IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2012

IN RE SINGSONG ELECTRONICS, INC.,

Debtor,

PLUM, INC.,

Petitioner,

v.

SINGSONG ELECTRONICS, INC.,

Respondent.

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

BRIEF FOR RESPONDENT

Team Number 48
Counsel for the Respondent
QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Thirteenth Circuit correctly found that a pre-petition bankruptcy waiver located in the governing documents of Singsong Electronics, Inc. is unenforceable?

2. Whether the Court of Appeals for the Thirteenth Circuit correctly found that Plum, Inc.’s pre-petition suit, which sought as remedy an injunction controlling Singsong Electronics, Inc.’s property, was subject to the automatic stay of 11 U.S.C. § 362 and that 28 U.S.C. § 959(a) did not function as an independent exception to the automatic stay?
TABLE OF CONTENTS

QUESTIONS PRESENTED ........................................................................................................ i

TABLE OF CONTENTS .......................................................................................................... ii

TABLE OF AUTHORITIES .................................................................................................... iv

OPINIONS BELOW .............................................................................................................. vii

STATEMENT OF JURISDICTION ........................................................................................ vii

STATUTORY PROVISIONS INVOLVED ............................................................................. vii

SUMMARY OF ARGUMENT ............................................................................................... viii

STATEMENT OF THE CASE ............................................................................................... 1

ARGUMENTS ........................................................................................................................ 5

I. The provision in Singsong’s bylaws that waives the corporation’s ability to voluntary file
bankruptcy is unenforceable. .............................................................................................. 5

A. Singsong’s bylaws constitute a bankruptcy waiver and are unenforceable as against public
policy. ..................................................................................................................................... 6

B. The pre-petition bankruptcy waiver prohibits Singsong from voluntarily availing itself of the
entire Bankruptcy Code, contrary to Congressional intent. ........................................... 7

1. The language found in the Constitution suggests that the federal bankruptcy laws are to be applied
broadly. .................................................................................................................................... 7

2. The definition of who may be a debtor, as established in § 109, indicates that Congress did not
intend to allow waivers of access to the bankruptcy courts. .............................................. 7

3. Singsong’s bylaws are a poor attempt to circumvent the Code’s express prohibition of ipso facto
clauses. ................................................................................................................................. 7

4. Allowing parties to waive access to certain provisions of the Bankruptcy Code is not the same as
allowing a waiver of access to the Code in its entirety. .................................................... 9

C. Should the waiver in Singsong’s bylaws be held enforceable, the negative effects would be
widespread. .......................................................................................................................... 11

1. Voluntary filings of chapter 11 bankruptcy petitions would essentially disappear if corporations
are able to prohibit themselves from filing bankruptcy via provisions in their governing documents.
.............................................................................................................................................. 11

2. Enforcing Singsong’s bylaws would render the Bankruptcy Code useless in many cases. .......... 11

3. Pre-petition bankruptcy waivers should not be enforced because enforcement would be harmful to
creditors and the economy. ................................................................................................. 13

4. Allowing corporate officers to create bankruptcy waiver provisions would allow officers to
contract away certain fiduciary duties. ............................................................................... 14

D. Bankruptcy waiver provisions found in corporate bylaws are unnecessary because
restricting access to certain portions of the Bankruptcy Code is possible without upholding a
complete waiver. .................................................................................................................... 15

II. The automatic stay applies to actions seeking to enjoin allegedly unlawful post-petition
operation of the debtor’s business ......................................................................................... 17

A. Plum’s pre-petition patent infringement suit is stayed under § 362(a)(1). .......................... 17

1. The Thirteenth Circuit correctly held that Plum’s suit was stayed under the plain language of §
362(a)(1). ............................................................................................................................. 17
2. The continuation during bankruptcy of conduct begun beforehand cannot be bifurcated between pre- and post-petition periods. ................................................................. 17
3. Allowing Plum’s pre-petition suit to proceed without court approval threatens all the ills the automatic stay is intended to prevent. ........................................................................ 18
B. Plum’s pre-petition patent infringement suit is stayed under § 362(a)(3) .............................. 20
   1. The Thirteenth Circuit correctly held that Plum’s suit was stayed under the plain language of § 362(a)(3) ........................................................................................................ 20
   2. Controlling Singsong’s allegedly tortious use of property cannot be distinguished from controlling the property itself. .................................................................................. 21
C. Section 959(a) is not an independent exception to the automatic stay. ................................. 22
   1. Congress did not intend § 959(a) to operate as an independent exception to the automatic stay ... 22
   2. Ruling that § 959(a) is not an exception to the automatic stay will not permit a debtor like Singsong to commit torts with impunity. ........................................................................ 23
   3. Requiring Plum to seek relief from stay best harmonizes the important policies reflected by §§ 362 and 959(a). ........................................................................................................... 24

APPENDIX A .................................................................................................................. I
APPENDIX B .................................................................................................................. II
APPENDIX C .................................................................................................................. III
APPENDIX D .................................................................................................................. VI
APPENDIX E .................................................................................................................. VII
APPENDIX F .................................................................................................................. IX
APPENDIX G .................................................................................................................. XVI
APPENDIX H .................................................................................................................. XVII
APPENDIX I .................................................................................................................. XVIII
## TABLE OF AUTHORITIES

### Cases


*Barton v. Barbor* 104 U.S. 126, 131 (1881) ................................................................ 22


*Carrieri v. Jobs.com, Inc.*, 393 F.3d 508, 534 n.24 (5th Cir. 2004) .................................. 14

*Diners Club, Inc. v. Bumb*, 421 F.2d 396 (9th Cir. 1970) ............................................. 22

*Dominic’s Restaurant v. Mantia*, 683 F.3d 757, 760-61 (6th Cir. 2012) ......................... 21


*F.D.I.C. v. Prince George Corp.*, 58 F.3d 1041, 1046 (4th Cir. 1995) ......................... 16

*Fallick v. Kehr*, 369 F.2d 899, 904 (2d Cir. 1966) .................................................. 5


*Hazelquist v. Guichi Moomie Tackle Co., Inc.*, 437 F.3d 1178, 1180 (Fed. Cir. 2006) ................................. 18, 24

*Hillis Motors, Inc. v. Hawaii Automobile Dealers’ Assoc.*, 997 F.2d 581, 592-593 (9th Cir. 1993) .................................................. 23


*In re Beaty*, 306 F.3d 915, 922 (9th Cir. 2002) .................................................. 10

*In re Burgess*, 234 B.R. 793 (D. Nev. 1999) .................................................. 22

*In re Capelli*, 261 B.R. 81, 87 (Bankr. D. Conn. 2001) .................................................. 6

*In re Cinematronics, Inc.*, 111 B.R. 892, 897-98 (Bankr. S.D. Cal. 1990) ......................... 21


*In re Colonial Reality Co.*, 980 F.2d 125, 133 (2d. Cir. 1992) ........................................ 25

*In re Cox*, 53 B.R. 829 (Bankr. M.D. Fla. 1985) .................................................. 18


*In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litigation*, 140 B.R. 969, 976 (N.D. Ill. 1992) .................................................. 17, 20, 24, 26


*In re Tru Block Concrete Prods., Inc.*, 27 B.R. 486, 492 (Bankr. S.D. Cal. 1983) ......................... 5

*In re VarTec Telecom, Inc.*, 2007 WL 2872283 at *2 (Bankr. N.D. Tex. 2007) ......................... 14


*In re Vistacare Group*, 678 F.3d 218, 227 .................................................. 23


*Jaytee-Pendel Co. v. Bloor* (In re Investors Funding Corp.), 547 F.2d 13, 16 (2d. Cir. 1976) .... 24
**Keenihan v. Heritage Press, Inc.**, 19 F.3d 1255, 1259 (8th Cir. 1994) ................................................................. 16
**Klingman v. Levinson**, 831 F.2d 1292, 1296 n.3 (7th Cir. 1987) ................................................................. 5, 6
**Local Loan Co. v. Hunt**, 292 U.S. 234, 244 (1934) .................................................................................................................. 6
**Muratore v. Darr**, 375 F.3d 140 (1st Cir. 2004) .................................................................................................................. 22
**Price v. Gurney**, 324 U.S. 100, 106 (1945) .................................................................................................................. 14
**Rite-Hite Corp. v. Kelley Co.**, 56 F.3d 1538, 1554 (Fed. Cir. 1995) .................................................................................. 18
**S.E.C. v. Byers**, 609 F.3d 87, 92 (2d Cir. 2010) .................................................................................................................. 13
**Seiko Epson Corp. v. Nu-Kote Int’l, Inc.**, 190 F.3d 1360, 1364-65 (Fed. Cir. 1999) ......................................................... 19
**St. Croix Condominium Owners v. St. Croix Hotel Corp.** 682 F.2d 1031, 1036 (3d. Cir. 1991) 19, 25, 26, 27
**Stellwagen v. Clum**, 245 U.S. 605, 617 (1918) .................................................................................................................. 6
**Sunshine Dev., Inc. v. FDIC**, 33 F.3d 106 (1st Cir. 1994) ................................................................................................. 19, 25
**Taylor v. Meirick**, 712 F.2d 1112 (7th Cir. 1983) .................................................................................................................. 18

**Statutes**

11 U.S.C. § 109............................................................................................................................................................................. i, 7, 8
11 U.S.C. § 301................................................................................................................................................................................ 5, VI
11 U.S.C. § 303................................................................................................................................................................................ vii, 12, IX, XVI
11 U.S.C. § 541................................................................................................................................................................................ 20, XVI
11 U.S.C. §362................................................................................................................................................................................ passim
11. U.S.C. § 101................................................................................................................................................................................ vii, 8
11. U.S.C. § 365................................................................................................................................................................................ 8, 9, XV
28 U.S.C. § 959(a)........................................................................................................................................................................ passim

**Act of March 3, 1887, ch. 373, § 2-3, 24 Stat. 554................................................................................................................ passim**

**Other Authorities**

S. Rep. No. 95-989, at 50 (1978) .................................................................................................................................................. 19, 21
Constitutional Provisions
art. I, § 8, cl. 4 ........................................................................................................................................ 7, 11
OPINIONS BELOW

By order and decision, the United States Bankruptcy Court for the Eastern District of Moot entered an order dismissing Singsong Electronics, Inc.’s chapter 11 case and denied its motion for injunctive relief. In doing so, the Bankruptcy Court held that: (1) Singsong lacked the corporate authority to file a voluntary petition in bankruptcy, and (2) the automatic stay did not apply to the Plum, Inc.’s patent infringement action. (R. 6.) On appeal, the United States District Court for the Western District of Washington combined the appeals and reversed both orders. (R. 6.) On December 14, 2012, the United States Court of Appeals for the Thirteenth Circuit affirmed the judgment of the District Court. (R. 13.)

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions in this case are: 11 U.S.C. §§ 101, 105, 109, 301, 303, 362, 365 and 451, 28 U.S.C. § 959, and 24 Stat. 554 (1883-1887), which are reproduced in Appendices A through I.
SUMMARY OF ARGUMENT

The United States Court of Appeals for the Thirteenth Circuit correctly affirmed the judgment of the District Court. This case presents the Court with two issues: (1) whether a corporation’s governing documents can prevent the corporation from filing a voluntary bankruptcy provision, and (2) whether the automatic stay prohibits the filing of an action to enjoin post-petition operations of the debtor’s business.

The provision in the bylaws of Singsong Electronics, Inc. ("Singsong"), insisted on by Plum, Inc. ("Plum") is unenforceable because it is a pre-petition waiver of bankruptcy. Pre-petition bankruptcy waivers are unenforceable as against public policy. The public policy reasons underlying the Bankruptcy Code include providing debtors with a “fresh start” and protecting creditors’ interests.

Should a pre-petition bankruptcy waiver be enforced, the debtor would be unable to avail himself of the protections afforded by the bankruptcy courts. Congress intended access to the bankruptcy courts to be broad and a pre-petition waiver goes against Congressional intent by limiting access. Further, bylaws that restrict a corporation from voluntarily filing a bankruptcy petition are a poor attempt to bypass the Code’s express prohibition of *ipso facto* clauses.

Upholding the provision in Singsong’s bylaws would have a negative effect. Voluntary filings of chapter 11 bankruptcy petitions by corporations would essentially disappear because lenders would insist on corporations including bankruptcy waivers in their governing documents. Creditors would be hurt because debtor corporations would not be able to file for bankruptcy when the corporation is near insolvency.

Pre-petition waivers of bankruptcy do not need to be allowed in order to restrict a debtor’s access to the bankruptcy courts. Creditors have numerous options available to them that
serve a similar purpose, short of being an all-out waiver, including voting restrictions, creditor representation, and special purpose entities.

Plum’s pre-petition patent infringement suit, which seeks as remedy an injunction controlling Singsong’s use of its property, is stayed under the plain language of both §§ 362(a)(1) and (a)(3). Adopting a straightforward reading of these sections is justified by Congress’s stated intent that the scope of the automatic stay be broad in order to protect debtors by preventing interference with estate administration, creditors by ensuring equality of distribution, and the effectiveness of the bankruptcy court judge.

Congress adopted § 959(a) as a statutory exception to the judicial doctrine announced by this Court in *Barton v. Barbor*, 104 U.S 126, 131 (1881), and not as an independent exception to the automatic stay. Ruling that § 959(a) does not function as an independent exception to the automatic stay by no means permits debtors to commit post-petition torts with impunity, but simply requires plaintiffs comply with the procedural safeguards established by Congress. Ruling otherwise enables plaintiffs like Plum to circumvent these safeguards and jeopardizes the policies the automatic stay is in place to protect.
STATEMENT OF THE CASE

Singsong Electronics, Inc. and Plum, Inc. are both major consumer electronics companies. (R. 2.) Singsong, incorporated under the laws of the State of Moot, began its existence as a manufacturer of consumer electronics for other companies. (R. 2.) In time Singsong started producing its own competing products and ultimately became a well-regarded brand name in its own right. (R. 2.) Plum, on the other hand, designs consumer electronics products but does little manufacturing itself. (R. 2.) Although they are competitors in some product markets, Plum and Singsong worked jointly to develop and manufacture successful products in other markets. (R. 3.)

Several years ago Singsong had the opportunity to become the exclusive manufacturer of Plum products. (R. 4.) At the time, Singsong was experiencing financial difficulties. (R. 4.) As such, Plum was unwilling to enter into a long-term exclusive manufacturing agreement with Singsong, unless Plum obtained the right to terminate the contract and move its manufacturing to a different firm in the event Singsong filed for bankruptcy. (R. 5.) 11 U.S.C. § 362(e)(1) renders such a contractual term – commonly referred to as an *ipso facto* clause – ineffective in a bankruptcy case. In an effort to circumvent this section, Plum required Singsong to amend its corporate by-laws to provide that Singsong lacked the corporate authority to file a petition in bankruptcy. (R. 5.) The new by-law provision provided, in part:

> Notwithstanding any other provision to the contrary, the Corporation is not authorized to file a petition in bankruptcy under section 301 of the United States Bankruptcy Code or to consent to the institution of bankruptcy, reorganization, or insolvency proceedings against it. Further, the Board of Directors of the Corporation does not have authority to consider or approve a resolution to file a voluntary petition in bankruptcy and no Officer has any authority to sign any such petition or cause it to be filed.

(R. 5.)
In 2011, Plum released the e-Phone, a multifunctional mobile smart phone designed by Plum but manufactured by Singsong. (R. 3.) The e-Phone proved to be very popular, and competing mobile phone producers began producing smart phones with similar capabilities. (R. 3.) Already a major supplier of mobile phones, Singsong introduced its own multifunctional smart phone, called the Galactica. (R. 3.)

On April 16, 2012, Plum filed suit against Singsong in the United States District Court for the Western District of Washington, alleging the software used in Singsong’s Galactica infringed Plum’s patented e-Phone software. (R. 3.) Among other remedies, the complaint requested an injunction restraining Singsong’s sale of the Galactica. (R. 3.) In its response, Singsong attacked the validity of Plum’s software patent on the ground that, under United States law, software is not patent eligible subject matter. (R. 4.) Singsong admitted that, were Plum’s patent valid, the Galactica software would infringe it. (R. 4.) Despite the patentability of software being a divisive issue – and one for which en banc review by the Federal Circuit is pending – the district court granted summary judgment against Singsong on the issue of infringement on June 11, 2012 and invited Plum to file a motion requesting an injunction. (R. 4.)

Plum refused to agree a settlement with Singsong that would permit it to temporarily license the e-Phone software while a non-infringing model of the Galactica was rushed into production. (R. 4.) Faced with financial ruin, Singsong’s Board of Directors consulted with legal counsel regarding its by-laws and then unanimously approved a resolution authorizing the filing of chapter 11 bankruptcy. (R. 5.) Singsong filed for chapter 11 bankruptcy in the Eastern District of Moot on June 13, 2012. (R. 4.)

Despite having been advised by Singsong of its chapter 11 filing, the following day, June 14 2012, Plum filed a motion with the Washington District Court in the patent infringement
action to enjoin Singsong from displaying, distributing, selling or taking orders for the Galactica. (R. 4.) Such an injunction would have been a death knell to Singsong, preventing it from both selling the nearly 100 million existing in-stock Galactica phones that use the software and delivering phones for at least three months while it switched production to the new version of the Galactica. (R. 4.)

Singsong responded by filing an emergency motion with the bankruptcy court alleging that Plum’s district court motion was filed in violation of the section 362 automatic stay. Singsong requested an order enjoining Plum from proceeding with the patent infringement action and, specifically, enjoining Plum from seeking injunctive relief against Singsong’s sale of Galactica phones. (R. 5.) Plum responded, first, that the express authority to sue granted by 28 U.S.C. § 959(a) operates as an independent exception to the § 362(a) automatic stay and, second, that the automatic stay never arose because no valid bankruptcy petition had been filed due to Singsong’s lack of authority to file bankruptcy. (R. 5-6.) In addition, Plum filed a motion to dismiss Singsong’s chapter 11 case on the ground that Singsong lacked corporate authority to file a voluntary petition in bankruptcy. (R. 6.)

The bankruptcy court denied Singsong’s motion and adopted both of Plum’s arguments ruling that the stay did not apply to the patent infringement action and dismissing Singsong’s chapter 11 case. (R. 6.) Recognizing that its dismissal was based on a legal theory not yet addressed in the Thirteenth Circuit, the court stayed its dismissal order to give Singsong an opportunity to seek appellate review. (R. 6.)

Singsong appealed both the dismissal order and the related order on the automatic stay issue. (R. 6.) The district court reversed both of the bankruptcy court’s orders. (R. 6.)
Thirteenth Circuit Court of Appeals affirmed the district court. (R. 7) This Court granted certiorari. (R. 7)
ARGUMENTS

I. The provision in Singsong’s bylaws that waives the corporation’s ability to voluntarily file bankruptcy is unenforceable.

The right to file bankruptcy may not be contracted away via a pre-petition waiver. See *Klingman v. Levinson*, 831 F.2d 1292, 1296 n.3 (7th Cir. 1987) (“For public policy reasons, a debtor may not contract away the right to a discharge in bankruptcy.”); *Fallick v. Kehr*, 369 F.2d 899, 904 (2d Cir. 1966) (“Advance agreement to waive the benefits of the Act would be void.”); *Double v. Cole (In re Cole)*, 428 B.R. 747, 753 (Bankr. N.D. Ohio 2009) (“This approach, of not enforcing, on public policy grounds, pre-petition agreements to waive the discharge of particular debts is widely accepted.”); *In re Weitzen*, 3 F.Supp. 698, 698 (S.D.N.Y. 1933) (“The agreement to waive the benefit of bankruptcy is unenforceable.”). This is because pre-petition waivers of bankruptcy are considered to be unenforceable as against public policy. *Klingman*, 831 F.2d at 1296 n.3; *Weitzen*, 3 F.Supp. at 698; *In re Tru Block Concrete Prods., Inc.*, 27 B.R. 486, 492 (Bankr. S.D. Cal. 1983); *In re Madison*, 184 B.R. 686, 690 (Bankr. E.D. Pa. 1995). These public policy considerations include protecting creditors and providing honest debtors with a “fresh start,” which allows them to start anew, free from certain obligations of indebtedness. *R.P Williams v. U.S. Fid. & Guar. Co.*, 236 U.S. 549, 554-55 (1915).

The Court of Appeals for the Thirteenth Circuit correctly held that the provision found in Singsong’s governing documents that purports to waive Singsong’s ability to voluntarily file for bankruptcy is unenforceable and serves to prohibit Singsong from instituting a voluntary bankruptcy case under § 301 of the Bankruptcy Code, 11 U.S.C. § 301. (R. 9) (subsequent undesignated statutory references are to the Bankruptcy Code, 11 U.S.C.). Pre-petition waivers circumvent the Bankruptcy Code itself. Further, should provisions such as the one included in
Singsong’s governing documents be held to be enforceable, the negative consequences would be widespread. Finally, enforcing pre-petition bankruptcy waivers in the corporate context is unnecessary because there exist alternative options that can be used to restrict access to the bankruptcy courts that are short of an all-out waiver.

A. Singsong’s bylaws constitute a bankruptcy waiver and are unenforceable as against public policy.

“It is a well settled principal [sic] that an advance agreement to waive the benefits conferred by the bankruptcy laws is wholly void as against public policy.” In re Tru Block Concrete Products, Inc., 27 B.R. at 492; see also In re Madison, 184 B.R. at 690; Klingman, 831 F.2d at 1296 n.3; Weitzen, 3 F.Supp. at 698. The public policy reasons for availing debtors of access to the protections of the Bankruptcy Code include providing debtors with a “fresh start” and protecting creditors’ interests in recouping payment of their debts by fairly and equally distributing the property of the debtor among creditors. See In re Capelli, 261 B.R. 81, 87 (Bankr. D. Conn. 2001); Stellwagen v. Clum, 245 U.S. 605, 617 (1918).

The “fresh start” idea for debtors predates the Code and is viewed as one of the primary purposes underlying federal bankruptcy laws. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934). Both private and public interests, as well as the courts, have discussed the importance of the “fresh start” idea for both individual and corporate debtors. See Stellwagen, 245 U.S. 605 at 617 (discussing the federal system of bankruptcy’s main purpose of aiding debtors by giving them “a fresh start in life” in the context of an Ohio corporation).

At least one scholar suggests that the reasoning behind the “fresh start” policy applies only to individuals and does not apply to businesses. Forrest Pearce, Bankruptcy-Remote Special Purpose Entities and a Business’s Right to Waive its Ability to File for Bankruptcy, 28
Emory Bankr. Dev. J. 507, 517 (2012). However, even assuming, arguendo, that the “fresh start” policy does not apply to corporations, other public policy reasons underlying the Code do apply, such as the need to protect creditors and preserve entities.

B. The pre-petition bankruptcy waiver prohibits Singsong from voluntarily availing itself of the entire Bankruptcy Code, contrary to Congressional intent.

Although there is no Constitutional right to file for bankruptcy and the Code does not expressly state that an individual may not waive its right to voluntarily file, the provisions contained within the Code, as well as case law, demonstrate that Congress intended access to the Code to be applied broadly.

1. The language found in the Constitution suggests that the federal bankruptcy laws are to be applied broadly.

Although short of creating a Constitutional right to file for bankruptcy, the language found in art. I, § 8, cl. 4 suggests that Congress intended to provide for broad access to federal bankruptcy laws: “Congress shall have the power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.”

2. The definition of who may be a debtor, as established in § 109, indicates that Congress did not intend to allow waivers of access to the bankruptcy courts.

The express language of the Bankruptcy Code demonstrates that Congress did not anticipate allowing waivers of voluntary petitions. For example, in the case of a chapter 11 proceeding, § 109(d), sets forth who may be a debtor:

Only a railroad, a person that may be a debtor under chapter 7 of this title (except a stockbroker or a commodity broker), and an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act, which
operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991 may be a debtor under chapter 11 of this title. (Emphasis added.)

The section specifically excludes stockbrokers and commodity brokers. *Id.* The drafters of the Code would not take the time to specifically articulate a broad list of persons that may file chapter 11 if they intended to allow just any corporation to be able to voluntarily opt out of the protections of the Code. There is no provision in § 109(d), or anywhere else in that section where it states that a person who may be a debtor is a person who has not waived their ability to file. Further, § 101 defines “person” to include individuals, partnerships, and corporations. § 101(41). This means that, for the purposes of the Bankruptcy Code, corporations are persons.

Allowing a corporation to effectively waive its right to file would be to change the definition of a “person” under the Code. If a corporation is able to waive its ability to file a voluntary petition, and thereby to waive its ability to be a debtor under the Code, then this would mean that the corporation would no longer be a “person” under the Code. If it is no longer considered a “person,” then even should an involuntary petition be filed, questions might arise as to how other sections of the Code could be applied to the corporation.

3. **Singsong’s bylaws are a poor attempt to circumvent the Code’s express prohibition of ipso facto clauses.**

Provisions in executory contracts or leases that alter or terminate the agreements based on insolvency or a filing for bankruptcy are known as *ipso facto* clauses and are expressly prohibited by § 365(e). *Breeden v. Catron (In re Catron)*, 158 B.R. 624, 628 (Bankr. E.D. Va. 1992); § 365(e).
Singsong’s bylaws that preclude the corporate authority to file a petition in bankruptcy are simply the result of Plum’s attempt to create a permissible *ipso facto* clause, since § 365(e) does not prohibit such restrictions in governing documents. Plum’s insistence that Singsong amend its bylaws allowed Plum to take advantage of its superior bargaining power and results in complete contradiction to the prohibition of *ipso facto* clauses in § 365(e). The fact that the language is located within a governing document, as opposed to in an executory contract or lease, should make no difference.

4. **Allowing parties to waive access to certain provisions of the Bankruptcy Code is not the same as allowing a waiver of access to the Code in its entirety.**

While recent case law indicates that courts are willing to allow parties to waive the benefits of certain provisions of the Bankruptcy Code, these cases suggest that courts do not intend to allow parties to waive access to the Code in its entirety. The Court of Appeals dissent argues that there is a modern trend that supports a contractual theory of bankruptcy that can be seen in cases allowing pre-petition waivers of the automatic stay. (R. 16); *In re Club Tower L.P.*, 138 B.R. 307 (Bankr. N.D. Ga. 1991); *In re Citadel Props., Inc.*, 86 B.R. 275 (Bankr. M.D. Fla. 1988). However, a waiver of the automatic stay is not the same as a waiver of the right to seek bankruptcy protection.

For example, in *In re Club Tower L.P.* (cited by the dissent on R. 16), the L.P. debtor and a creditor agreed pre-petition that the creditor would be entitled to immediate relief from the automatic stay should the debtor file a bankruptcy petition. 138 B.R. at 308–09. In enforcing the pre-petition agreement, the court explained that filing for bankruptcy should be a last resort, and pre-petition agreements to waive provisions of the automatic stay should be enforced against debtors that later file for bankruptcy. *Id.* at 312.
Accepting the dissent’s contractual theory of bankruptcy, the *Club Tower* court noted that a pre-petition waiver of § 362 is “significantly different from a provision which prohibits a debtor from filing a bankruptcy petition and thus [here] there is no violation of public policy.” *Id.* at 311. In short, waiving a single benefit of the Code is not the same as waiving all of the benefits provided by the Code; and a debtor who waives the benefit of the automatic stay still retains the core rights under the Code, including the ability to make a “fresh start.” *Id.* at 311-12. The court’s reasoning in *In re Club Tower* demonstrates that while there might be a trend towards allowing parties to agree to waive certain protections of the Bankruptcy Code pre-petition, this is not to be confused with allowing parties to agree to waive access to the Bankruptcy Code in its entirety.

Another crucial distinction that can be seen in the cases that enforce pre-petition agreements waiving a debtor’s right to automatic stay protections is that in those instances, there exists a bankruptcy judge who determines whether the agreement is enforceable or not. To enforce a waiver of a voluntary filing would be a unilateral decision, made between the parties, without the benefit of an arbiter to determine what is fair versus what is not. Because bankruptcy courts are, by definition, courts of equity, it should be up to the court to determine whether a waiver of the ability to voluntarily file bankruptcy is fair to the debtor. *See In re Beaty*, 306 F.3d 915, 922 (9th Cir. 2002) (“A bankruptcy court is a court of equity and should invoke equitable principles and doctrines, refusing to do so only where their application would be inconsistent with the Bankruptcy Code.”); § 105(a).
C. Should the waiver in Singsong’s bylaws be held enforceable, the negative effects would be widespread.

If the bankruptcy waiver found in Singsong’s bylaws is held to be enforceable, the effects of this decision would be disastrous and widespread.

1. Voluntary filings of chapter 11 bankruptcy petitions would essentially disappear if corporations are able to prohibit themselves from filing bankruptcy via provisions in their governing documents.

“Even bargained-for and knowing waivers of the right to seek protection in bankruptcy must be deemed void. . . otherwise, the lending community would be able to determine the extent, if any of access to the bankruptcy courts.” In re Madison, 184 B.R. 686, 690 (Bankr. E.D. Pa. 1995). What Plum did here (R. 5) is no different than what the Madison court noted “the lending community” would be able to do. Thus, the result should be no different: the bylaws prohibiting the filing of a chapter 11 petition are void.

Enforcing the bylaws would open the door for all creditors to require their debtor colleagues to pass ipso facto provisions in the debtors’ governing documents. Creditors that are in a position of superior bargaining power thereby will be able to effectively control a debtor corporation’s access to the bankruptcy courts. This runs contrary to Congressional intent, because pursuant to art. I, § 8, Congress is the only entity that is entitled to set and restrict access to the bankruptcy courts.

2. Enforcing Singsong’s bylaws would render the Bankruptcy Code useless in many cases.

If a corporation could choose to remove itself completely from the protections provided by the Bankruptcy Code, then the corporation’s personal interests would be

The dissent suggests that even if Singsong is prevented from filing a voluntary petition, § 303, which allows creditors to file an involuntary petition, acts as a safeguard because it allows creditors to decide if bankruptcy is a better solution than an out-of-court workout. (R. 16-17.) Though, this assumes that creditors would file an involuntary petition. Additionally, this assumes that a waiver would not harm creditors, since the dissent implies that they could instead choose to bring an involuntary proceeding. However, one commentator suggests that some creditors may not have complete access to information and the unsophisticated creditor might not be able to understand that a bankruptcy waiver provision means that doing business with the company would put the creditor, particularly the unsecured creditor, at an increased risk. See Marshall E. Tracht, Contractual Bankruptcy Waivers: Reconciling Theory, Practice, and Law, 82 Cornell L. Rev. 301, 335-36 (1997). In fact, one of the primary purposes of bankruptcy is to protect creditors. R.P. Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549, 554 (1915). However, if an unsecured creditor is forced to rely on an involuntary filing to protect its interest, but is unaware of this, then the unsecured creditor might not accordingly adjust the price of the consideration it receives from the debtor. Tracht, supra at 335-36. This would mean that a waiver could result in prejudice to the interests of unsecured creditors. Id.
Further, the dissent seems to agree (R. 16-17) with the idea that the ability to file an involuntary petition cannot be waived. *See* Tracht, *supra* at 305. However, *S.E.C. v. Byers*, a recent case out of the Second Circuit, suggests that filing an involuntary petition may be waivable. *See S.E.C. v. Byers*, 609 F.3d 87, 92 (2d Cir. 2010) (“Simply put, there is no unwaivable right to file an involuntary bankruptcy petition”). Meaning, debtors might not be able to rely on creditors filing an involuntary petition to provide access to the bankruptcy courts.

3. **Pre-petition bankruptcy waivers should not be enforced because enforcement would be harmful to creditors and the economy.**

Some of the most important policies that underlie bankruptcy law include: equality of distribution among creditors, debtor rehabilitation, and an economical administration of the bankruptcy process. *See* Steven L. Schwarcz, *Rethinking Freedom of Contract: A Bankruptcy Paradigm*, 77 Tex. L. Rev. 515, 542 (1999); *R.P. Williams v. U.S. Fid. & Guar. Co.*, 236 U.S. 549, 554-55 (1915). Indeed, the purpose of allowing a corporation to file a chapter 11 petition is “so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders.” H.R. Rep. No. 95-595 at 220 (1977). Thus, if a corporation is able to restrict itself from filing a voluntary bankruptcy petition, should the company experience a period of financial duress in which it would want to file for bankruptcy but be unable to, then employees and creditors would not be able to avail themselves of the protections of the Bankruptcy Code unless a creditor decided to file an involuntary petition.

Bankruptcy courts are courts of equity, and allowing companies to fail would not only hurt the nation’s economy, but would hurt the people who work for these companies, as well
as the creditors because they would become forced to rely on involuntary petitions.

Enforcing a pre-petition bankruptcy waiver, be it in a contract or in the governing documents of a business, would violate the public policies underlying the Code.

4. **Allowing corporate officers to create bankruptcy waiver provisions would allow officers to contract away certain fiduciary duties.**

Known as the “vicinity” or “zone” of insolvency theory, under the laws of certain states, once a business is near insolvency, fiduciary duties that are generally owed to shareholders, shift to creditors. *See In re Verestar, Inc.*, 343 B.R. 444, 471-72 (Bankr. S.D. N.Y. 2006); *see also In re VarTec Telecom, Inc.*, 2007 WL 2872283 at *2 (Bankr. N.D. Tex. 2007) (Delaware and Texas follow this theory). While fiduciary duties that are owed to shareholders do not disappear, once a corporation nears the zone of insolvency, officers’ fiduciary duties expand to include all creditors of the corporation, as well as equity holders. *Carrieri v. Jobs.com, Inc.*, 393 F.3d 508, 534 n.24 (5th Cir. 2004) (Texas law).

The dissent cites *Price v. Gurney* (R. 14), which stands for the proposition that the authority to file a bankruptcy petition must be found in the corporation’s instruments and in applicable state law. 324 U.S. 100, 106 (1945). If the authority to file a bankruptcy petition is to be found in state law, then in the states recognizing the “zone of insolvency” theory, a bankruptcy waiver provision found in the bylaws of a corporation could actually violate state law. For example, if Singsong’s bylaws are held to be enforceable, and Moot’s laws are similar to Delaware or Texas, then Singsong’s officers owe a fiduciary duty toward their creditors once the company is on the verge of insolvency. In keeping with this duty, failing to file a bankruptcy petition, because the officers are prevented from doing so, even if the filing is in the best interests of creditors, would be a violation of state law.
Additionally, enforcing the bankruptcy waiver would run contrary to the Code’s purpose of promoting uniformity. This Court has held that, “[t]he laws passed on the subject [of bankruptcy] must . . . be uniform throughout the United States, but that uniformity is geographical, not personal.” Hanover Nat. Bank v. Moyses, 186 U.S. 181, 188 (1902); see also Butner v. United States, 440 U.S. 48, 55 (1979) (state laws may result in some variations, so long as there is geographical uniformity). Enforcing a pre-petition bankruptcy waiver would mean that large corporations would have to check every single state law to determine if such waivers are permissible. This would run counter the Congressional intent of creating a uniform national framework for bankruptcy matters and the requirement of geographical uniformity.

D. Bankruptcy waiver provisions found in corporate bylaws are unnecessary because restricting access to certain portions of the Bankruptcy Code is possible without upholding a complete waiver.

A complete waiver of the ability to file a voluntary bankruptcy provision is not necessary because there are alternative methods that can be employed in order to effect a restriction of access to certain portions of the Bankruptcy Code.

One way to restrict access to the Bankruptcy Code would be to create a provision that requires a unanimous or supermajority vote of shareholders to file a bankruptcy petition, sometimes known as “bankruptcy remote provisions.” For example, in In re Kingston Square Associates, the court upheld an LLC’s bylaws that placed restrictions on the filing of bankruptcy by requiring unanimous consent of the board of directors or of its general partner and the shareholders. 214 B.R. 713, 716 (Bankr. S.D.N.Y. 1997); see also In re AM. Globus Corp., 195 B.R. 263, 265 (Bankr. S.D.N.Y. 1996) (upholding bylaws with a voting
requirement that all corporate action be approved by a unanimous vote of the two shareholders). In short, these bankruptcy remote provisions do not prevent the filing of a voluntary petition altogether. Instead, they simply place restrictions on the ability to file.

Additionally, provisions that require creditor representation on the board of directors have also been upheld. See *Keenihan v. Heritage Press, Inc.*, 19 F.3d 1255, 1259 (8th Cir. 1994) (stock agreement authorizing creditor to vote stock allowed creditor to essentially restrict the debtor from filing for bankruptcy). The idea behind this type of provision is that the creditor would not vote in favor of the company voluntarily filing for bankruptcy, so that the company would be prevented from filing because they lack the requisite voting majority to do so.

Special purpose entities, or asset securitizations, are another way to restrict companies from filing for bankruptcy. As the dissent correctly points out, an asset securitization is not a bankruptcy waiver and is one way to restrict access to the Bankruptcy Code. (R. 17-18.) An asset securitization is distinguishable from a bylaws provision waiving the right to file a voluntary petition because a note in an asset securitization does not *prohibit* the debtor from filing for bankruptcy. *F.D.I.C. v. Prince George Corp.*, 58 F.3d 1041, 1046 (4th Cir. 1995).

Thus creditors and debtors have numerous options available to them should they want to restrict a debtor’s ability to file for bankruptcy. These options, upheld by courts, have the effect of limiting the debtor’s access to the Bankruptcy Code without acting as a complete prohibition on voluntary filing.
II. The automatic stay applies to actions seeking to enjoin allegedly unlawful post-petition operation of the debtor’s business.

A. Plum’s pre-petition patent infringement suit is stayed under § 362(a)(1).

1. The Thirteenth Circuit correctly held that Plum’s suit was stayed under the plain language of § 362(a)(1).

   Section 362(a)(1) operates as a stay of “the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against a debtor that was or could have been commenced [pre-petition].” 11 U.S.C. § 362(a)(1) (2010). The judicial action in question – Plum’s suit against Singsong alleging patent infringement – could have been and in fact was commenced several months prior to Singsong’s petition in bankruptcy. (R. 3-4.) The Thirteenth Circuit correctly held that the plain language of § 362(a)(1) operates as a stay on Plum’s pre-petition suit. (R. 12); see also In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litigation, 140 B.R. 969, 976 (N.D. Ill. 1992); Advanced Computer Serv. of Mich., Inc. v. MAI Sys. Corp., 161 B.R. 771, 774-75 (E.D. Va. 1993); In re Spansion, Inc., 418 B.R. 84, 91 (Bankr. D. Del. 2009).

2. The continuation during bankruptcy of conduct begun beforehand cannot be bifurcated between pre- and post-petition periods.

   That pre-petition patent infringing conduct continues post-petition does not render the patent infringement suit incapable of having been brought pre-petition. Mahurkar, 140 B.R. at 976. The dissent below suggested that § 362(a)(1) ought not stay a pre-petition action seeking to enjoin allegedly illegal post-petition conduct because the claims relating to post-petition conduct may be bifurcated from the rest of the suit. (R. 20) (citing Voice Sys. & Serv., Inc. v. VMX, Inc., No. 91-C-88-B, 1992 WL 510121, at *11 (N.D. Okla. 1992). These decisions rely heavily on the
theory that “each act of patent infringement gives rise to a separate cause of action.” Hazelquist v. Guchi Moochie Tackle Co., Inc., 437 F.3d 1178, 1180 (Fed. Cir. 2006). However, courts do not conceive of ongoing infringement by a party as made up entirely independent torts for all purposes. See Taylor v. Meirick, 712 F.2d 1112 (7th Cir. 1983) (plaintiff in a copyright infringement suit may recover for entire period copyright was infringed, despite some infringement occurring outside the statutory limitations period, because the infringement constituted a continuous wrong); see also In re Cox, 53 B.R. 829 (Bankr. M.D. Fla. 1985) (rejecting plaintiff’s argument that claim for breach of a non-compete clause may be bifurcated into pre- and post-petition periods despite the wrong being continuous and causing damage both pre- and post-petition). The Federal Circuit acknowledges the continuous nature of a patent infringement tort for some purposes. See Rite-Hite Corp. v. Kelley Co., 56 F.3d 1538, 1554 (Fed. Cir. 1995). In determining a reasonable royalty, for example, the Federal Circuit advises a “hypothetical negotiation” for the terms of a licensing agreement “at the time the infringement began.” Id. Such a test necessarily recognizes the continuous nature of a patent infringement tort. Just as the Federal Circuit considers patent infringement as a continuous tort when determining a reasonable royalty to effectuate the policy of adequately compensating patent holders, Id. at 1545-46, the policies underlying § 362 justify viewing pre- and post-petition infringement as continuous for purposes of the automatic stay.

3. **Allowing Plum’s pre-petition suit to proceed without court approval threatens all the ills the automatic stay is intended to prevent.**

(1978) (“all proceedings are stayed, including arbitration, administrative, and judicial
proceedings”). While a patent infringement suit against a debtor may involve both pre- and post-
petition conduct, “the continuous nature of a patent infringement tort does not override a
paramount function of the bankruptcy court: to serve as the clearinghouse for attempted
enforcement of pre-petition claims or continuation of pre-petition litigation against the debtor.”

_Spansion_, 418 B.R. at 92.

The automatic stay avoids depletion of the debtor’s assets due to legal costs. _See St.
Enabling Plum to proceed with its pre-petition suit in Washington District Court while Singsong
works to rehabilitate its business in the Eastern District of Moot without first seeking relief from
the bankruptcy court threatens just such a disruption. The present appeal is distinguishable from
cases holding that a pre-petition injunction remains in force against a debtor post-petition in that
such a rule imposes no further litigation expenses on the debtor. _Seiko Epson Corp. v. Nu-Kote
Int’l, Inc._, 190 F.3d 1360, 1364-65 (Fed. Cir. 1999) (“proceedings that do not threaten to deplete
the assets of the debtor need not be stayed”).

Furthermore, permitting Plum to continue its pre-petition suit without first seeking relief
from the automatic stay threatens uniformity of distribution among similarly placed creditors.
_See Sunshine Dev., Inc. v. FDIC_, 33 F.3d 106 (1st Cir. 1994); _In re Steenstra_, 280 B.R. 560
(Bankr. Mass. 2002) (“The automatic stay under § 362(a) . . . is a critical component . . . to
ensur[ing] a uniform distribution of nonexempt assets to creditors of the same class”). Under
Plum’s interpretation of § 362(a)(1), a claimant alleging patent, trademark, or copyright
infringement spanning pre-and post-petition periods is free to pursue an injunction against the
debtor without first going through the clearinghouse of the bankruptcy court. _See Spansion_, 418
B.R. at 92. The injunction may then be used as leverage against the debtor to extract value from the estate in out-of-court negotiations – with the effect of depressing the overall value of the estate and to the detriment of other claimants and creditors. See Mahurkar 140 B.R. at 977; see also eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 396-97 (2006) (warning that patent holders may use the threat of an injunction “simply for undue leverage in negotiations” and to the detriment of the public interest).

B. Plum’s pre-petition patent infringement suit is stayed under § 362(a)(3).

1. The Thirteenth Circuit correctly held that Plum’s suit was stayed under the plain language of § 362(a)(3).

   Section 362(a)(3) operates as a stay of “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.” 11 U.S.C. § 362(a)(3) (2010). Section 541 defines property as including “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541 (2012). Here, property of the estate includes Singsong’s phone inventory. (R. 4.) Singsong is not divested of all equitable interest in its phone inventory by the district court’s grant of summary judgment on the issue of patent infringement because the issue is on appeal and Singsong’s rights are not finally determined. See In re Cinnabar 2000 Haircutters, Inc., 20 B.R. 575, 576 (Bankr. S.D.N.Y. 1982).

   Plum seeks to enjoin Singsong from “displaying, distributing, selling or taking orders” for its phone inventory. (R. 4.) The Thirteenth Circuit correctly held that Plum’s motion for an injunction constitutes an act to exercise control over the property of the estate. (R. 12.) In In re Cinematronics, Inc., the plaintiff’s obtaining a temporary restraining order preventing the debtor from displaying, selling, or taking orders for its product violated § 362(a)(3) as an effort to

2. **Controlling Singsong’s allegedly tortious use of property cannot be distinguished from controlling the property itself.**

The dissent below seeks to distinguish controlling the debtor’s use of property from controlling the property itself. (R. 20) (citing *Dominic’s Restaurant v. Mantia*, 683 F.3d 757, 760-61 (6th Cir. 2012)). This distinction reads into § 362(a)(3) language that is simply not present in the statute. Moreover, as the Thirteenth Circuit correctly pointed out, a corporate debtor is incapable of controlling property other than through the actions of its agents and therefore controlling the agents’ actions is controlling the property. (R. 12.)

Nev. 1999) (while County may possess an absolute right to revoke a license constituting property of the estate, “when the holder of such a license is in bankruptcy, the County must first seek relief from the automatic stay”).

C. Section 959(a) is not an independent exception to the automatic stay.

Section 959(a) provides, “Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice . . . .” 28 U.S.C. § 959(a) (2012).

1. Congress did not intend § 959(a) to operate as an independent exception to the automatic stay.

Congress enacted what is now § 959 in the Act of March 3, 1887, ch. 373, § 2-3, 24 Stat. 554. This section was passed into law not as a reply to the automatic stay but rather in response to this Court’s ruling in Barton v. Barbor 104 U.S. 126, 131 (1881), that a plaintiff must first seek leave of the appointing court before it may bring suit against a receiver. See Diners Club, Inc. v. Bumb, 421 F.2d 396 (9th Cir. 1970); Muratore v. Darr, 375 F.3d 140 (1st Cir. 2004) (§ 959(a) codifies a “limited” exception to the rule announced in Barton). Congress did not intend for § 959(a) to function as an independent exception to the automatic stay because the two operate in different spheres: the automatic stay is a statutory injunction, in contrast to the common law ruling in Barton. (R. 11.)

Because Congress made minor changes to § 959 in 1978, the same year it adopted the Bankruptcy Code, Congress necessarily was aware of § 959 when it drafted § 362. See In re Vistacare Group, 678 F.3d 218, 227; see also Goodyear Atomic Corp. v. Miller, 486 U.S. 174.
(1988) (Congress is presumed knowledgeable about existing law pertinent to the legislation it enacts). If Congress intended § 959(a) to function as an exception to the automatic stay it could have placed § 959(a) or a similarly worded provision in § 362(b). Further, § 959(b) was enacted at the same time as § 959(a), is worded similarly, addressed to the same actors, and is also not intended as an independent exception to the automatic stay. See Hillis Motors, Inc. v. Hawaii Automobile Dealers’ Assoc., 997 F.2d 581, 592-593 (9th Cir. 1993) (rejecting § 959(b) as an independent exception to the automatic stay because the alternative would abrogate carefully drawn governmental exceptions in § 362(b)). In sum Congress could not have intended subsection (a) to be an exception to the automatic stay, but not subsection (b).

2. Ruling that § 959(a) is not an exception to the automatic stay will not permit a debtor like Singsong to commit torts with impunity.

The Thirteenth Circuit correctly observed that ruling § 959(a) does not operate as an independent exception to the automatic stay by no means permits Singsong to commit post-petition torts with impunity. (R. 10.) Instead, Plum is simply required to first seek relief from the automatic stay – such as under the § 362(d)(1) “cause” standard – before pursuing its pre-petition suit. Section 959(a) itself serves as a substantial policy consideration in favor of permitting Plum’s suit based on Singsong’s post-petition business activity. (R. 10); accord Hillis Motor, 997 F.2d at 581 (Section 959(b) is not an independent exception to the automatic stay but rather operates as a weighty policy consideration when contemplating relief from stay). The Thirteenth Circuit suggested that “cause” will likely exist here. (R. 10.) In any event, either Plum can meet its burden of showing an injunction would not significantly interfere with administration of the estate or else Plum should not be allowed to interfere with estate administration.
Under these circumstances, substantively the § 362(d)(1) “cause” standard is not very different than the § 959(a) standard because § 959(a) empowers the bankruptcy court to exercise its general equity power over post-petition claims as may be necessary “to the ends of justice.” 28 U.S.C. § 959(a). Finally, when applying the “ends of justice” standard, the court must take into consideration the effect of the suit on administration of the estate. See Jaytee-Pendel Co. v. Bloor (In re Investors Funding Corp.), 547 F.2d 13, 16 (2d. Cir. 1976) (under § 959(a) the standard is whether an action would adversely affect the reorganization proceedings).

Requiring Plum to seek relief from stay does not impose a substantial time burden, as 11 U.S.C. § 362(e) (2012) provides that the stay terminates thirty days after a motion is filed under § 362(d) unless the court orders the stay to remain in effect after making certain required findings. In the alternative, Plum may seek expedited relief under the “irreparable damage” standard of 11 U.S.C. § 362(f) (2012). Plum may also seek an injunction of ongoing wrongs from the bankruptcy court itself. Mahurkar, 140 B.R. at 977. Additionally, “damages for wrongs done during the bankruptcy proceeding are administrative claims, and thus paid in full most of the time.” Id. If infringement continues after the stay is no longer in effect there exists a cause of action for post-discharge or post-confirmation acts of infringement. See Hazelquist, 437 F.3d at 1181; Spansion, 418 B.R. at 92.

3. **Requiring Plum to seek relief from stay best harmonizes the important policies reflected by §§ 362 and 959(a).**

Section 959(a) recognizes the value in permitting parties to pursue claims against a trustee or debtor-in-possession arising from purely post-petition operation of a business. The automatic stay protects creditors by ensuring uniformity of distribution and protects debtors by avoiding duplicative legal costs, inconsistent results, and unjustified distractions from the
rehabilitation effort. See S. Rep. No. 95-989, at 49-50 (1978); see also Sunshine Dev., Inc. v. FDIC, 33 F.3d 106, 114 (1st Cir. 1994). Requiring that Plum first seek relief from stay rather than permitting it to circumvent the procedural safeguards built into § 362 by means of an overbroad interpretation of § 959(a) best harmonizes the important policy considerations these two sections serve. (R. 11.) Holding, as did the Thirteenth Circuit, that § 959(a) is not an independent exception to the automatic stay may only briefly delay the continuation of Plum’s suit. (R. 10); see also Sunshine, 33 F.3d at 106; Allentown Ambassadors, Inc., v. Northeast American Baseball, LLC (In re Allentown Ambassadors, Inc.), 361 B.R. 422, 440 (Bankr. E.D. Pa. 2007). Nevertheless, this procedural check ensures the policies for which the stay was enacted are given due consideration. See St. Croix Condominium Owners, 682 F.2d at 1036. By contrast, permitting § 959(a) to serve as an independent exception results in actions that ought to be stayed under the plain language of § 362(a)(1) or (a)(3) proceeding with zero consideration given to the policies Congress had in mind when enacting the automatic stay.

The automatic stay promotes ease of judicial administration and prevents disruption of the debtor’s reorganization effort in defending proceedings brought against it in multiple fora. “The automatic stay insures that the debtor’s affairs will be centralized, initially, in a single forum in order to prevent conflicting judgments from different courts . . .” In re Colonial Reality Co., 980 F.2d 125, 133 (2d. Cir. 1992). In addition to depletion of assets through the costs of litigation, suits in multiple fora oblige the debtor and its counsel to spend substantial time away from rehabilitating the business. See In re Northwest Airlines Corp., No. 05-17930ALG, 2006 WL 694727, (Bankr. S.D.N.Y. Mar. 13, 2006). Under the approach advocated by the dissent below, Plum may drag Singsong from its efforts to rehabilitate its business without regard to the effect on the bankruptcy court’s proceeding, Singsong’s efforts or other creditors. Such an
approach undermines the purpose for which the stay is in place and threatens to frustrate the
effectiveness of the bankruptcy court judge.

The automatic stay bars a creditor from gaining a preference for its claims against the
debtor and avoids interference with the orderly rehabilitation of the debtor. *St. Croix Condominium Owners*, 682 F.2d at 1036. Permitting § 959(a) to function as an independent exception to the automatic stay advantages claimants alleging patent, trademark, or copyright infringement, which almost inevitably bled into the post-petition period, over all other pre-petition claimants and creditors by enabling them to pursue remedies without first obtaining leave of the bankruptcy court. *See Mahurkar* 140 B.R. at 977. The record does not disclose whether Singsong has other creditors or claims pending against it or what effect the continuation of Plum’s suit will have on Singsong’s reorganization or the uniform distribution of its assets. The actor in the best position to make this determination is the bankruptcy court judge. Requiring relief from stay recognizes that “it is the bankruptcy judge who is the most knowledgeable about the debtor’s affairs and about the effect that any judicial proceeding would have on the debtor’s reorganization. It is essential that he make the determination as to whether an action against the debtor may proceed . . . .” *St. Croix Condominium Owners*, 682 F.2d at 1036.

Congress enacted the automatic stay to give the debtor a “breathing spell” from the claims of creditors which drove it into bankruptcy. H. Rep. No. 95-595, at 174 (1978). Here, it is Plum’s pre-petition suit that drove Singsong into bankruptcy. (R. 4.) While there may be cause for permitting Plum’s suit to proceed, Congress has established standards that must first be met and imbued the bankruptcy court judge with the power to make that judgment. *St. Croix*
Condominium Owners, 682 F.2d at 1036. Plum should not be permitted to circumvent these procedural safeguards.

CONCLUSION

For the foregoing reasons, Respondent Singsong respectfully requests that this Court affirm the judgment of the Court of Appeals for the Thirteenth Circuit and hold that (1) the provision in Singsong’s bylaws that prohibits the corporation from filing a voluntary petition is unenforceable and (2) Plum’s pre-petition suit is subject to the automatic stay of § 362. The Court should remand for further proceedings consistent with this opinion.
APPENDIX A

11 U.S.C. §101(41) Definitions

(41) The term “person” includes individual, partnership, and corporation, but does not include governmental unit, except that a governmental unit that—
  (A) acquires an asset from a person—
      (i) as a result of the operation of a loan guarantee agreement; or
      (ii) as receiver or liquidating agent of a person;
  (B) is a guarantor of a pension benefit payable by or on behalf of the debtor or an affiliate of the debtor; or
  (C) is the legal or beneficial owner of an asset of—
      (i) an employee pension benefit plan that is a governmental plan, as defined in section 414(d) of the Internal Revenue Code of 1986; or
      (ii) an eligible deferred compensation plan, as defined in section 457(b) of the Internal Revenue Code of 1986;
shall be considered, for purposes of section 1102 of this title, to be a person with respect to such asset or such benefit.
APPENDIX B

11 U.S.C. §105 Power of Court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

(d) The court, on its own motion or on the request of a party in interest—

(1) shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and

(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, may issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that—

(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

(B) in a case under chapter 11 of this title—

(i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.
APPENDIX C

11 U.S.C. §109 Who may be a debtor

(a) Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.

(b) A person may be a debtor under chapter 7 of this title only if such person is not—
   (1) a railroad;
   (2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, a New Markets Venture Capital company as defined in section 351 of the Small Business Investment Act of 1958, a small business investment company licensed by the Small Business Administration under section 301 of the Small Business Investment Act of 1958, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act, except that an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991 may be a debtor if a petition is filed at the direction of the Board of Governors of the Federal Reserve System; or
   (3) (A) a foreign insurance company, engaged in such business in the United States; or
   (B) a foreign bank, savings bank, cooperative bank, savings and loan association, building and loan association, or credit union, that has a branch or agency (as defined in section 1(b) of the International Banking Act of 1978) in the United States.

(c) An entity may be a debtor under chapter 9 of this title if and only if such entity—
   (1) is a municipality;
   (2) is specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter;
   (3) is insolvent;
   (4) desires to effect a plan to adjust such debts; and
   (5) (A) has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;
   (B) has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;
   (C) is unable to negotiate with creditors because such negotiation is impracticable; or
   (D) reasonably believes that a creditor may attempt to obtain a transfer that is avoidable under section 547 of this title.
(d) Only a railroad, a person that may be a debtor under chapter 7 of this title (except a stockbroker or a commodity broker), and an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991 may be a debtor under chapter 11 of this title.

(e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $250,000 and noncontingent, liquidated, secured debts of less than $750,000, or an individual with regular income and such individual’s spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $250,000 and noncontingent, liquidated, secured debts of less than $750,000 may be a debtor under chapter 13 of this title.

(f) Only a family farmer or family fisherman with regular annual income may be a debtor under chapter 12 of this title.

(g) Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if—

1. the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or
2. the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

(h) Subject to paragraphs (2) and (3), and notwithstanding any other provision of this section other than paragraph (4) of this subsection, an individual may not be a debtor under this title unless such individual has, during the 180-day period ending on the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111 (a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.

1. Paragraph (1) shall not apply with respect to a debtor who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved nonprofit budget and credit counseling agencies for such district are not reasonably able to provide adequate services to the additional individuals who would otherwise seek credit counseling from such agencies by reason of the requirements of paragraph (1).

2. The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in subparagraph (A) shall review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter. Notwithstanding the preceding sentence, a nonprofit budget and credit counseling agency may be disapproved by the United States trustee (or the bankruptcy administrator, if any) at any time.

3. Subject to subparagraph (B), the requirements of paragraph (1) shall not apply with respect to a debtor who submits to the court a certification that—
(i) describes exigent circumstances that merit a waiver of the requirements of paragraph (1);
(ii) states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain the services referred to in paragraph (1) during the 7-day period beginning on the date on which the debtor made that request; and
(iii) is satisfactory to the court.

(B) With respect to a debtor, an exemption under subparagraph (A) shall cease to apply to that debtor on the date on which the debtor meets the requirements of paragraph (1), but in no case may the exemption apply to that debtor after the date that is 30 days after the debtor files a petition, except that the court, for cause, may order an additional 15 days.

(4) The requirements of paragraph (1) shall not apply with respect to a debtor whom the court determines, after notice and hearing, is unable to complete those requirements because of incapacity, disability, or active military duty in a military combat zone. For the purposes of this paragraph, incapacity means that the debtor is impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities; and “disability” means that the debtor is so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing required under paragraph (1).
APPENDIX D

11 U.S.C. § 301 Voluntary cases

(a) A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter.
(b) The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.
APPENDIX E

11 U.S.C. § 303 Involuntary cases

(a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title—

- (1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount, or an indenture trustee representing such a holder, if such noncontingent, undisputed claims aggregate at least $10,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;
- (2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724 (a) of this title, by one or more of such holders that hold in the aggregate at least $10,000 of such claims;
- (3) if such person is a partnership—
  - (A) by fewer than all of the general partners in such partnership; or
  - (B) if relief has been ordered under this title with respect to all of the general partners in such partnership, by a general partner in such partnership, the trustee of such a general partner, or a holder of a claim against such partnership; or
- (4) by a foreign representative of the estate in a foreign proceeding concerning such person.

(c) After the filing of a petition under this section but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim that is not contingent, other than a creditor filing under subsection (b) of this section, may join in the petition with the same effect as if such joining creditor were a petitioning creditor under subsection (b) of this section.

(d) The debtor, or a general partner in a partnership debtor that did not join in the petition, may file an answer to a petition under this section.

(e) After notice and a hearing, and for cause, the court may require the petitioners under this section to file a bond to indemnify the debtor for such amounts as the court may later allow under subsection (i) of this section.

(f) Notwithstanding section 363 of this title, except to the extent that the court orders otherwise, and until an order for relief in the case, any business of the debtor may continue to operate, and the debtor may continue to use, acquire, or dispose of property as if an involuntary case concerning the debtor had not been commenced.

(g) At any time after the commencement of an involuntary case under chapter 7 of this title but before an order for relief in the case, the court, on request of a party in interest, after notice to the debtor and a hearing, and if necessary to preserve the property of the estate or to prevent loss to the estate, may order the United States trustee to appoint an interim trustee under section 701 of this title to take possession of the property of the estate and to operate any business of the debtor. Before an order for relief, the debtor may regain possession of property in the possession of a trustee ordered appointed under this subsection if the debtor files such bond as the court requires,
conditioned on the debtor’s accounting for and delivering to the trustee, if there is an order for relief in the case, such property, or the value, as of the date the debtor regains possession, of such property.

(h) If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed. Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if—

(1) the debtor is generally not paying such debtor’s debts as such debts become due unless such debts are the subject of a bona fide dispute as to liability or amount; or
(2) within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

(i) If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment—

(1) against the petitioners and in favor of the debtor for—
   (A) costs; or
   (B) a reasonable attorney’s fee; or
(2) against any petitioner that filed the petition in bad faith, for—
   (A) any damages proximately caused by such filing; or
   (B) punitive damages.

(j) Only after notice to all creditors and a hearing may the court dismiss a petition filed under this section—

(1) on the motion of a petitioner;
(2) on consent of all petitioners and the debtor; or
(3) for want of prosecution.

(k)
(1) If—
   (A) the petition under this section is false or contains any materially false, fictitious, or fraudulent statement;
   (B) the debtor is an individual; and
   (C) the court dismisses such petition,
the court, upon the motion of the debtor, shall seal all the records of the court relating to such petition, and all references to such petition.
(2) If the debtor is an individual and the court dismisses a petition under this section, the court may enter an order prohibiting all consumer reporting agencies (as defined in section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a (f))) from making any consumer report (as defined in section 603(d) of that Act) that contains any information relating to such petition or to the case commenced by the filing of such petition.
(3) Upon the expiration of the statute of limitations described in section 3282 of title 18, for a violation of section 152 or 157 of such title, the court, upon the motion of the debtor and for good cause, may expunge any records relating to a petition filed under this section.
APPENDIX F


(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a)—

(A) of the commencement or continuation of a civil action or proceeding—

(i) for the establishment of paternity;

(ii) for the establishment or modification of an order for domestic support obligations;

(iii) concerning child custody or visitation;

(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or

(v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;
(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;
(D) of the withholding, suspension, or restriction of a driver’s license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act;
(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;
(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or
(G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act;
(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee’s rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;
(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit’s or organization’s police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit’s or organization’s police or regulatory power;
(6) under subsection (a) of this section, of the exercise by a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency of any contractual right (as defined in section 555 or 556) under any security agreement or arrangement or other credit enhancement forming a part of or related to any commodity contract, forward contract or securities contract, or of any contractual right (as defined in section 555 or 556) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such contracts, including any master agreement for such contracts;
(7) under subsection (a) of this section, of the exercise by a repo participant or financial participant of any contractual right (as defined in section 559) under any security agreement or arrangement or other credit enhancement forming a part of or related to any repurchase agreement, or of any contractual right (as defined in section 559) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;
(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was
formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of—
   (A) an audit by a governmental unit to determine tax liability;
   (B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;
   (C) a demand for tax returns; or
   (D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under chapter 537 of title 46 or section 109 (h) of title 49, or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under chapter 537 of title 46;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the exercise by a swap participant or financial participant of any contractual right (as defined in section 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any swap agreement, or of any contractual right (as defined in section 560) to offset or net out
any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;
(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax, or a special tax or special assessment on real property whether or not ad valorem, imposed by a governmental unit, if such tax or assessment comes due after the date of the filing of the petition;
(19) under subsection (a), of withholding of income from a debtor’s wages and collection of amounts withheld, under the debtor’s agreement authorizing that withholding and collection for the benefit of a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, that is sponsored by the employer of the debtor, or an affiliate, successor, or predecessor of such employer—
   (A) to the extent that the amounts withheld and collected are used solely for payments relating to a loan from a plan under section 408(b)(1) of the Employee Retirement Income Security Act of 1974 or is subject to section 72(p) of the Internal Revenue Code of 1986; or
   (B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;
but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title;
(20) under subsection (a), of any act to enforce any lien against or security interest in real property following entry of the order under subsection (d)(4) as to such real property in any prior case under this title, for a period of 2 years after the date of the entry of such an order, except that the debtor, in a subsequent case under this title, may move for relief from such order based upon changed circumstances or for other good cause shown, after notice and a hearing;
(21) under subsection (a), of any act to enforce any lien against or security interest in real property—
   (A) if the debtor is ineligible under section 109(g) to be a debtor in a case under this title; or
   (B) if the case under this title was filed in violation of a bankruptcy court order in a prior case under this title prohibiting the debtor from being a debtor in another case under this title;
(22) subject to subsection (l), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor;
(23) subject to subsection (m), under subsection (a)(3), of an eviction action that seeks possession of the residential property in which the debtor resides as a tenant under a lease or rental agreement based on endangerment of such property or the illegal use of controlled substances on such property, but only if the lessor files with the court, and serves upon the debtor, a certification under penalty of perjury that such an eviction
action has been filed, or that the debtor, during the 30-day period preceding the date of the filing of the certification, has endangered property or illegally used or allowed to be used a controlled substance on the property;

(24) under subsection (a), of any transfer that is not avoidable under section 544 and that is not avoidable under section 549;

(25) under subsection (a), of—

(A) the commencement or continuance of an investigation or action by a securities self regulatory organization to enforce such organization’s regulatory power;

(B) the enforcement of an order or decision, other than for monetary sanctions, obtained in an action by such securities self regulatory organization to enforce such organization’s regulatory power; or

(C) any act taken by such securities self regulatory organization to delist, delete, or refuse to permit quotation of any stock that does not meet applicable regulatory requirements;

(26) under subsection (a), of the setoff under applicable nonbankruptcy law of an income tax refund, by a governmental unit, with respect to a taxable period that ended before the date of the order for relief against an income tax liability for a taxable period that also ended before the date of the order for relief, except that in any case in which the setoff of an income tax refund is not permitted under applicable nonbankruptcy law because of a pending action to determine the amount or legality of a tax liability, the governmental unit may hold the refund pending the resolution of the action, unless the court, on the motion of the trustee and after notice and a hearing, grants the taxing authority adequate protection (within the meaning of section 361) for the secured claim of such authority in the setoff under section 506 (a);

(27) under subsection (a) of this section, of the exercise by a master netting agreement participant of any contractual right (as defined in section 555, 556, 559, or 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any master netting agreement, or of any contractual right (as defined in section 555, 556, 559, or 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such master netting agreements to the extent that such participant is eligible to exercise such rights under paragraph (6), (7), or (17) for each individual contract covered by the master netting agreement in issue; and

(28) under subsection (a), of the exclusion by the Secretary of Health and Human Services of the debtor from participation in the medicare program or any other Federal health care program (as defined in section 1128B(f) of the Social Security Act pursuant to title XI or XVIII of such Act).

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

XIII
(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and
(B) such property is not necessary to an effective reorganization;

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later—

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or
(B) the debtor has commenced monthly payments that—

(i) may, in the debtor’s sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and
(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor’s interest in the real estate; or

(4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either—

(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or
(B) multiple bankruptcy filings affecting such real property.

If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.

(1) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as
a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(2) Notwithstanding paragraph (1), in a case under chapter 7, 11, or 13 in which the debtor is an individual, the stay under subsection (a) shall terminate on the date that is 60 days after a request is made by a party in interest under subsection (d), unless—

(A) a final decision is rendered by the court during the 60-day period beginning on the date of the request; or

(B) such 60-day period is extended—

(i) by agreement of all parties in interest; or

(ii) by the court for such specific period of time as the court finds is required for good cause, as described in findings made by the court.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.
APPENDIX G

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

(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.
APPENDIX H

11 U.S.C. § 541(a) Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor’s spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor’s spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329 (b), 363 (n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510 (c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor’s spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.
APPENDIX I

28 U.S.C. § 959(a) & (b) Trustees and receivers suable; management; State laws

(a) Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive of his right to trial by jury.

(b) Except as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

Act of March 3, 1887, ch. 373, § 2-3, 24 Stat. 554

Sec. 2. That whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated in the same manner the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof be punished by a fine not exceeding three thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 3. That every receiver or manager of any property appointed by any court of the United States may be sued in respect to any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.