *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 532 (1984), this Court held that such a contract, if not assumed, "is not an enforceable contract" of the estate. Rejection is deemed a pre-petition breach of contract; the counterparty is a creditor and is entitled to a pre-petition claim for damages. Pre-bankruptcy, respondent entered into a co-marketing agreement granting petitioner a non-exclusive license to use respondent's trademark and imposing related obligations on respondent to maintain quality control of its trademark. After filing for bankruptcy, respondent, as debtor in possession acting as trustee, rejected the agreement. The Court granted review only on the first question presented in the Petition:

1. Whether, notwithstanding a trustee's rejection of a trademark "license agreement," that license agreement remains enforceable against the estate.

The Court declined review of a second question, regarding whether petitioner's exclusive product distribution rights under the agreement qualified as a patent license protected under Bankruptcy Code Section 365(n). The denial of certiorari on the second question raises a threshold question of mootness:

2. Whether there is a justiciable controversy over enforceability of an expired, non-exclusive trademark license against a bankruptcy estate, when the licensee made no infringing sales between the rejection of the license and its expiration, and there is no assertion of post-rejection interference by the estate.

AMENDED CORPORATE DISCLOSURE STATEMENT

Respondent is Old Cold LLC, formerly known as Tempnology LLC. Old Cold LLC is owned by Frigid Fabrics LLC; Schleicher & Stebbins Hotels L.L.C.; Blue Wave Trading LLC; Cool Comfort Technologies, Inc.; and Mighty Moose LLC, none of which is publicly held. No publicly held corporation has a 10% or greater ownership interest in respondent.

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BRIEF FOR RESPONDENT

INTRODUCTION

Bankruptcy Code Section 365(a) grants a bankruptcy trustee an extraordinary authority that does not exist outside of bankruptcy—the choice to assume or reject the debtor's executory contracts. This Court's construction of Section 365(a) and (g) makes clear that those provisions mean what they say. Upon assumption, the entire contract, with all its benefits and burdens, is enforceable against the estate; by contrast, a rejected contract is "not an enforceable contract." *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 532 (1984). Instead, the Code provides that a rejected contract is deemed breached, and the counterparty's remedy is a pre-petition breach-of-contract claim, 11 U.S.C. 365(g), consistent with the Code's policy to administer and discharge even "contingent" claims against the debtor, 11 U.S.C. 101(5).

Recognizing that this general rule may sometimes be unduly harsh, Congress has established limited statutory "exceptions" that grant counterparties to certain types of contracts, including real estate leases and patent licenses, the choice to treat the contract as terminated, per the general rule, or to retain certain rights specified by the exceptions. Neither trademark licenses nor exclusive distribution rights fall within those exceptions. Indeed, on multiple occasions, Congress has considered but declined to adopt an exception for trademark licenses.

Contrary to the statute's terms and this Court's holding in *Bildisco*, under petitioner's construction, a rejected contract would remain "an enforceable contract" against the debtor, at least insofar as the counterparty could successfully characterize the specific obligation in question as a "property interest" or a "negative covenant." Petitioner's argument is not only inconsistent with the Code's text, it would also violate the canon of *expressio unius est exclusio alterius* and impermissibly render the statutory exceptions superfluous.

Petitioner's arguments also fail based on the express terms of the parties' contract. Consistent with background principles of trademark law that require unity of ownership of trademarks, the contract specifies that petitioner obtained no property interest in respondent's trademarks. Nor is the license a mere "negative covenant." Under state and federal law (and the contract), respondent retained a *duty* to maintain quality control of the mark. If the trademark were severed from respondent's ongoing affirmative obligation, the license would be invalid. Similarly, petitioner's contractual right as exclusive distributor of certain products in a defined territory gives petitioner no property right that distinguishes it from any other contractual rights.

While petitioner's arguments fail on the merits, the Court should not reach them because the only issue properly before the Court is moot. The Court denied review of the ruling below concerning petitioner's exclusive distribution rights. Petitioner erroneously asserts that rejection's effect on petitioner's exclusive distribution rights is within the question on which the Court granted review. But petitioner's premise—that exclusive distribution rights are a "license" to respondent's intellectual property—was rejected by the lower courts, and this Court denied review on that issue in the Petition's second question presented. Pet. i. If exclusive distribution rights were a license to intellectual property, Section 365(n) would have protected it. Pet. App. 12a-20a. The court of appeals rejected petitioner's contention as contrary to the contract's language, and this Court declined to review that fact-based question. Petitioner (Br. 41-42 n.11) contends that the issue was preserved as part of Question 1 in a footnote of the Petition (at 15 n.4), but permitting petitioner to shoehorn Question 2 into Question 1 in that fashion would violate two principles: issues raised only in footnotes are waived; and this Court will not review in the first instance an issue deemed forfeited and therefore not decided below.

Standing alone, any question regarding the enforceability of petitioner's non-exclusive trademark license post-rejection is moot. Tellingly, while petitioner filed a proof of claim for several million dollars in alleged damages from the loss of its exclusive distribution rights, petitioner never asserted a damages claim for post-rejection deprivation of its non-exclusive trademark license. Nor is there any basis for a damage claim. The license expired in July 2016, and petitioner never attempted to sell products bearing respondent's trademark post-rejection. Petitioner has asserted it "would have" attempted to do so but for the lower court's orders, but the lower courts never enjoined petitioner from selling trademarked goods. Petitioner's decision to abide by the bankruptcy court's order affords no basis for a damages claim against the estate. Thus, there is no live controversy regarding the sole issue on which the Court granted review.

STATUTES INVOLVED

Sections 101(5), 101(35A), 365, 502(g)(1), 1113, and 1141(d)(1) of Title 11 of the United States Code, and Section 365(a) and (g)-(i) as enacted in 1978, are reproduced in a statutory addendum hereto, App., *infra*, 1a-26a.

STATEMENT

I. STATUTORY FRAMEWORK

A. Principles Of Rejection

1. Upon the filing of a bankruptcy petition, a bankruptcy estate is formed, comprising "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. 541. A bankruptcy trustee serves as the "representative of the estate." 11 U.S.C. 323. In a chapter 11 case like this one, the debtor serves as "debtor in possession," with all the powers of a trustee. 11 U.S.C. 1101(1), 1107(a).

The trustee has a period of time to decide whether to "assume or reject any executory contract or unexpired lease." 11 U.S.C. 365(a) and (d). Contracts that are assumed are assumed "*cum onere*," *i.e.*, with all benefits and burdens. *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 531-532 (1984). Upon assumption, a contract becomes enforceable against the estate, and "the expenses and liabilities incurred may be treated as administrative expenses, which are afforded the highest priority on the debtor's estate." *Ibid.*

In contrast, a rejected executory contract remains unenforceable. A contract that is not assumed "is not an enforceable contract" of the estate; "suit may not be brought against the debtor-in-possession under the * * * agreement; recovery may be had only through administration of the claim in bankruptcy." *Bildisco*, 465 U.S. at 530, 532. The trustee's power to reject is a unique authority granted by the Code, permitting the trustee to "deal with [the debtor's] contracts and property in a manner it could not have employed absent the bankruptcy filing." *Id.* at 528.

2. Rejection of an executory contract "constitutes a breach of such contract * * * immediately before the date of the filing of the petition," 11 U.S.C. 365(g)(1), giving rise to a dischargeable, pre-petition "claim" against the estate, 11 U.S.C. 502(g)(1). "Claim" includes any "right to payment" and any "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. 101(5). Such rights are "claims," whether "reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unse-

cured." *Ibid.* All claims are administered in the bankruptcy case, following the Code's priority scheme. 11 U.S.C. 507.

3. The Code contains several exceptions that permit counterparties to certain categories of contracts to choose specific statutorily-enumerated remedies as an alternative to the default remedy of a pre-petition claim. In 1978, when the Code was enacted, the default rule applied "[e]xcept as provided in subsections (h)(2) and (i)(2)." 11 U.S.C. 365(g) (1976 Supp. III) (reproduced at App., *infra*, 24a-26a). At that time, Subsection (h) governed real property leases, and Subsection (i) governed real property sales contracts where the purchaser was in possession. Each subsection offered the non-debtor counterparty a choice upon rejection: treat the agreement "as terminated" or "remain in possession." 11 U.S.C. 365(h)(1) and (i)(1). If the counterparty chose to "remain in possession," the specified "[e]xcept[ions]" in Subsections (h)(2) or (i)(2) governed the counterparty's relationship with the debtor—for example, allowing the counterparty to offset damages caused by rejection against amounts it owed the debtor.

Congress has added four more statutory exceptions governing particular types of contracts and reorganized Subsection (h), without making conforming amendments to Section 365(g)'s "[e]xcept as provided" clause.

In 1984, Congress added a statutory exception for collective bargaining agreements in response to this Court's decision in *Bildisco*. Pub. L. No. 98-353, 98 Stat. 333. That exception, 11 U.S.C. 1113, requires a debtor to follow specific procedures before rejecting a collective bargaining agreement. After complying, however, the debtor may still "terminate" the agreement, or any provision, by rejecting it. 11 U.S.C. 1113(c)-(d).

Congress has also revised Sections 365(h) and (i), adding two new exceptions and rearranging Subsection (h). Timeshare interest sale contracts are subject to current Section 365(h)(2), and current Section 365(h)(1)(C) provides that the exception for real property leases, when invoked for shopping center leases, permits the enforcement of restrictive covenants concerning "radius, location, use, exclusivity, or tenant mix or balance." Original Section 365(h)(2) is now Section 365(h)(1)(B).

Finally, in response to the Fourth Circuit's decision in *Lubrizol Enterprises, Inc.* v. *Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (1985), cert. denied, 475 U.S. 1057 (1986), Congress added a sixth statutory exception in Section 365(n) for licenses of certain forms of intellectual property. "Intellectual property," as defined in Section 101(35A) and as applicable to Section 365(n), covers, *e.g.*, patents and copyrights, but not trademarks. The omission was intentional: "[T]he bill does not address the rejection of executory trademark, trade name or service mark licenses by debtor-licensors." S. Rep. No. 505, 100th Cong., 2d Sess. 5 (1988).

Apart from Section 1113, which provides a unique process, the post-1978 exceptions, like the original exceptions for real property leases and certain real property sales contracts, provide the non-debtor counterparty with a binary choice: treat the contract "as terminated" or opt for alternative rights and duties spelled out in the Code. See 11 U.S.C. 365(h)(1) (real property leases), (h)(2) (timeshare interests), (i) (sales of real property and timeshare interests), and (n) (intellectual property licenses). For example, if the counterparty decides to retain its rights under a patent license, it can choose to retain those rights "as such rights existed immediately before the [bankruptcy] case commenced," for "the duration of [the] contract; and any period for which [the] contract may be extended by the licensee as of right," including the "right to enforce any exclusivity provision of such contract," but must waive administrative claims against the licensor and make "all royalty payments," without a right of setoff with respect to rejection damages. 11 U.S.C. 365(n).

B. Trademark Law

Trademark law is grounded in the law of unfair competition. *B & B Hardware, Inc.* v. *Hargis Indus., Inc.*, 135 S. Ct. 1293, 1299 (2015). In 1946, Congress enacted the Lanham Act, "to provide national protection for trademarks used in interstate and foreign commerce." *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U.S. 189, 193 (1985).

As public symbols of the source of goods or services, trademarks protect consumers by helping them "identify goods and services that they wish to purchase, as well as those they want to avoid." *Matal* v. *Tam*, 137 S. Ct. 1744, 1751 (2017). Trademarks "secure to the owner of the mark the goodwill of his business and * * * protect the ability of consumers to distinguish among competing producers." *Park 'N Fly*, 469 U.S. at 198 (citation omitted).

A defining feature of trademarks is unified ownership: "Good will and its trademark symbol are as inseparable" as conjoined twins who "cannot be separated without death to both." 3 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 18:2 (5th ed. 2018) (McCarthy). The Lanham Act recognizes this principle, permitting assignment of a registered mark only "with the good will of the business in which the mark is used." 15 U.S.C. 1060(a)(1). It also indicates that goodwill from "legitimate[]" use of the mark "shall inure to the benefit of the [trademark] registrant." 15 U.S.C. 1055; 3 McCarthy § 18:45.50.

Although early trademark law held that licensing was "totally inconsistent" with unified ownership and would cause loss of rights in a mark, *e.g.*, *Macmahan Pharmacal Co.* v. *Denver Chem. Mfg. Co.*, 113 F. 468, 475 (8th Cir. 1901), licensing is now permitted so long as the licensor controls "the nature and quality of the goods or services" sold by the licensee, see 15 U.S.C. 1055, 1127. Trademark law thus imposes an affirmative duty of quality control on the owner-licensor. 3 McCarthy § 18:42. Licensing a trademark without adequate quality control is a "naked licens[e]" and renders the license invalid. *Dawn Donut Co.* v. *Hart's Food Stores, Inc.*, 267 F.2d 358, 367 (2d Cir. 1959).

Unlike other intellectual property, trademarks continue in perpetuity unless and until abandoned. See 15 U.S.C. 1058, 1059, 1127. Trademarks may evolve over time as the owner updates them as marketing strategies change. 3 McCarthy § 17:28 (showing examples). As a trademark evolves, quality-control covenants allow the licensor to police consistency of the trademark's use.

II. Background Of The Case

A. Respondent Tempnology, LLC designed patented, chemical-free cooling fabrics used to make towels, socks, and headbands that would stay cool during strenuous activity. Respondent marketed its products under the "Coolcore" and "Dr. Cool" brands and held a "significant intellectual property portfolio support[ing]" its products, including issued and pending patents and trademarks. Pet. App. 2a-3a.

On November 21, 2012, respondent entered into a Co-Marketing, Sourcing and Distribution Agreement (Agreement) with petitioner. J.A. 203-293. The Agreement contained three categories of rights relevant here: certain exclusive distribution rights, a non-exclusive intellectual property license (excluding trademarks), and a non-exclusive trademark license.

Distribution Rights: Respondent granted petitioner rights to sell respondent's products worldwide, except for certain countries in East Asia. J.A. 203-205 (§ 1(A), (B)). Within the United States, respondent granted petitioner "exclusive distribution rights" for some products (Exclusive Cooling Accessories). J.A. 203-205 (§ 1(A), (B)), 211-218 (§§ 5, 6), 256 (Ex. A). For other products, called "Non-Exclusive Cooling Accessories," respondent reserved to itself "the right to sell" to certain types of customers. J.A. 211 (§ 5).

Intellectual Property License, Excluding Trademarks: Respondent granted petitioner "a non-exclusive, irrevocable, royalty-free, fully paid-up, perpetual, worldwide, fully transferable license" to its products and intellectual property *except* for its trademarks. J.A. 234-235 (§ 15(b)).

Trademark License: In a separate provision, Section 15(d), respondent granted petitioner a "non-exclusive, non-transferable, limited license * * * to use its Coolcore trademark and logo (as well as any other Marks licensed hereunder) for the limited purpose of performing its obligations hereunder, exercising its rights and promoting the purposes of this Agreement." J.A. 237-238. Respondent prohibited use of its marks "in a (i) disparaging or inaccurate manner or (ii) manner which is inconsistent with the terms of this Agreement." *Ibid.* Section 15(d) provided that the trademark license "shall expire upon the termination of this Agreement except as necessary to allow either party to exercise its rights during the Wind-Down Period." *Ibid.*

Petitioner agreed to "comply with any written trademark guidelines" provided by respondent. J.A. 237-238. The parties also agreed to each other's "right to review and approve all uses of its Marks," except for pre-approved uses. *Ibid.* Other provisions provided for further quality-control oversight by respondent. J.A. 213-216 (§ 6(a), (b)), 222-223 (§ 9(a)), 227-229 (§ 11).

The Agreement further provided "[f]or avoidance of doubt" that each party's "use of the other party's Marks will not create in it * * * any right, title, or interest in or to such Marks other than the limited licenses expressly granted herein," and that "all use of the other party's Marks in connection with this Agreement will inure to the benefit, and be on behalf, of the other party." J.A. 237-238 (§ 15(d)).

The initial term of the Agreement ended on July 1, 2016, and automatically renewed for additional one-year periods, subject to mutual termination rights. J.A. 207

(§ 2). By written notice, each party could terminate the Agreement without cause, starting a two-year wind-down period. J.A. 207-209 (§ 3).

B. In 2014, the relationship between petitioner and respondent soured. On June 30, 2014, petitioner issued notice of termination without cause, triggering a wind-down period ending on July 1, 2016. Pet. App. 4a-5a. On July 22, 2014, respondent issued its own notice of termination, with cause, alleging material breach of the Agreement and declaring the Agreement terminated immediately. *Id.* at 4a. Per the Agreement, the parties entered into arbitration. *Id.* at 4a-5a.

During the arbitration, on April 16, 2015, petitioner notified respondent that it did "not presently contemplate making any purchases from [respondent] for the 2015-2016 Contract Year," *i.e.*, through July 1, 2016. J.A. 558-559. On June 10, 2015, the arbitrator issued a partial award in petitioner's favor, finding that the Agreement remained in effect. J.A. 294-311. This "ruling meant that [petitioner] was contractually entitled to retain its distribution and trademark rights until July 1, 2016," when the Agreement terminated. Pet. App. 5a.

C. Respondent's financial prospects, already poor in 2014, grew worse. J.A. 321. On September 1, 2015, respondent filed a chapter 11 bankruptcy petition. Pet. App. 5a. The following day, respondent moved to reject certain of its executory contracts pursuant to 11 U.S.C. 365. J.A. 28. Respondent also sought approval of bidding procedures to sell substantially all of its assets, including its trademarks. J.A. 28-29. Respondent's pre-bankruptcy secured lender, Schleicher & Stebbins Hotels, L.L.C. (S&S), would serve as the stalking-horse bidder. J.A. 399.

Petitioner objected to both the rejection and sale motions. In a brief order issued October 2, 2015, the bankruptcy court granted respondent's motion to reject the Agreement as of the petition date, subject to petitioner's "election to preserve its rights under 11 U.S.C. § 365(n)." Pet. App. 83a-84a.

On October 8, 2015, the bankruptcy court set bidding procedures for the sale. J.A. 78-79. Petitioner and S&S participated, and S&S was declared the successful bidder on November 6, 2015. J.A. 412.

Respondent asked the court to determine the applicability and scope of petitioner's rights under Section 365(n). In its November 12, 2015 opinion, the bankruptcy court held that Section 365(n) protected petitioner's patent license but that petitioner was not entitled to retain its exclusive distribution rights or non-exclusive trademark license after rejection. Pet. App. 76a-81a. The court reasoned that the Agreement distinguished the exclusive distribution rights from the non-exclusive patent license and that the former did not "amount to anything more than the right to sell and distribute specified products." *Id.* at 79a. Further, the court held that Congress's omission of trademarks from Section 365(n) meant petitioner did not retain its trademark rights post-rejection. *Id.* at 80a-81a. Petitioner appealed.

On December 18, 2015, the bankruptcy court approved the sale of respondent's assets (including trademarks) to S&S, free and clear of petitioner's rights under the Agreement. J.A. 443-541. The sale closed immediately afterwards. J.A. 542. The Bankruptcy Appellate Panel (BAP), 558 B.R. 500 (2016), and First Circuit, 879 F.3d 376 (2018), affirmed. The sale order is final.

On December 21, 2015, petitioner filed a proof of claim, claiming $4,160,000 for "intentional misconduct," "breach of exclusivity provisions," "failure to defend IP against competitors," and "damage to relationships," based on sales of respondent's products to other distributors. J.A 547-557.

The Agreement's wind-down period expired on July 1, 2016. During the wind-down period, petitioner made no purchases from respondent. J.A. 335-338, 593.

D. On November 18, 2016, the BAP affirmed in part and reversed in part the bankruptcy court's decision regarding the effect of rejection. Pet. App. 35a-65a. The BAP agreed that Section 365(n) did not protect petitioner's exclusive distribution rights from rejection. *Id.* at 49a-51a. The BAP explained that the "letter [and] spirit of the Agreement" confirmed that the exclusive distribution rights and the intellectual property license were separate provisions, serving "two independent goals." *Ibid.* However, relying on the Seventh Circuit's decision in *Sunbeam Products, Inc.* v. *Chicago American Manufacturing, LLC*, 686 F.3d 372, cert. denied, 568 U.S. 1076 (2012), the BAP held that petitioner retained the right to use respondent's trademarks after rejection. Pet. App. 51a-60a. The BAP adopted *Sunbeam's* rationale that "[w]hat section 365(g) does by classifying rejection as a breach is establish that in bankruptcy, as outside of it, the other party's rights remain in place." *Id.* at 59a-60a (quoting 686 F.3d at 377).

Petitioner appealed the BAP's ruling regarding exclusive distribution rights; respondent did not cross-appeal the trademark license ruling.

E. The court of appeals ordered briefing on whether the case was moot. J.A. 560-561. Petitioner argued that it was not but conceded that petitioner "does not believe that injunctive relief is required should it prevail" and is "only seek[ing] monetary relief." J.A. 573. Petitioner asserted that, if the court found that its exclusivity rights survived rejection, respondent's violations of the exclusivity provision "would give rise to a claim by [petitioner]." J.A. 570. Petitioner further stated that, but for the bankruptcy court's decision, it "would have continued" using respondent's trademarks post-rejection, "in furtherance of its exclusive rights." J.A. 572.

On January 12, 2018, the court of appeals affirmed the original bankruptcy court opinion in all respects, with one judge partially dissenting. Pet. App. 1a-34a. The court rejected petitioner's efforts to cast its exclusive distribution rights as intellectual property rights under Section 365(n), holding that "[a]n exclusive right to sell a product is not equivalent to an exclusive right to exploit the product's underlying intellectual property." *Id.* at 15a. Moreover, while petitioner had "salt[ed] its brief with several undeveloped suggestions that rejection under section 365(a)" might not extinguish its exclusive distribution rights, it had never raised the argument in the bankruptcy court and, therefore, "the argument is waived in this civil action." *Id.* at 19a-20a.

With respect to trademark rights, the court of appeals rejected *Sunbeam*'s approach, noting the continuing quality-control burden that approach would impose on debtors. Pet. App. 23a-27a. The court reasoned that allowing petitioner to continue using respondent's marks would force respondent "to choose between performing executory obligations arising from the continuance of the license or risking the permanent loss of its trademarks." *Id.* at 24a. Such restrictions on respondent's ability to free itself from executory obligations would jeopardize its fresh start and "depart from the manner in which section 365(a) otherwise operates." *Ibid.* The court of appeals explained that rejection does not "vaporize" a right but "converts the right into a prepetition claim for damages." *Id.* at 22a. The court rejected the dissent's proposed "case-specific, equitable approach" as lacking any statutory foundation. *Id.* at 24a-27a.

F. Petitioner sought a writ of certiorari, presenting two questions: (1) whether, under Section 365, a debtor-licensor's "rejection" of a license agreement terminates rights of the licensee that would survive the licensor's breach under applicable nonbankruptcy law, and (2) whether an exclusive right to sell certain products practicing a patent in a particular geographic territory is a "right to intellectual property" within the meaning of Section 365(n). Pet. i.

On June 11, 2018, S&S asked the bankruptcy court to lift the stay to distribute the estate's remaining cash—$524,274.70—to S&S, in partial satisfaction of its secured claims. J.A. 179. Petitioner objected. On September 19, 2018, the bankruptcy court granted the lift-stay motion; it subsequently declined to enter a stay pending appeal, but it delayed the order's effectiveness so petitioner could seek a stay from the BAP. J.A. 596-597.

On October 26, 2018, this Court granted review solely as to Question 1. 139 S. Ct. 397.

On November 7, 2018, petitioner sought a stay pending appeal from the BAP, which denied the motion. Order, No. 18-48 (Nov. 27, 2018). Petitioner sought no further relief regarding the lift-stay order, and the estate's remaining funds were distributed to S&S on November 29, 2018. Debtor-in-Possession Monthly Operating Report, No. 15-11400-CJP (Bankr. D.N.H. Dec. 17, 2018), ECF No. 597.

SUMMARY OF ARGUMENT

The Court need not reach the merits of either of petitioner's claims. Petitioner's claim concerning exclusive distribution rights is outside the question presented, and its trademark license claim is moot because the Court cannot provide any meaningful relief. The case should therefore be dismissed.

If the Court reaches the merits, neither petitioner's trademark license nor its exclusive distribution rights survive the Agreement's rejection. The general rule in Section 365(a) and (g) of the Code provides the non-debtor counterparty to a rejected executory contract with a right to file a dischargeable pre-petition claim for damages as the sole remedy for rejection. Congress has provided exceptions for six specific categories of contracts; none applies here.

I. Petitioner's exclusive distribution rights are outside of the question presented. In Question 2 of the Petition, petitioner asked the Court to consider whether petitioner's exclusive distribution rights were an intellectual property license protected by Section 365(n).

The Court denied review of that question. The Court should reject Petitioner's attempts to rewrite the Agreement to shoehorn exclusive distribution rights into Question 1. Moreover, the court of appeals deemed this argument waived. Pet. App. 19a-20a. This Court should not consider it in the first instance.

Because petitioner's exclusive distribution rights claim is not within Question 1, the case is moot because the Court cannot grant any effectual relief on the only remaining claim. Petitioner's trademark license has expired, and petitioner never used the trademark between rejection and the license's expiration. Petitioner's purely speculative argument that it would have used the mark but for the bankruptcy court's rulings provides no damages claim against the estate and does not support jurisdiction.

II. If the Court reaches the merits, petitioner's arguments fail. The text, structure, and purpose of Section 365 and related provisions confirm that a rejected contract cannot be enforced against the estate, unless a statutory exception applies. Instead, the counterparty's exclusive remedy is a pre-petition claim for damages.

Section 365 creates a dichotomy. The trustee either assumes the contract, taking all of its benefits and burdens, or rejects it, rendering it "not an enforceable contract" against the estate. *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 532 (1984); 11 U.S.C. 365(a) and (g)(1), 502(g)(1). Rejection is a tool that "could not have [been] employed absent the bankruptcy filing." *Bildisco*, 465 U.S. at 528. Upon rejection, the Bankruptcy Code reduces all of the non-debtor's non-bankruptcy rights to a "claim" for monetary damages—defined intentionally to be all-encompassing. 11 U.S.C. 101(5), 365(g)(1), 502(g)(1). Unless a statutory exception applies, the contract is otherwise unenforceable against the estate.

Congress's creation of express statutory exceptions confirms the general rule. Each exception provides the counterparty with a binary choice between (a) the background rule, *i.e.*, treating the contract as breached and pursuing a pre-petition damages claim, or (b) retaining certain statutorily defined rights and obligations. The exceptions reflect Congress's careful balance of the rights of the debtor and non-debtor. To interpret the general rule as allowing the non-debtor to retain other remedies would swallow the exceptions by providing greater rights under the general rule, violating both the *expressio unius* canon and rule against superfluities.

Petitioner's rule would frustrate the Code's goals of rehabilitating debtors and maximizing property available for creditors, and would upset the Code's policy of equality in distributing assets to creditors, by arbitrarily elevating the claim of certain counterparties to rejected contracts above other general unsecured creditors' claims.

III. Applying these principles, neither petitioner's non-exclusive trademark license nor its exclusive distribution right is enforceable against the estate following rejection. Petitioner's remedy for each is a pre-petition damages claim.

Petitioner erroneously claims a property interest in respondent's trademarks. A trademark license does not create a property interest in the trademark—just a contractual right to use it. Trademarks are unique: unlike patents or copyrights, trademarks by definition require unified ownership of the mark and its goodwill, obliging the owner to exercise quality control over the goods and services sold under any license. The Agreement's text is in accord, stating that the non-exclusive trademark license conveyed a contract right, not a property interest. And because the trademark license required an ongoing bilateral relationship between the parties, including requiring respondent to continue specific obligations to maintain quality control of the marks, the license reflected much more than the purely "negative covenants" that petitioner (incorrectly) asserts would allow the contract to remain enforceable post-rejection.

This Court has already denied review of the only argument presented to and decided by the court of appeals concerning petitioner's exclusive distribution rights. But if the Court reaches those rights, petitioner's only remedy for their rejection is a pre-petition damages claim. As the court of appeals found, exclusive distribution rights are neither an interest in respondent's intellectual property nor other "property" that petitioner (incorrectly) asserts survives rejection.

ARGUMENT

I. Rejection's Effect On Petitioner's Exclusive Distribution Rights Is Not Within The Question Presented, And Its Effect On Petitioner's Expired Trademark License Is A Moot Issue

A. The Effect Of Rejection On Petitioner's Exclusive Distribution Rights Under The Agreement Is Outside The Question On Which The Court Granted Review

The Court granted certiorari "limited to Question 1," 139 S. Ct. 397 (2018), concerning the consequences under Section 365 of "'rejection' of a *license* agreement" for "rights of the *licensee*," Pet. i (emphases added). The Agreement expressly distinguishes between "license" rights to intellectual property, J.A. 232-240 (§ 15, "Intellectual Property"), and exclusive distribution rights, J.A. 211-218 (§§ 5-6, "Product Exclusivity" and "Distribution Exclusivity and Collaboration"). Only the former—"license" rights—are before the Court; petitioner's exclusive distribution rights were the subject of the Petition's second question, as to which the Court denied review.

In the courts below, petitioner argued that "its exclusivity rights under sections 1, 5, 6, and 7 of the Agreement" constituted "the grant of an exclusive license apart from the Non-Exclusive License under section 15(b)," supposedly bringing those rights within Section 365(n)'s exception for patent licenses. Pet. App. 75a; see also *id.* at 14a-15a, 50a-51a. The lower courts all rejected petitioner's "attempt to re-characterize its exclusive product distribution rights under the Agreement as an intellectual property license." *Id.* at 51a; see also *id.* at 14a-15a, 79a. Construing the Agreement, the court of appeals held that "[t]he only thing that is exclusive is the right to sell certain products, not the right to practice, for example, the patent that is used to make those products." *Id.* at 15a; see also *id.* at 51a, 79a.

In Question 2, petitioner sought review of the court of appeals' holding that petitioner's exclusive distribution rights did not constitute an intellectual property license under Section 365(n), asking "[w]hether an exclusive right to sell certain products practicing a patent in a particular geographic territory is a 'right to intellectual property' within the meaning of § 365(n) of the Bankruptcy Code." Pet. i. Respondent observed that it was unnecessary to review the court of appeals' conclusion "that Petitioner's exclusive right to distribute certain products in a limited geographic territory did not rise to the level of a grant of a license in intellectual property that would enjoy post-rejection protection under section 365(n)." Br. in Opp. 17-18. The Court declined review on Question 2. 139 S. Ct. at 397.

Despite the Court's refusal to review the holding that petitioner's exclusive distribution rights are not a "license" (which petitioner (Br. 41) states it "does not challenge * * * here"), petitioner now contends that Question 1 encompasses "[petitioner's] exclusivity rights." Br. 41-42 & n.11. Nowhere, however, does petitioner explain how its "exclusivity rights" qualify as "rights of a licensee" under a "license agreement" within Question 1 if, as the lower courts held, those exclusive distribution rights are not a "license" under the Agreement's terms.

Furthermore, letting petitioner expand Question 1 would require this Court to decide in the first instance an issue the court of appeals declined to reach. That court held that "the argument [was] waived" because petitioner "never raised any such argument in the bankruptcy court as a basis for preserving its exclusive distribution rights." Pet. App. 20a. This is "a court of review, not of first view." *Nautilus, Inc.* v. *Biosig Instruments, Inc.*, 572 U.S. 898, 913 (2014) (internal quotation marks and citation omitted).

Ironically, petitioner urges that it resurrected this forfeited argument *in a footnote* in the Petition and that respondent "waived" any objection by not flagging petitioner's forfeiture in the Brief in Opposition. Pet. Br. 41-42 n.11 (citing Pet. 15 n.4). This Court's rule is to the contrary; a "footnote reference" is "plainly insufficient to raise the issue." *Communist Party of U.S.* v. *Subversive Activities Control Bd.*, 367 U.S. 1, 34-35 n.10 (1961). If respondent did not recognize petitioner's intent in footnote 4 to revive an issue the court of appeals deemed forfeited, that only proves the wisdom of the rule, not waiver. In any event, footnote 4 *nowhere suggests* petitioner intended to present for this Court's resolution under Question 1 whether its exclusive distribution rights survived rejection. Instead, petitioner stated that if the Court reversed regarding "the trademark issue," the court of appeals could decide on remand whether to relieve petitioner of its forfeiture and address "application of [this Court's] ruling to [petitioner's] exclusive distribution rights." Pet. 15 n.4. Tellingly, petitioner's amici do not address the merits of its exclusive distribution rights argument.

B. If The Court Agrees That Petitioner's Exclusive Distribution Rights Claim Is Not Within The Question Presented, The Case Is Moot

Standing alone, petitioner's trademark license claim is moot because petitioner has no legal or economic interest that depends on the case's outcome. "[A]n actual controversy must be extant at all stages of review * * *. If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, * * * the action can no longer proceed and must be dismissed as moot." *Genesis Healthcare Corp.* v. *Symczyk*, 569 U.S. 66, 71-72 (2013) (citations omitted).

A case is moot and should be dismissed when it becomes "impossible for the court to grant 'any effectual relief'" to the prevailing party. *Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1992) (citation omitted). There is no ongoing dispute about enforceability of petitioner's non-exclusive trademark license, which has expired. Nor is there a live controversy concerning petitioner's trademark rights between rejection and the license's expiration, because petitioner never used the trademark during that period. Indeed, petitioner's only damages claim regarding the post-rejection period concerns its exclusive distribution rights, which are no longer at issue.

It is undisputed that petitioner's trademark license expired on July 1, 2016. Cert. Reply Br. 9. Thus, there is no ongoing dispute about future enforcement of petitioner's rights under the trademark license.

Nor, in light of the denial of certiorari regarding petitioner's exclusive distribution rights, is there any live controversy regarding damages relating to petitioner's non-exclusive trademark license. Both before the court of appeals and at the petition stage before this Court, petitioner responded to respondent's suggestions of mootness (*e.g.*, Br. in Opp 1, 16; Letter from respondent's counsel to Clerk, at 1-2 (Oct. 23, 2018)) by pointing to its damages claim stemming from purported interference with its exclusive distribution rights. In the court of appeals, petitioner noted its suit in the Southern District of New York against S&S (purchaser of respondent's assets) for tortious interference with petitioner's purported exclusive distribution rights. J.A. 569. And in its petition-stage reply (at 9 (citing J.A. 584-585)), petitioner pointed to its multi-million dollar proof of claim for damages resulting from sales by petitioner's competitors. But a dispute regarding exclusive distribution rights, on which the Court denied review, cannot support jurisdiction over petitioner's now-expired, non-exclusive trademark license.

Nor is there any live dispute about damages for *post-rejection* interference with petitioner's non-exclusive trademark license. In its petition-stage reply (at 9), petitioner did not separately address pre- and post-rejection claims, discussing generally claims for interference with petitioner's use of the trademarks "during the two years before the agreement terminated," which included petitioner's assertion that respondent "wrongfully repudiat[ed] the agreement and demand[ed] that [petitioner] cease using its trademarks" in July 2014, long before the bankruptcy. Petitioner has *never* asserted that respondent interfered with petitioner's non-exclusive trademark license post-bankruptcy, apart from rejecting the Agreement. Indeed, before the court of appeals, petitioner conceded that it never sold trademarked products post-rejection, only that petitioner "*would have*" done so "[b]ut for [the bankruptcy court's] decision finding that rejection terminated [petitioner's] trademark rights under the Agreement." J.A. 572 (emphasis added). But petitioner's choice to comply with the bankruptcy court's ruling—which contained no injunction—pending appeal provides no basis for a post-petition damages claim against the estate.

Tellingly, even now petitioner does not assert that, apart from rejecting the Agreement, respondent interfered with petitioner's purported trademark rights post-rejection. Rather, it frames the dispute in hypothetical, conditional terms: "*had* [respondent] tried to stop [petitioner] from [using the trademarks post-rejection], the Agreement *would have* been a full defense to that claim." Pet. Br. 39 (emphasis added). Article III does not confer jurisdiction over hypothetical disputes. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The hypothetical nature of the dispute explains why respondent did not appeal from the BAP's ruling that petitioner retained its trademark license post-rejection. Resolution of the issue has no practical significance to respondent.[1]

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[1] The United States' speculation (Br. 32) that success by petitioner on the moot trademark license issue could lead the court of appeals on remand to exercise its discretion to relieve petitioner of its forfeiture concerning petitioner's exclusivity rights is not sufficiently concrete to avoid mootness. See *Lujan*, 504 U.S. at 562 (chain of causation depending on discretion of independent actors too speculative to satisfy redressability prong of standing). On remand, the First Circuit will only reconsider matters outside the mandate "sparingly and only when * * * necessary to avoid extreme

Finally, any post-bankruptcy claim against petitioner's estate has become even more academic due to the recent distribution of the estate's assets. On November 29, 2018, after the BAP denied petitioner's request for a stay pending appeal, respondent distributed the remaining $524,274.70 in the estate to secured creditor S&S, leaving a zero balance. Debtor-in-Possession Monthly Operating Report at 3-4, 13, No. 15-11400-CJP (Bankr. D.N.H. Dec. 17, 2018), ECF No. 597. Petitioner previously argued that those funds "would be necessary to satisfy any claim * * * with respect to which [petitioner] has petitioned for a writ of certiorari." Order at 19, No. 18-48 (B.A.P. 1st Cir. Nov. 27, 2018).

The combination of the denial of certiorari on Question 2 and the lack of any effectual relief on petitioner's non-exclusive trademark rights means there is no case or controversy to support Article III jurisdiction. The case should be dismissed as moot.

II. A Rejected Contract Is Unenforceable Against The Debtor's Estate, And No Remedy Other Than A Pre-Petition Damages Claim Is Available, Unless An Express Exception Applies

If the Court reaches the merits, the text, structure, and purpose of Section 365 and other Code provisions all confirm that, unless the contract falls within an express

injustice." *Kotler* v. *American Tobacco Co.*, 981 F.2d 7, 13 (1992) (citation omitted). Neither petitioner nor the United States explains why holding petitioner to its forfeiture would be an "extreme injustice." *Ibid.* (citation omitted).

statutory exception, the rejected contract is unenforceable against the estate, except by way of a pre-petition claim for breach-of-contract damages.

A. Under Section 365's Plain Text, Executory Contracts Are Unenforceable Against The Debtor's Estate Unless Assumed And, If Rejected, Give Rise Only To A Pre-Petition Damages Claim

1. *Once a bankruptcy petition is filed, an executory contract is unenforceable against the estate unless assumed*

Section 365 and related provisions make clear that a "rejected" contract is not enforceable against a debtor's estate. The statute gives the trustee a binary choice: either "assume" or "reject" an executory contract. 11 U.S.C. 365(a). By "assuming" the contract, the trustee affirms it as an obligation of the estate, and liabilities under the contract become "actual, necessary costs and expenses of preserving the estate," treated as "administrative" expenses and "afforded the highest priority on the debtor's estate." 11 U.S.C. 503(b)(1)(A); *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 532 (1984). When the trustee "elect[s] to assume the executory contract, * * * it assumes the contract *cum onere*," *i.e.*, in its entirety, with all its burdens and benefits. *Bildisco*, 465 U.S. at 531-532; see, *e.g.*, *Sharon Steel Corp.* v. *National Fuel Gas Distrib. Corp.*, 872 F.2d 36, 40 (3d Cir. 1989) (citing *Bildisco*). If expressly rejected or not assumed within the statutory deadlines, 11 U.S.C. 365(a) and (d)(1), the executory contract is "not an enforceable contract" against the estate, *Bildisco*, 465 U.S. at 532, except as a pre-petition claim, 11 U.S.C. 365(g)(1), 502(g)(1).

The distinct statutory outcomes of rejection and assumption confirm this strict dichotomy. Rejection creates a claim for *pre-petition* breach, 11 U.S.C. 365(g)(1), whereas assumption causes expenses under the contract to become administrative costs of "the estate," 11 U.S.C. 503(b)(1)(A). In other words, if rejected, the contract never becomes enforceable as an administrative claim against the estate.

Section 365 states that the "contract" must be rejected or assumed, meaning the *entire* contract; apart from specified exceptions, there is no sub-category of provisions of a rejected contract that passes through and remains enforceable. Section 365(a) speaks of assuming or rejecting "any executory contract," and Section 365(g) provides that "the rejection of an executory contract * * * constitutes a breach of such contract." Neither provision contemplates pulling contracts apart. See *Bildisco*, 465 U.S. at 532; *e.g.*, *City of Covington* v. *Covington Landing L.P.*, 71 F.3d 1221, 1226 (6th Cir. 1995) ("Neither the debtor nor the bankruptcy court may excise material obligations owing to the non-debtor contracting party.").

Congress's choice of the term "rejection" shows that it intentionally created a unique power within bankruptcy, rather than adopting (and limiting the trustee's power to) an existing concept from non-bankruptcy law. Petitioner (Br. 18) thus misses the mark by comparing rejection and "anticipatory repudiation * * * outside bankruptcy." Indeed, this Court has recognized that the trustee is "empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have employed absent the bankruptcy filing." *Bildisco*, 465 U.S. at 528. Even Professor Andrew, on whose work petitioner relies so heavily, acknowledges that the term "rejection" was "a radical departure from normal contract law" with "no ready contract law analogue." Michael T. Andrew, *Executory Contracts In Bankruptcy: Understanding 'Rejection'*, 59 U. Colo. L. Rev. 845, 847-848 (1988). Moreover, Congress has received at least one proposal to amend Section 365 to eliminate the concept of "rejection" and replace it with a non-bankruptcy concept, "election to breach." See Nat'l Bankruptcy Review Commission Final Report, *Bankruptcy: The Next Twenty Years* 459-460 (Oct. 20, 1997) (proposal of congressionally created commission). The proposal would have adopted a rule similar to what petitioner espouses here. *Id.* at 459-462. Congress did not enact the proposal.

Accordingly, petitioner's assertion (Br. 14) that rejection "does not give the estate any greater rights than the breaching party * * * would have outside bankruptcy," cannot be squared with the text or this Court's recognition that rejection is a power the debtor "could not have employed absent the bankruptcy filing," *Bildisco*, 465 U.S. at 528.

2. *A non-debtor's sole remedy for a rejected contract is a pre-petition claim for damages*

Upon rejection, the Bankruptcy Code reduces all of a non-debtor counterparty's non-bankruptcy rights, including equitable remedies of specific performance, to a monetary damages claim. The default rule is that "rejection of an executory contract * * * constitutes a breach of such contract * * * immediately before the date of the filing of the petition," 11 U.S.C. 365(g)(1), and all rights under non-bankruptcy law are replaced with a right to a dischargeable pre-petition claim against the estate, 11 U.S.C. 502(g)(1), unless a specific statutory exception applies to give the non-debtor counterparty alternative rights.

Critically, the Code provision defining "claim," 11 U.S.C. 101(5), is all-encompassing. It sweeps in any conceivable form of breach-of-contract damages, including any "right to payment" or "right to an equitable remedy for breach of performance," whether "unliquidated," "contingent," or "unmatured." *Ibid.* Section 101(5) is the "broadest possible definition" of "claim" because the Code "contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case." S. Rep. No. 989, 95th Congress, 2d Sess. 21-22 (1978); *Ohio* v. *Kovacs*, 469 U.S. 274, 279 (1985) (citing same).

Section 101(5)'s breadth serves an important purpose. Before 1934, the Code's predecessors only discharged claims that "mature[d] at or before the filing of the petition." *City Bank Farmers Tr. Co.* v. *Irving Tr. Co.*, 299 U.S. 433, 440 (1937). This undercut the rehabilitative purpose of bankruptcy law. The counterparty's matured debts were discharged, but the original agreement remained effective, allowing the counterparty to "haunt the bankrupt" by "harass[ing] the discharged bankrupt by successive actions for accruing rent and so retard or prevent the debtor's financial rehabilitation which the statute was intended to aid." *Id.* at 437-438.

Bankruptcy Act amendments in 1934 solved the problem, making the debtor's future obligations "of whatsoever sort" provable claims in bankruptcy." *Id.* at 437-439. Section 101(5)'s broad definition of "claim" and other Code provisions confirm that even difficult-to-calculate future damages from rejection must be asserted as pre-petition claims and discharged. *E.g.*, 11 U.S.C. 502(c)(2) (authorizing estimate of "any right to payment arising from a right to an equitable remedy for breach of performance"), 1141(d)(1).

Petitioner's argument against mootness depends on its ability (which respondent contests) to enforce a rejected contract against the estate through a post-petition, administrative damages claim. See J.A. 563-564. The Code does not support that theory. Sections 365(g)(1) and 502(g)(1) specify that the remedy for rejection is a *pre-petition* claim, and Section 101(5) confirms that a "claim" encompasses "unmatured" claims under the contract. Petitioner offers no clearly articulated test for determining which "claims" for future losses under rejected contracts must be asserted as pre-petition claims entitled only to pro rata distributions under Sections 365(g)(1), 502(g)(1), and 101(5), and which claims may instead be withheld and asserted as post-petition, priority administrative claims. To the extent petitioner contends that the counterparty can choose to sue for pre-petition breach or retain its contract rights and an option to sue for post-petition breach, Congress specified that such a choice is only available under certain statutory exceptions. 11 U.S.C. 365(g); see pp. 33-41, *infra*. Even in those exceptions, Congress expressly limited non-debtors' ability to assert administrative claims. See 11 U.S.C. 365(h)(1)(B) (limiting claim to a setoff right against rent due), and (n)(2)(c) (requiring waiver of administrative claims and setoff rights).

Tellingly, petitioner did assert a $4.16 million proof of claim for pre-petition breach based on, *inter alia*, the expected value of its lost exclusive distribution rights under the Agreement. J.A. 555-557. That proof of claim confirms that petitioner's lost contract rights can be reduced to a "right to payment." Petitioner argues, however, that those claims may instead be asserted as post-petition administrative claims. J.A. 563-564. Without any test rooted in the statutory text, petitioner's theory would invite endless, costly litigation over whether a counterparty's contract rights survive rejection and are entitled to administrative priority. Indeed, petitioner's rule even raises the prospect of double recoveries. See Pet. Br. 33 (implying that counterparty would have a pre-petition claim for breach of contract and a right to assert a post-petition, administrative claim for subsequent non-performance).

B. Congress's Adoption Of Statutory Exceptions Allowing Enforcement Of Limited Rights In Certain Circumstances Confirms That, Outside Those Exceptions, Rejection Renders The Contract Entirely Unenforceable

1. *Express statutory exceptions allow contracting parties to elect particular statutory remedies instead of the general rule*

Congress has adopted specific exceptions to the general rule that rejection gives rise to a pre-petition damages claim as the exclusive remedy. When adopted in 1978, Section 365(g) made clear that it establishes the general rule "[e]xcept as provided in subsections (h)(2) and (i)(2)." 11 U.S.C. 365(g) (1976, Supp. III). Those exceptions identified categories of contracts under which a counterparty could retain limited contract rights notwithstanding rejection. No such exception has ever existed for trademark licenses (or exclusive product distribution agreements). It is not the courts' role to adopt exceptions beyond those Congress established.

As originally enacted, Section 365(h)(1) gave nondebtor lessees to rejected real estate leases two options: (1) treat the lease as terminated and assert a damages claim, *i.e.*, the default rule, or (2) "remain in possession" of the property, subject to statutorily prescribed rights and obligations in Section 365(h)(2). 11 U.S.C. 365(h)(1) (1976 Supp. III). For example, a lessee who retained possession could "offset against the rent" damages from the lessor's nonperformance but would have to forego further claims against the estate. 11 U.S.C. 365(h)(2) (1976 Supp. III). Original Section 365(i)(1) and (2) provided a similar choice for certain purchasers of real property. 11 U.S.C. 365(i) (1976 Supp. III). By labeling only Subsections (h)(*2*) and (i)(*2*) as "[e]xcept[ions]" to (g), Congress made clear that "treat[ing] such contract[/lease] as terminated" under (h)(*1*) or (i)(*1*) was *not* an exception, but meant the same thing as the default rule under Section 365(g).[2]

[2] Subsections (h)(1) and (i)(1) were also exceptions, to the extent they gave the counterparty (rather than trustee) the choice to accept termination or retain possession under the conditions of (h)(2) and (i)(2), but Congress understandably only identified as an "[e]xcept[ion]" the set of limited rights and duties if the counterparty elected possession. Doing so made clear that if the counter-

Later-enacted exceptions in Section 365 provide the counterparty with the same binary choice—accept rejection as termination under the general rule, or retain a limited set of statutory rights.[3] For example, when Congress added Subsection (n), it allowed licensees under rejected intellectual property licenses the binary choice to "treat such contract as terminated," or "retain its rights," subject to specified conditions. 11 U.S.C. 365(n)(1)-(3). Those "rights" reflect a careful balance between debtors and non-debtors, including limiting retained rights to those in existence on the petition date, requiring that royalty payments continue, and waiving any administrative claim or setoff rights. *Ibid.*

2. *Legislative amendments confirm that rejection forecloses the counterparty's ability to enforce the contract, except as a pre-petition claim*

Congress's responses to this Court's decision in *Bildisco* and the Fourth Circuit's in *Lubrizol Enterprises, Inc.* v. *Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (1985), cert. denied, 475 U.S. 1057 (1986), confirm the interpretation of Subsections (a) and (g) that those decisions adopted. In each case, Congress did not re-

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party elected termination, the consequences would be those of Sections 365(g) and 502(g)(1)—a pre-petition damages claim, not some other remedy.

[3] Congress has not made conforming amendments to the "[e]xcept as provided" clause in Subsection (g) in light of subsequent amendments, including the restructuring of Subsection (h). See, *e.g.*, Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106, § 205(a).

spond by revising Subsection (g), but by creating an *additional*, *narrowly tailored exception* to Subsection (g)'s general rule.

In both cases, the courts construed Subsections (a) and (g) as providing that a rejected contract is "not an enforceable contract." *Bildisco*, 465 U.S. at 532; see *Lubrizol*, 756 F.2d at 1048. Each court based its construction of Subsections (a) and (g)'s effect in part on the enactment of statutory exceptions to the normal scope of those subsections. See *Bildisco*, 465 U.S. at 522 & n.8.; *Lubrizol*, 756 F.2d at 1048.

In each instance, Congress responded *not* by amending the general rule of subsections (a) and (g), but by adding *an additional exception to that general rule*. In 1984, Congress enacted a new exception, establishing that a trustee "may assume or reject a collective bargaining agreement only in accordance with the provisions of this section," which require making a proposal to the employee representative and presentation to the court to determine whether "the balance of the equities clearly favors rejection." 11 U.S.C. 1113(a), (b), and (c). Tellingly, however, a trustee *may* "terminate * * * provisions" of the agreement after complying with the prerequisites for rejection. See 11 U.S.C. 1113(d)(2) and (f). By confirming that rejection has the effect of "terminat[ing]" the agreement, Congress affirmed this Court's core holding in *Bildisco*.

Congress responded similarly to *Lubrizol*. Rather than amend Subsections (a) or (g), Congress adopted a new exception, providing licensees under a rejected intellectual property license a choice to "treat such contract as terminated" and pursue a pre-petition damages claim, or "retain its rights" in the license subject to limitations. 11 U.S.C. 365(n)(1) and (2). The Senate Report confirms Congress's understanding that Subsection (n) creates a binary choice to "elect one of two sets of consequences to attach to that rejection," either "treat the rejection as terminating the license" or "elect to retain its rights under the license," subject to statutory conditions. S. Rep. No. 505, 100th Cong., 2d Sess. 8 (1988). The report further confirms that the former choice (treating the license as terminated) is the same as "would be available to the licensee without" the amendment. *Ibid.* At the same time, Congress consciously chose not to include trademark licenses in the new exception, noting that trademark licenses "raise issues beyond the scope of this legislation" because trademarks "depend to a large extent on control of the quality of the products or services sold by the licensee." *Id.* at 5.

Each amendment confirms the core holdings of *Bildisco* and *Lubrizol*—under the general rule, rejection makes the agreement "not an enforceable contract," *Bildisco*, 465 U.S. at 532, *i.e.*, rejection "terminates" the counterparty's ability to enforce any provision of the contract except by a pre-petition damages claim. Exclusive product distribution agreements and trademark licenses are not within any exception and thus are subject to the general rule.

3. *Where Congress adopts a specific list of exceptions, courts cannot add to the list, or construe the general rule to render the exceptions superfluous*

Under the *expressio unius* canon, Congress's adoption of specific exceptions where rights under rejected contracts can be retained precludes courts from creating further exceptions. Relatedly, the rule against superfluities prevents reading the general rule so broadly that the exceptions become superfluous. Petitioner's reading violates both canons.

The *expressio unius* canon confirms that courts should not read Section 365 to create additional exceptions beyond those Congress adopted. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980); see also *Leatherman* v. *Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). Here, Congress's identification of certain carefully balanced exceptions to the general rule means that it did not intend for courts to create other exceptions. Petitioner's argument would permit an infinite number of exceptions, allowing counterparties to retain rights under many categories of rejected contracts not identified by Congress.

Petitioner's assertion that it retains rights under its rejected trademark license is a particularly egregious violation of the *expressio unius* canon. As discussed *supra*, Congress specifically considered creating an exception allowing retention of trademark license rights in Section 365(n) but declined to do so, in part because trademarks "depend to a large extent on control * * * of the products or services sold by the licensee." S. Rep. No. 505, at 5. And in 2013, the House of Representatives approved a bill to amend Section 101(35A) to include trademarks, service marks, and trade names in the definition of "intellectual property." H.R. 3309, 113th Cong.

§ 6(d)(2)(A)(iii). Notably, the House recognized that doing so required a further amendment to Section 365(n) to provide that "in the case of a trademark, service mark, or trade name, the trustee shall not be relieved of a contractual obligation to monitor and control the quality of a licensed product or service." *Ibid.* The bill also required licensees that retained rights to make "other payments," such as for trademark-based advertising. *Ibid.* The Senate, however, did not adopt the bill. Congress could enact a nuanced exception addressing the unique characteristics of trademarks, such as the need for continued monitoring; this Court cannot.

Similarly, the rule against superfluities requires that effect be given to each clause of a statute so that none is rendered superfluous. *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004). For similar reasons, exceptions must provide *greater* rights than the general rule, to avoid "the superfluity of a specific provision that is swallowed by the general [rule]." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012). Notably, the remedies provided by Section 365's exceptions, under petitioner's construction, are *narrower* than remedies available under non-bankruptcy law. For example, under petitioner's construction, trademark licensees under a rejected contract would retain the non-bankruptcy rights to set off post-rejection damages against royalties and other payments due to a debtor-licensor, and to utilize future versions of a trademark. However, neither setoff rights nor rights to use future versions of intellectual property are available to patent and copyright licensees under Section 365(n). Retained rights are limited "as such rights existed immediately before the [bankruptcy] case commenced." 11 U.S.C. 365(n)(1)(B). Patent licensees must "make all royalty payments" and forego setoff rights. 11 U.S.C. 365(n)(2)(B) and (C). Given that under petitioner's view the "background rule" of Section 365 is more favorable to licensees than the Section 365(n) exception, it is unclear why a patent licensee would *ever* choose the statutory "exception."

Petitioner seeks to avoid these canons by urging that Subsections (h), (i), and (n) are "expressions of the general principle * * * , *rather than exceptions*," *i.e.*, they are "safe harbor[s]" showing particularized application of Section 365(g)'s general rule to "specific concern[s]." Pet. Br. 28 n.8, 47 (emphasis added). The first, and sufficient, response is that petitioner's view is directly contradicted by Congress's express designation of original Subsections (h)(2) and (i)(2) as "[e]xcept[ions]" to the general rule of Subsection (g). 11 U.S.C. 365(g). Alternatively, petitioner makes the counterintuitive argument (Br. 48) that Subsection (n) is not superfluous because it "provid[es] additional benefits *to debtors*" beyond the general rule. (Emphasis added). But it is nonsensical to think that Congress would permit the *counterparty* to choose a regime that affords *debtors* additional benefits beyond the background rule: the counterparty would always opt for the broader rights available under petitioner's version of the general rule.

Notably, *RadLAX*, which petitioner cites to support its view that Section 365's exceptions are instead "safe harbor[s]," Pet. Br. 47, *rejected* that proposed interpretation of the statute in question, finding it would be a "surpassingly strange manner" of carrying out Congress's intent. 566 U.S. at 647. So too here. Section 365(a) and (g) are better understood as setting forth a broadly applicable general rule, except as provided in specific statutory exceptions.

C. Recognizing That Rejection Precludes A Contract's Enforcement Against The Estate As An Administrative Claim Furthers The Code's Purposes

Core purposes of bankruptcy law confirm that rejection of executory contracts yields just one remedy—a pre-petition damages claim. There are "two recognized policies underlying Chapter 11": "preserving going concerns and maximizing property available to satisfy creditors." *Bank of Am. Nat'l Tr. & Sav. Ass'n* v. *203 N. LaSalle St. P'ship*, 526 U.S. 434, 453 (1999). The Court has likewise recognized that "the authority to reject an executory contract is vital to the basic purpose of a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful reorganization." *Bildisco*, 465 U.S. at 528. Petitioner's dramatic curtailing of the trustee's power to reject burdensome contracts would frustrate those policies.

Even before the Code's adoption, the Court recognized that "[a] salient element" of "a reorganization is *the discharge of all demands of whatsoever sort*, executory and contingent, presently due or to mature in the future." *City Bank Farmers*, 299 U.S. at 438-439 (emphasis added). Congress underscored that purpose by adopting the "broadest possible definition" of "claim" in 11 U.S.C. 101(5) because the Code "contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case." S. Rep. No. 989, at 21-22; *Kovacs*, 469 U.S. at 279 (citing same).

Sections 365(g)(1) and 502(g)(1) further that same policy by establishing that all future damages, including "claims arising after filing" that "result from the rejection of an executory contract" must be "presented through the normal administration process by which claims are estimated and classified" and ultimately discharged. *Bildisco*, 465 U.S. at 530. Complete relief from burdensome contracts is especially important in Chapter 11 business reorganizations "to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." *Id.* at 528. Reorganizations often require new investment, which "could be jeopardized if the debtor-in-possession were saddled automatically with the debtor's prior" contractual undertakings. *Ibid.* An unsustainable contract granting unfavorable exclusive distribution rights and a trademark license to an antagonistic counterparty would jeopardize efforts to attract new capital for reorganization no less than an unfavorable collective bargaining agreement. And, as discussed below, see pp. 58-60, *infra*, a franchisor's successful reorganization may depend upon updating or repositioning its trademark, which would be frustrated if the franchisor was bound to prior franchise agreements.

"Equality of distribution among creditors" is another "central policy of the Bankruptcy Code" that petitioner's proposal would frustrate. *Begier* v. *IRS*, 496 U.S. 53, 58 (1990). "[C]reditors of equal priority should receive pro rata shares of the debtor's property." *Ibid.* Congress has established a hierarchy for creditors. It respects the rights of secured creditors and priority classes of claims and treats contract rejection claims equally with other pre-petition claims, with specific exceptions for, *inter alia*, real property leases and intellectual property licenses. The Code treats unsecured creditors Congress has not separately addressed equally.

Petitioner's proposed rule would frustrate the policy of equal distribution by creating arbitrary distinctions between contract counterparties, depending on whether the counterparty can characterize its post-petition enforcement of a rejected contract as outside Sections 365(g)(1) and 502(g)(1). This case illustrates the arguments counterparties would make, attempting to characterize even a burdensome obligation to sell products exclusively through the counterparty as a "property right" surviving rejection. There is no reason a licensee's interest should be afforded priority over unsecured creditors who may have invested considerable sums in the licensor's business.

To be sure, a trustee's right to reject executory contracts is not absolute; it is subject to the bankruptcy court's approval. 11 U.S.C. 365(a). Where rejection is unnecessary "to the success of the reorganization," and would impose undue hardship on the counterparty without counterbalancing advantage to the estate, the "Bankruptcy Court [as] a court of equity" must "balanc[e] the equities" in deciding whether to approve rejection. *Bildisco*, 465 U.S. at 527; see, *e.g.*, *In re Petur U.S.A. Instrument Co.*, 35 B.R. 561, 563-564 (Bankr. W.D. Wash. 1983) (declining to approve rejection that would "result[] in the destruction" of the counterparty and cause damages "grossly disproportionate to any benefit derived by the general creditors"). No such issue is presented here.[4]

D. Petitioner's Counter-Arguments Fail

1. *Petitioner's "property interest" theory is unsupported*

Underpinning much of petitioner's argument is the flawed contention that the Agreement "transfer[red] * * * an interest in property," *i.e.*, a property interest in respondent's patents and trademarks. Br. 22-23, 43. Petitioner asserts that rejection of the Agreement could not deprive petitioner of those "property" rights. Petitioner is mistaken.

(a) First, petitioner's argument proves too much. Rights under any contract constitute a "property interest." But to say that a contract is property is not the same as transferring title or even creating a contingent interest, such as a security interest, in an underlying asset. Any contract rejection that renders a pre-bankruptcy contract "not an enforceable contract," *Bildisco*, 465 U.S. at 532, deprives the counterparty of some "property," broadly defined. Simply denominating a contract right a "property" interest does not exempt that right from the consequences of Section 365(g).

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[4] The bankruptcy court's statutorily assigned role in approving assumption or rejection, 11 U.S.C. 365(a), which may involve equitable considerations, see *Bildisco*, 465 U.S. at 527, is distinct from the atextual, case-by-case "equitable" determination of which contract rights should survive rejection, as some judges and amici propose. See pp. 50-51, *infra*.

(b) Petitioner's argument regarding its contractual right to be exclusive distributor of respondent's products proves the breadth of its "interest-in-property" rule. Petitioner simply asserts (Br. 43) that the exclusive distribution contract provisions constituted "certain sticks in the bundle of sticks that comprised [respondent's] ownership of its intellectual property—the right to sell certain patented and trademarked products and to exclude others, including [respondent], from doing so in the United States." But petitioner's characterization of its contractual distribution rights as "certain sticks" of respondent's property is pure *ipse dixit*. Petitioner attempts to paint a narrow rule about "intellectual property," but its rule is broad and ill-defined. As the court of appeals correctly observed, the contractual exclusive-distribution term "is simply a restriction on the right to sell certain products that, like many products, happen to be made using a patent." Pet. App. 15a. If petitioner's exclusive contractual right to distribute respondent's products is a "property interest" in respondent's business, then *all* exclusive distribution rights must likewise survive.

(c) Nor does the "interest-in-property" theory help petitioner regarding its trademark license rights. As discussed further below, trademarks require unity of ownership and related goodwill, and they impose an ongoing obligation to police quality, which is a *sine qua non* of a valid license. See 15 U.S.C. 1055, 1127; 3 McCarthy §§ 18:2, 18:42; see also pp. 52-56, *infra*. Indeed, in excluding trademarks from the Section 365(n) exception, the Senate Report noted: "trademark * * * licensing relationships depend to a large extent on control of the quality of the products or services sold by the licensee."

S. Rep. No. 505, at 5. Moreover, consistent with the background legal rule, the Agreement makes explicit that it conveyed no property interest in respondent's trademarks. J.A. 238; pp. 54-56, *infra*. Petitioner's trademark license is just a right under a rejected contract. Petitioner does not own and has never owned any property interest in respondent's trademarks.

(d) Finally, petitioner's heavy reliance (Br. 24-29, 37) on this Court's 1924 decision in *Board of Trade of Chicago* v. *Johnson*, 264 U.S. 1, is misplaced. To begin, *Board of Trade* was not decided under the Bankruptcy Code. Nor did it address "rejection" of executory contracts. Thus, it has limited, if any, relevance to construing 11 U.S.C. 365(a) and (g), which were adopted over fifty years later.

To the extent the case is relevant to interpreting Section 365, it would be by analogy to *assumption* of a contract. The Court repeatedly relied on analysis of the Board of Trade's "rules"—*i.e.*, the relevant contract terms. 264 U.S. at 6, 7, 10, 12, 14. The estate sought to assume the member's benefits under that agreement without also assuming its burdens, which the Court ruled was impermissible. *Id.* at 14-15. Of course, the same is true of Section 365(a), which requires assuming the debtor's contracts "*cum onere*." *Bildisco*, 465 U.S. at 531-532. But the principle that under Section 365 a contract must be assumed or rejected *in toto* supports respondent, not petitioner. See pp. 28-30, *supra*.

Attempting to analogize to Section 365(a) and (g), petitioner seems to suggest that the Court considered "membership" as property separate from the Board's rules, which purportedly were the "rejected" contract, and that the rules established a "property interest" in the membership that survived rejection. But this just demonstrates how far petitioner strains to shoehorn a 1924 decision into a 1978 statutory framework. The Code specifically addresses various contracts involving rights to a debtor's property, but it does so in specified exceptions. 11 U.S.C. 365(h), (i), and (n); 11 U.S.C. 1113.

Finally, to the extent *Board of Trade* retains relevance, it is unlike this case because it concerned a "lien" that was "inherent in the property in its creation," and because the party asserting the lien was the same party that created the "membership" property. 264 U.S. at 15. No similar relationship exists here. Petitioner's sole relationship to respondent's trademarks is the Agreement, which is an executory contract, subject to rejection under Section 365.[5]

2. *The proffered distinction between "negative covenants" and "affirmative obligations" also fails*

Petitioner's suggestion (Br. 34-35) of a difference between "negative" and "affirmative" obligations has no statutory support. Affirmative contractual obligations can almost always be recast as negative covenants, and vice versa. For example, a collective bargaining agreement, such as the one deemed unenforceable in *Bildisco*,

[5] Nor does this case involve tangible property in which another party has a possessory interest, such as those addressed by the United States. *E.g.*, U.S. Br. 15 (analogies involving cars, photocopiers, and apartments). A separate provision of the Code, 11 U.S.C. 542, addresses the obligations of parties who are in possession of estate property, but that is beyond the scope of the present dispute.

can easily be reframed as a negative covenant—a promise not to hire anyone *other* than union members or not to provide pay and benefits *other* than those contractually agreed upon. Likewise, an exclusive distribution agreement can be characterized as an obligation *to* sell through the counterparty, or a duty to *refrain* from selling through others.

Congress has recognized that negative covenants in a rejected contract are not enforceable absent a statutory exception. To protect shopping center tenants, Congress enacted Section 365(h)(1)(C) to make enforceable negative covenants in leases "pertaining to radius, location, use, exclusivity, or tenant mix or balance," notwithstanding lease rejection by a debtor-landlord. That exception would be unnecessary if negative covenants remained enforceable post-rejection, as petitioner posits.

The purported distinction between negative covenants and affirmative obligations is not an administrable line. The only proper line is the one that Congress drew in specific exceptions from the general rule of Section 365(a) and (g).

3. *The repeated references of petitioner and its amici to "avoidance," "revocation," and "rescission" are red herrings*

By repeatedly trying to equate the court of appeals' ruling with the trustee avoiding, revoking, rescinding, or "vaporizing" the contract, petitioner (Br. 22-29, 55-56) and amici (*e.g.*, U.S. Br. 19-21) attack a straw argument. Neither the court of appeals nor respondent contends that rejection treats a contract as never having existed.

Instead, the counterparty's contractual rights are replaced with a claim for "breach of the contract which relates back to the date immediately preceding the filing of [the] petition in bankruptcy." *Bildisco*, 465 U.S. at 530.

The rejection power and the Code's process for allowance of claims are separate and distinct from the power to avoid a transfer under Sections 544 through 553. Avoidance unwinds a contractual obligation or transfer of interest in property, essentially treating that obligation or transfer as void and restoring the debtor to the *status quo ante*. See generally *Merit Mgmt. Grp., LP* v. *FTI Consulting, Inc.*, 138 S. Ct. 883, 888-889 (2018); 5 *Collier on Bankruptcy* § 548.10[1] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2018). By contrast, rejection does not unwind a contract; it limits remedies for rejection to a pre-petition claim for breach-of-contract damages. 11 U.S.C. 365(a) and (g); 11 U.S.C. 502(g)(1). The two powers have distinct purposes. Rejection releases a debtor from burdensome contractual obligations, giving counterparties breach-of-contract claims, *Bildisco*, 465 U.S. at 528, while avoidance helps "recapture the value of * * * avoided transfers for the benefit of the estate," *Merit Mgmt.*, 138 S. Ct. at 888 (citation omitted).

For the same reason, petitioner (Br. 35) and its amici (*e.g.*, U.S. Br. 13) err in suggesting that the court of appeals endorsed a power to "revoke" the Agreement, which they appear to equate with avoidance. Suggesting that respondent rendered the Agreement a nullity is incorrect for the reasons stated above, including because the counterparty retains a pre-petition damages claim based on the contract.

4. *The Code does not authorize an "equitable" case-by-case approach*

In his dissent, Judge Torruella suggested that courts reject a "bright-line rule" and instead adopt an "equitable" case-by-case approach to determine the effect of rejection on trademark licenses. Pet. App. 29a-34a. This approach, also endorsed by some amici, IPO Amicus Br. 24-30, AIPLA Amicus Br. 19-28, directly contradicts the Code and this Court's precedent.

This Court has "long held that whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Law* v. *Siegel*, 571 U.S. 415, 421 (2014) (internal quotation marks and citation omitted). "Bankruptcy courts are not authorized in the name of equity to make wholesale substitution of underlying law controlling the validity of creditors' entitlements, but are limited to what the Bankruptcy Code itself provides." *Raleigh* v. *Illinois Dep't of Revenue*, 530 U.S. 15, 24-25 (2000). And bankruptcy courts have the "obligation to interpret the Code clearly and predictably using well established principles of statutory construction." *RadLAX*, 566 U.S. at 649.

Section 365 governs, exhaustively, the treatment of executory contracts. There is no statutory authorization for bankruptcy courts to conduct equitable analysis of the consequence of rejection under Subsection (g), as other provisions contemplate. *E.g.*, 11 U.S.C. 552(b) (permitting exception "based on the equities of the case"). It is no surprise that no court has found the Senate Report's ambiguous comment referencing "the development of equitable treatment * * * by bankruptcy courts," S. Rep. No. 505, at 5, to be "a toehold for unfettered 'equitable' dispensations from section 365(a) rejection." Pet. App. 21a.

5. *There is no consensus supporting* Sunbeam

The majority of courts to consider *Lubrizol*'s application to trademarks have held that, in the absence of a statutory exception, trademark licenses are not enforceable after rejection. See Pet. App. 20a-27a; *In re HQ Global Holdings, Inc.*, 290 B.R. 507, 513 (Bankr. D. Del. 2003); *In re Dynamic Tooling Sys. Inc.*, 349 B.R. 847, 856 (Bankr. D. Kan. 2006); *In re Old Carco LLC*, 406 B.R. 180, 211 (Bankr. S.D.N.Y. 2009); *In re Centura Software Corp.*, 281 B.R. 660, 668-674 (Bankr. N.D. Cal. 2002); *In re Blackstone Potato Chip Co.*, 109 B.R. 557, 560-561 (Bankr. D.R.I. 1990); *In re Chipwich, Inc.*, 54 B.R. 427, 431 (Bankr. S.D.N.Y. 1985). *Sunbeam* disagreed, but it did not consider the unique characteristics of trademarks, Congress' expansive definition of "claim" in 11 U.S.C. 101(5), or the implications of the *expressio unius* canon. 686 F.3d at 375-378.

Nor is there an academic consensus supporting petitioner. Of the twenty-five articles amici law professors cite (Br. 13 n.8) as evidencing an "academic consensus" in favor of *Sunbeam*, twelve do not address trademark licensing at all. See, *e.g.*, Bradley S. Friedman, *Taking the Intellectual Out of Intellectual Property Licenses Under Section 365 of the Bankruptcy Code*, 20 J. Bankr. L. & Prac. 823, 825, 828-832 (2011) (expressly omitting "discussion of * * * trademark law"). Six that do address trademark licenses either agree with respondent, see, *e.g.*, Peter S. Menell, *Bankruptcy Treatment of Intellectual Property Assets: An Economic Analysis*, 22 Berkeley Tech L.J. 733, 775 (2007) (rejection leaves trademark licensee "with only a claim for breach of contract"), or call for a legislative solution, see, *e.g.*, Tyler S. Dischinger, *Problems in the Code, Section 305(a): A Call for Clarity*, 32 Am. Bankr. Inst. J. 50, 51 (2013).

III. NEITHER PETITIONER'S NON-EXCLUSIVE TRADEMARK LICENSE NOR ITS EXCLUSIVE DISTRIBUTION RIGHTS UNDER THE REJECTED AGREEMENT IS ENFORCEABLE AS AN ADMINISTRATIVE CLAIM

Applying the principles above, neither petitioner's non-exclusive trademark license nor its exclusive distribution rights is enforceable against the estate following rejection or could conceivably give rise to an administrative claim.

A. Petitioner's Trademark License Under The Rejected Agreement Is Not Enforceable As An Administrative Claim Against The Estate

1. *Background legal principles and the Agreement's terms make clear petitioner has no property interest in the mark*

Petitioner's assertion of a property interest in respondent's trademarks depends upon faulty analogies to other types of property that fail to account for a trademark's unique legal characteristics. As the leading treatise observes, "the 'property' parameters of a trademark are defined very differently from any other kind of 'property.'" 1 McCarthy § 2:10. It therefore warns against drawing "[a]nalogies to other forms of 'property,' from real estate to patents and copyrights."

Ibid. This Court has likewise observed that it is a "fundamental error" to "suppos[e] that a trade-mark right is a right in gross or at large, like a statutory copyright or a patent for an invention," because "[t]here is no such thing as property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark is employed." *United Drug Co.* v. *Theodore Rectanus Co.*, 248 U.S. 90, 97 (1918); see *Visa, U.S.A., Inc.* v. *Birmingham Tr. Nat'l Bank*, 696 F.2d 1371, 1375 (Fed. Cir. 1982) ("Unlike patents or copyrights, trademarks are not separate property rights * * * [from] the goodwill of the business or services to which they pertain.").

The Lanham Act requires that a trademark and accompanying goodwill must always be held by a single owner, creating the inseverable tie of unified ownership. See 15 U.S.C. 1060(a)(1) (permitting trademark assignment only "with the good will of the business in which the mark is used"); 3 McCarthy § 18:2; see also, *e.g.*, *Visa*, 696 F.2d at 1375. The rule of unified ownership serves the long-recognized purposes of trademark law. If property interests in a trademark could be allocated to multiple owners, there would be no guarantee of consistent quality, and the trademark would no longer be synonymous with the goodwill of the company's goods or services, harming both the mark's owner and the public. See 1 McCarthy § 2:15; 3 McCarthy § 18:48.

Unified ownership imposes a fundamental restriction on trademark licensing: a trademark owner may license a trademark "*only* if the [owner] exercises control over the nature and quality of the goods and/or services sold by the licensee under the licensed mark." 3 McCarthy § 18:38 (emphasis added); see *Dawn Donut Co.* v. *Hart's*

Food Stores, Inc., 267 F.2d 358, 367 (2d Cir. 1959). The owner must exercise quality control even absent an explicit quality-control provision in the license "because trademark law, rather than the contract itself, confers on the licensor the right and obligation to exercise quality control." *Miller* v. *Glenn Miller Prods.*, 454 F.3d 975, 992 (9th Cir. 2006). The quality-control requirement ensures that all goodwill arising from use of the trademark "inure[s] to the benefit of" the licensor, as federal law requires. 15 U.S.C. 1055. "[T]he grant of [a] license[] without the retention of control" is a "naked licens[e]" and is "invalid." *Dawn Donut*, 267 F.2d at 367.

The consequence of these unique features of trademarks is that a "licensee acquires no ownership rights in the mark itself." 3 McCarthy § 18:52. Rather than confer a property interest in the trademark, a trademark license "confers *only the right to use* the trademark." *Silverstar Enters., Inc.* v. *Aday*, 537 F. Supp. 236, 239 (S.D.N.Y. 1982) (emphasis added) (citation omitted).

Moreover, as petitioner concedes (Br. 6), its trademark license was expressly designated "*non-exclusive*." (Emphasis added); see J.A. 237. As this Court has recognized, "[t]he hallmark of a protected property interest is the right to exclude others." *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999). This rule applies to trademarks as well; a trademark owner has a property right "because he can exclude others from using them." *Ibid.* By designating petitioner's license "non-exclusive," the parties invoked a term with an "established legal meaning": "that the licensee is granted *a bare right to use* the trademark or patent being licensed *without any right to exclude others.*" *Hugo Boss Fashions, Inc.* v. *Federal Ins. Co.*, 252 F.3d 608, 617 (2d Cir. 2001) (internal citation and quotation marks omitted, emphasis altered). As the court of appeals correctly observed regarding the Agreement, "[t]he only thing that is exclusive is the right to sell certain products, not the right to practice, for example, the patent that is used to make those products." Pet. App. 15a.[6]

In addition to these background principles, the Agreement itself confirms that the trademark license was merely a nonexclusive contract right, not a conveyance of a property interest. The Agreement states that "[i]t is not the parties' intention to create any jointly owned Intellectual Property Rights hereunder. Rather, the parties intend that all Intellectual Property Rights should be categorized as either [Petitioner's] Property or [Respondent's] Property and licensed pursuant to the terms herein." J.A. 239. With respect to respondent's trademarks in particular, the Agreement provides: "For avoidance of doubt, each party acknowledges that its use of the other party's Marks will not create * * * any right, title, or interest in or to such Marks other than the limited licenses expressly granted herein." J.A. 238.

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[6] Petitioner's reliance (Br. 37) on *K Mart Corp.* v. *Cartier, Inc.*, 485 U.S. 176 (1988), is misplaced. While *K Mart* does reference that trademark owners possess a "bundle" of rights, including "the right to enlist the Customs Service's aid to bar [importation of] foreign-made goods bearing [a registered] trademark," 485 U.S. at 186, it says nothing about whether a trademark owner can assign "sticks" within the bundle that would destroy the unified ownership that is fundamental to trademark law.

Trademark licensees are not left without methods to protect themselves from risk of a licensor's bankruptcy. See James M. Wilton & Andrew G. Devore, *Trademark Licensing in the Shadow of Bankruptcy*, 68 Bus. Lawyer 739, 776-780 (May 2013). They could insist that the trademark be owned and controlled by a separate entity shielded against bankruptcy risk. *Id.* at 778-779; Richard M. Cieri & Michelle M. Morgan, *Licensing Intellectual Property and Technology from the Financially-Troubled or Startup Company: Prebankruptcy Strategies to Minimize the Risk in a Licensee's Intellectual Property and Technology Investment*, 55 Bus. Lawyer 1649, 1687-1690 (2000). Or they could insist on a security agreement, giving the licensee a secured claim and priority if the license agreement is rejected. Wilton & Devore at 779-780; Cieri & Morgan at 1691-1692; 11 U.S.C. 506. In other words, trademark licensees, similar to other pre-petition creditors, can negotiate for contract rights that minimize credit risk, discourage rejection, or afford priority in the event of bankruptcy.

2. *Petitioner's trademark license under the Agreement was not merely a "negative covenant"*

Even if the Court were to adopt petitioner's proposal (Br. 35) that "*negative* covenants" in an executory contract survive rejection and remain enforceable against the estate, the Agreement's trademark license was not a mere "negative covenant." Rather, consistent with background trademark law, the Agreement contemplated an ongoing bilateral relationship and required respondent to maintain quality control of the marks.

As is typical of trademark licenses, the Agreement required close coordination between respondent and petitioner regarding use of respondent's trademarks. Petitioner was required to follow respondent's trademark guidelines, and respondent could review and approve petitioner's uses of respondent's trademarks. The parties were to agree on the exact placement, size, and treatment of Coolcore branding on products. J.A. 227-229 (§ 11). Further, the parties agreed "to work together on determining the appropriate branding for cooling accessories manufactured at [petitioner's] factory." *Ibid.* The parties also agreed "to finalize the structure, commission, plan, and process associated with [petitioner's] representation of [Coolcore]-branded apparel products" in certain sales channels. J.A. 213-214 (§ 6(a)). Respondent agreed to give petitioner at least 120 days' advance notice and obtain prior written approval for "any proposed changes in Cooling Accessories or other products that would materially alter the nature, quality, durability, size, composition, style, performance, functionality, or character of such products." J.A. 222-223 (§ 9(a)). Thus, the Agreement's quality-control provisions require a close and collaborative relationship between respondent and petitioner to develop the brand and to market products, with the goodwill accruing solely to respondent. J.A. 237-238 (§ 15(d)).

Petitioner and some amici attempt to downplay the crucial role of quality control in maintaining the integrity of trademarks in the marketplace, arguing that quality control is a legal requirement separate from the trademark license. The issue is not the precise source of these requirements, but that the unified ownership unique to trademarks means there is no license without quality control and that a license without quality control risks abandonment of the mark. See 3 McCarthy § 18:42; 15 U.S.C. 1127; see, *e.g.*, *Dawn Donut*, 267 F.2d at 367.

Consistent with the background principles of trademark law, the Agreement's trademark license imposes substantial quality-control burdens and bears little likeness to patent licenses. This is precisely why Congress omitted trademarks from Section 365(n).

3. *Petitioner's rule would severely damage trademark owners' ability to reorganize*

The *Sunbeam* rule petitioner advocates would severely frustrate the ability of trademark owners to reorganize in bankruptcy and, in many cases, would make reorganization impossible. For many trademark owners, a successful reorganization or going-concern sale will depend on using the tools the Code affords debtors, including the power to reject burdensome licenses under Section 365(a) to maximize the value of their trademarks. Failure to reorganize would result in piecemeal liquidation at significantly reduced values, harming creditors, employees, and customers.

There are numerous examples of trademark owners whose attempts at reorganization ended in failure and liquidation due, in part, to their inability under *Sunbeam* to terminate pre-petition trademark licenses following rejection. See, *e.g.*, Mem. L. Supp. Mot. TRO at 24, *In re Aerogroup Int'l, Inc.*, No. 17-51889-KJC (Bankr. D. Del. Dec. 22, 2017), ECF No. 7; Order at 1, 17-11962-KJC, *In re Aerogroup Int'l, Inc.* (Bankr. D. Del. Feb. 21, 2018), ECF No. 671.

Petitioner's rule is particularly fraught with peril for hotel and restaurant franchisors. Franchise agreements require intensive and rigorous enforcement of detailed contractual quality-control covenants addressing issues ranging from national or regional advertising, approved vendors, maintenance and upkeep, and requirements for standardized menus and services. To reorganize, a restaurant or hotel franchisor may need to modernize or revitalize its brand. See Bonnie M. Rubin, *They Were Huge Franchises. Why Did They Collapse?*, Wall St. J. (Nov. 25, 2018) (describing "rebranding" of three distressed restaurant brands, including the Ground Round trademark acquired from a Chapter 11 bankruptcy case); see also Wilton & Devore at 773 n.210. Reorganization may require rejection of franchise agreements with onerous contract terms or agreements with substandard or litigious licensees. See, *e.g.*, *Gorenstein Enters., Inc.* v. *Quality Care-USA, Inc.*, 874 F.2d 431, 435-436 (7th Cir. 1989) (Posner, J.) (noting protracted litigation where franchisees "were holding the trademark hostage as a bargaining tactic to pressure [the franchisor] into renegotiating the franchise or settling the suit"). If the *Sunbeam* rule applies and licensees can continue to use licensed brands under the failed franchise business plans that yielded bankruptcy, reorganization will often be impossible. And as the court of appeals correctly observed, the *Sunbeam* rule would force licensors to choose between (1) retaining burdensome obligations associated with monitoring quality control and continuing relationships with adversarial franchisees, or (2) abandoning a valuable trademark to the public domain. Pet. App. 24a. Either choice would impede a franchisor's ability to reorganize or maximize creditor recoveries through a going-concern sale in bankruptcy, undermining a fundamental purpose of the Code.

B. Petitioner's Exclusive Distribution Rights Under The Rejected Agreement Are Not Enforceable As An Administrative Claim Against The Estate

As discussed at pp. 21-23, *supra*, the Court denied review on the only question that was presented and decided by the court of appeals concerning petitioner's exclusive distribution rights under the Agreement. Should the Court nonetheless reach the issue, it should affirm.

Even if a counterparty's "property" rights survive rejection, but see pp. 44-47, *supra*, petitioner's exclusive distribution rights under the Agreement are not an interest in respondent's property. Despite petitioner's attempt (Br. 43) to cast them as such, by calling them "sticks in the bundle of sticks that comprised [respondent's] ownership of its intellectual property," the reality is that the exclusive distribution rights under the Agreement were "simply a restriction on [respondent's] right to sell certain products that, like many products, happen to be made using a patent." Pet. App. 15a. Petitioner and respondent could have made the same contractual agreement regarding sales of identified products within specified territories "even if there were no patent license at all." *Ibid.*; see J.A. 211-218 (Agreement §§ 5-6). Petitioner's argument about its contractual exclusive distribution rights thus has nothing to do with the existence of a "license" but extends to any exclusive distribution agreement. Petitioner had a contractual right but no interest in respondent's property.

Nor, for reasons explained above, are petitioner's exclusive distribution rights outside the scope of Section 365 merely because petitioner can characterize respondent's obligation as a "negative covenant." Barring respondent from selling its products to any person other than petitioner would put a stranglehold on respondent's future business even more than would holding the estate in *NLRB* v. *Bildisco & Bildisco* to its collective bargaining agreement. 465 U.S. 513, 526-527 (1984). Notably, even when Congress revised the Code after *Bildisco* to provide additional procedural protections to employees under such agreements, it recognized that the estate retained the right (subject to those procedures) ultimately to "terminate" the agreement. 11 U.S.C. 1113(d)(2).

Petitioner's argument contravenes this Court's precedent and the very purpose of bankruptcy law. Petitioner repeatedly (Br. 42, 43, 44) invokes the result "outside bankruptcy" if respondent sought to breach exclusive distribution provisions. That is irrelevant. Respondent is in bankruptcy and "empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have employed absent the bankruptcy filing." *Bildisco*, 465 U.S. at 528. Whereas the power to reject a contract in bankruptcy renders the contract "not an enforceable contract" of the estate except as a pre-petition claim, *id.* at 532, petitioner's rule would allow petitioner to enforce the contract as an administrative claim, with priority over other creditors. That contravenes Congress's express intent. Congress gave "claim" extraordinary breadth to ensure that "all demands of whatever sort, * * * presently due or to mature in the future," are asserted as *pre*-petition claims and discharged. *City Bank Farmers Tr. Co.* v. *Irving*

Tr. Co., 299 U.S. 433, 437-439 (1937). This ensures that the counterparty cannot "haunt the bankrupt" after rejection, by "harass[ing] the discharged bankrupt by successive actions" to prevent the debtor's successful reorganization. *Ibid.* Petitioner's contrary rule must be rejected.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

1. 11 U.S.C. 101 provides in pertinent part:

Definitions

In this title the following definitions shall apply:

* * * * *

(5) The term "claim" means—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

* * * * *

(35A) The term "intellectual property" means—

(A) trade secret;

(B) invention, process, design, or plant protected under title 35;

(C) patent application;

(D) plant variety;

(E) work of authorship protected under title 17; or

(F) mask work protected under chapter 9 of title 17; to the extent protected by applicable nonbankruptcy law.

* * * * *

2. 11 U.S.C. 365 provides:

Executory contracts and unexpired leases

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

(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) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to—

(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;

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

(D) the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance—

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

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

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

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

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

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

(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the

date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4)(A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of—

(i) the date that is 120 days after the date of the order for relief; or

(ii) the date of the entry of an order confirming a plan.

(B)(i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.

(ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.

(5) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other

than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

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

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

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

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

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

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

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

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

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

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

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

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

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party

other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title—

(A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title—

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h)(1)(A) If the trustee rejects an unexpired lease of real property under which the debtor is the lessor and—

(i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or

(ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease and for the term of any renewal or extension of such lease, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(C) The rejection of a lease of real property in a shopping center with respect to which the lessee elects to retain its rights under subparagraph (A)(ii) does not affect the enforceability under applicable nonbankruptcy law of any provision in the lease pertaining to radius, location, use, exclusivity, or tenant mix or balance.

(D) In this paragraph, "lessee" includes any successor, assign, or mortgagee permitted under the terms of such lease.

(2)(A) If the trustee rejects a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller and—

(i) if the rejection amounts to such a breach as would entitle the timeshare interest purchaser to treat the timeshare plan as terminated under its terms, applicable nonbankruptcy law, or any agreement made by timeshare interest purchaser, the timeshare interest purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection; or

(ii) if the term of such timeshare interest has commenced, then the timeshare interest purchaser may retain its rights in such timeshare interest for the balance of such term and for any term of renewal or extension of such timeshare interest to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the timeshare interest purchaser retains its rights under subparagraph (A), such timeshare interest purchaser may offset against the moneys due for such timeshare interest for the balance of the term after the date of the rejection of such timeshare interest, and the term of any renewal or extension of such timeshare interest, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such timeshare plan, but the timeshare interest purchaser shall not have any right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(i)(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) If such purchaser remains in possession—

(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(*l*) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.

(n)(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for—

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract—

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive—

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract or any agreement supplementary to such contract—

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

(*o*) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

(p)(1) If a lease of personal property is rejected or not timely assumed by the trustee under subsection (d), the leased property is no longer property of the estate and the stay under section 362(a) is automatically terminated.

(2)(A) If the debtor in a case under chapter 7 is an individual, the debtor may notify the creditor in writing that the debtor desires to assume the lease. Upon being so notified, the creditor may, at its option, notify the debtor that it is willing to have the lease assumed by the debtor and may condition such assumption on cure of any outstanding default on terms set by the contract.

(B) If, not later than 30 days after notice is provided under subparagraph (A), the debtor notifies the lessor in writing that the lease is assumed, the liability under the lease will be assumed by the debtor and not by the estate.

(C) The stay under section 362 and the injunction under section 524(a)(2) shall not be violated by notification of the debtor and negotiation of cure under this subsection.

(3) In a case under chapter 11 in which the debtor is an individual and in a case under chapter 13, if the debtor is the lessee with respect to personal property and the lease is not assumed in the plan confirmed by the court, the lease is deemed rejected as of the conclusion of the hearing on confirmation. If the lease is rejected, the stay under section 362 and any stay under section 1301 is automatically terminated with respect to the property subject to the lease.

3. 11 U.S.C. 502 provides in pertinent part:

Allowance of claims or interests

* * * * *

(g)(1) A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

* * * * *

4. 11 U.S.C. 1113 provides:

Rejection of collective bargaining agreements

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section "trustee" shall include a debtor in possession), shall--

(A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in

subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that--

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not

rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the employee to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

5. 11 U.S.C. 1141 provides in pertinent part:

Effect of confirmation

* * * * *

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not—

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

* * * * *

6. 11 U.S.C. 365 (1976 Supp. III) provides in pertinent part:

Executory contracts and unexpired leases

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

* * * * *

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, or 13 of this title—

(A) if before such rejection the case has not been converted under section 1112 or 1307 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112 or 1307 of this title—

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h)(1) If the trustee rejects an unexpired lease of real property of the debtor under which the debtor is the lessor, the lessee under such lease may treat the lease as terminated by such rejection, or, in the alternative, may remain in possession for the balance of the term of such lease and any renewal or extension of such term that is enforceable by such lessee under applicable nonbankruptcy law.

(2) If such lessee remains in possession, such lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease, and any such renewal or extension, any damages occurring after such date caused by the nonperformance of any obligation of the debtor after such date, but such lessee does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset.

(i)(1) If the trustee rejects an executory contract of the debtor for the sale of real property under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property.

(2) If such purchaser remains in possession—

(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

* * * * *