IN THE
Supreme Court of the United States
OCTOBER TERM 2013

IN RE FOODSTAR, INC.,
  Debtor

FOODSTAR, INC.,
  Petitioner

v.

RAVI VOHRA,
  Respondent

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

BRIEF FOR PETITIONER

Team P13
  Counsel for Petitioner

Oral Argument Requested
QUESTIONS PRESENTED

I. Does rejection of a trademark licensing agreement under 11 U.S.C. § 365 terminate the licensee’s right to use the trademark when the law governing rejection does not permit trademark licensees to retain their rights after rejection?

II. Does the presumption against the extraterritorial application of statutes prevent the application of 11 U.S.C. § 365 to a foreign trademark licensing agreement when the given controversy involves primarily domestic conduct and, alternatively, when Congress intended the Bankruptcy Code to apply extraterritorially?
# TABLE OF CONTENTS

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

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

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

OPINIONS BELOW .................................................................................................................... ix

STATEMENT OF JURISDICTION ................................................................................................. ix

STATUTORY PROVISIONS .......................................................................................................... ix

STATEMENT OF FACTS ............................................................................................................... 1

SUMMARY OF THE ARGUMENT ................................................................................................. 3

ARGUMENT .................................................................................................................................. 6

## I. Foodstar’s Rejection of the Trademark Agreement Terminates Vohra’s Right to Use the Burger Bites Trademark .................................................................................................................. 6

A. Because Congress purposefully chose not to protect trademarks in § 365, Foodstar’s rejection terminates Vohra’s rights to use the Burger Bites trademark .................................................................................................................. 7

1. Congress intentionally omitted trademark licensees in § 365(n) ........... 8

2. Congress provided protection for specific types of licensees, but trademark licensees are not among them ..................................................... 10

3. Because courts are charged with applying the law as Congress has written it, they cannot “step into the breach” to create a holding inconsistent § 365 ............................................................................................................. 13

B. Rejection is a bankruptcy law concept that goes beyond the ordinary effects of a contract breach ................................................................................................................................. 14

1. Rejection of an executory contract under § 365(g) converts a post-petition rejection into a pre-petition breach, differentiating rejection from a contract breach ........................................................................................................... 15

2. Defining rejection as only a breach would rob § 365(g) of its intended effect ................................................................................................................................. 17
C. Notwithstanding Foodstar’s rejection, allowing Vohra to retain his rights in the trademark agreement contradicts the fundamental purposes of bankruptcy law

1. Vohra’s continued use of the Burger Bites trademark would hinder the equitable distribution of Foodstar’s estate

2. Severing ongoing obligations is a fundamental purpose of bankruptcy, and Vohra’s continued use of the Burger Bites Trademark thwarts that purpose

II. THE PRESUMPTION AGAINST EXTRATERRITORIAL APPLICATION OF STATUTES DOES NOT PREVENT THE APPLICATION OF § 365 TO A FOREIGN LICENSING AGREEMENT

A. The presumption does not apply to Foodstar’s rejection of the trademark agreement because the conduct at issue principally occurred in the United States

B. Even if this Court finds the presumption applicable, Congress’ clear intention to apply the Bankruptcy Code extraterritorially rebuts the presumption

1. Congress intended for the Bankruptcy Code to apply to a debtor’s entire estate—including foreign property of the estate

2. According to the legislative history behind § 541, Congress intended the Bankruptcy Code and its substantive laws to be applied extraterritorially

3. The Code should be applied in whole, and rejection under § 365 should be achieved in a single proceeding

C. Even where congressional intent was not clear, the Supreme Court and several federal circuits have found the presumption inapplicable

CONCLUSION

APPENDIX A

APPENDIX B

APPENDIX C
# TABLE OF AUTHORITIES

## FEDERAL STATUTES

<table>
<thead>
<tr>
<th>Statute</th>
<th>Reference</th>
</tr>
</thead>
</table>

## UNITED STATES SUPREME COURT CASES

- **Continental Cas. Co. v. United States**, 314 U.S. 527 (1942) ................................................................. 11
- **Durousseau v. United States**, 10 U.S. 307 (1810) ................................................................. 11
- **Inhabitants of Montclair Twp. v. Ramsdell**, 107 U.S. 147 (1883) ................................................................. 18
- **Kiobel v. Royal Dutch Petroleum Co.**, 133 S. Ct. 1659 (2013) ................................................................. 28, 29, 33
Microsoft Corp. v. AT&T Corp.,
550 U.S. 437 (2007) .................................................................................. 32

Nicholas v. United States,
384 U.S. 678 (1966) .................................................................................. 19

NLRB v. Bildisco & Bildisco,

Segal v. Rochelle,
382 U.S. 375 (1966) .................................................................................. 21

Smith v. United States,
507 U.S. 197 (1993) .................................................................................. 26, 27, 29, 32

Steele v. Bulova Watch Co.,
344 U.S. 280 (1952) .................................................................................. 33

United States v. Menasche,
348 U.S. 528 (1955) .................................................................................. 17, 18

UNITED STATES COURT OF APPEALS CASES

Borman’s, Inc. v. Allied Supermarkets, Inc.,
706 F.2d 187 (6th Cir. 1983) .......................................................................... 13

Control Data Corp. v. Zelman,
602 F.2d 38 (2d Cir. 1979). .......................................................................... 13

Eastover Bank for Sav. v. Sowashee Venture,
19 F.3d 1077 (5th Cir. 1994) .......................................................................... 16

Envtl. Def. Fund v. Massey,
986 F.2d 528 (D.C. Cir. 1993) .................................................................. 24, 33

French v. Liebmann (In re French),
440 F.3d 145 (4th Cir. 2006) .................................................................. 23, 24, 25, 31

Hong Kong & Shanghai Banking Corp. v. Simon (In re Simon),
153 F.3d 991 (9th Cir. 1998) .................................................................. 23, 27, 33

In re BankVest Capital Corp.,
360 F.3d 291 (1st Cir. 2004) .................................................................. 22

In re Barnet,
737 F.3d 238 (2d Cir. 2013) .............................................................................. 6
In re Chi-Feng Huang,
23 B.R. 798 (9th Cir. 1982) ................................................................. 13

In re Exide Technologies,
607 F.3d 957 (3d Cir. 2010) ................................................................. 13, 15

In re FBI Distribution Corp.,
330 F.3d 36 (1st Cir. 2003) ................................................................. 15

In re Stewart Foods, Inc.,
64 F.3d 141 (4th Cir. 1995) ................................................................. 15

Laker Airways, Ltd. v. Sabena Belgian World Airlines,
731 F.2d 909 (D.C. Cir. 1982) ................................................................. 33

Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.,
756 F.2d 1043 (4th Cir. 1985) ................................................................. 6, 8, 13, 15

Lujan v. Defenders of Wildlife,
911 F.2d 117 (8th Cir. 1990) ................................................................. 31

O’Neill v. Cont’l Airlines, Inc.,
981 F.2d 1450 (5th Cir. 1993) ................................................................. 16

Sunbeam Products, Inc. v. Chicago Am. Mfg., LLC,
686 F.3d 372 (7th Cir. 2012) ................................................................. 6, 12, 14, 15, 16

Thompson v. Lil’ Joe Records, Inc.,
476 F.3d 1294 (11th Cir. 2007) ................................................................. 16

Underwood v. Hilliard (In re Rimsat, Ltd.),
98 F.3d 956 (7th Cir. 1996) ................................................................. 24, 32

United States v. Gatlin,
216 F.3d 207 (2d Cir. 2000) ................................................................. 26, 27, 28

United States v. Javino,
960 F.2d 1137 (2d Cir. 1992) ................................................................. 31

UNITED STATES DISTRICT COURT CASES

Amlon Metals, Inc. v. FMC Corp.,
775 F. Supp. 668 (S.D.N.Y. 1991) ................................................................. 31

In re Taylor,
103 B.R. 511 (D.N.J. 1989) ................................................................. 20, 21
UNITED STATES BANKRUPTCY COURT CASES

Florsheim Group, Inc. v. USAsia Int’l Corp. (In re Florsheim Group Inc.),
336 B.R. 126 (Bankr. N.D. Ill. 2005) ................................................................. 24

In re Ames Dept. Stores, Inc.,

In re Centura Software Corp.,
281 B.R. 660 (Bankr. N.D. Cal. 2002) ................................................................. 9

In re Chipwich, Inc.,
54 B.R. 427 (Bankr. S.D.N.Y. 1985) ................................................................. 9

In re Ciena Capital LLC,
2009 WL 2905759 (Bankr. S.D.N.Y. 2009) ....................................................... 22

In re Drexel Burnham Lambert Group, Inc.,

In re G. Survivor Corp.,

In re Gucci,

In re HQ Global Holdings, Inc.,
290 B.R. 507 (Bankr. D. Del. 2003) ................................................................. 9

In re Lakewood Eng’g & Mfg. Co,
459 B.R. 306 (Bankr. N.D. Ill. 2011) ................................................................. 14

In re Maxwell,
170 B.R. 800 (Bankr. S.D.N.Y. 1994) ................................................................. 33

In re Old Carco LLC,
406 B.R. 180 (Bankr. S.D.N.Y. 2009) ................................................................. 9, 21

In re Rajapakse,

In re Trans World Airlines, Inc.,
LEGISLATIVE MATERIALS

H.R. REP. NO. 82-2320 (1952),

H.R. REP. NO. 95-595 (1977),

Innovation Act, H.R. 3309,
  113th Cong. (2013) ...................................................... 10

Property Licenses in Bankruptcy Act, Pub. L. No. 100-506,
  102 Stat. 2583 (1988) ...................................................... 8, 9

S. REP. NO. 95-989 (1978),

S. REP. NO. 100-505 (1988),
  reprinted at 1988 U.S.C.C.A.N. 3200 .............................. 8, 10

OTHER AUTHORITIES

Marjorie F. Chertok, *Structuring License Agreements with Companies in Financial Difficulty—Section 365(n)—Divining Rod or Obstacle Course?*, 65 ST. JOHNS L. REV. 1045 (1991) ...................................................... 8


William S. Dodge, *Understanding the Presumption against Extraterritoriality*,
  16 BERKELEY J. INT'L LAW 85 (1998) .................................. 34
OPINIONS BELOW

The United States Bankruptcy Court for the District of Moot entered two orders in favor of the Petitioner, both of which were not accompanied by written opinion. (R. 5). Subsequently, the United States District Court for the District of Moot affirmed both orders without opinion. (R. 5). The opinion of the United States Court of Appeals for the Thirteenth Circuit in Case No. 13-4080, dated October 14, 2013, reversing the district court is unreported and incorporated in the Record on appeal. (R. 2-24).

STATEMENT OF JURISDICTION

A formal statement of jurisdiction is waived pursuant to Competition Rule VIII of the Twenty-Second Annual Judge Conrad B. Duberstein National Bankruptcy Moot Court Competition.

STATUTORY PROVISIONS

The following federal statutes relevant to the facts of this case are 11 U.S.C. § 365, 541, 544, 704, 1113, 1114, and 28 U.S.C. § 1334, some of which are set forth in the appendices as follows:

Appendix A: 11 U.S.C. § 365(a), (g), (n)
Appendix B: 11 U.S.C. § 541(8)
Appendix C: 28 U.S.C. § 1334
BRIEF FOR PETITIONER

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner Foodstar, Inc., appellee in Case No. 13-4080 before the U.S. Court of Appeals for the Thirteenth Circuit, respectfully submits this brief on the merits and asks this Court to reverse the decision of the Thirteenth Circuit Court of Appeals and render in favor of Petitioner Foodstar, Inc. on both certified questions.
STATEMENT OF FACTS

Background and Parties. This case involves a single creditor seeking to inhibit an honest, yet unfortunate debtor’s duty to satisfy its collective debt. The instant appeal involves the bankruptcy proceedings of Petitioner Foodstar, Inc. (“Foodstar”). Foodstar is the registered owner of the “Burger Bites” trademark and worldwide franchisor for the acclaimed “Burger Bites” restaurant chain. (R. 4). Foodstar acquired full rights to the Burger Bites franchise and trademark from Viraj Deshmukh (“Deshmukh”), an Eastlandian citizen. (R. 4). Foodstar possesses registered trademark rights to the Burger Bites franchise in the United States and several other nations—including the nation of Eastlandia. (R. 4). Nevertheless, after a fiscally crippling business venture, Foodstar filed for bankruptcy and sought to reorganize under Chapter 11 of the Bankruptcy Code; but, it failed to acquire the necessary financing for reorganization. (R. 3). As a result, Foodstar chose to liquidate under Chapter 11 instead of reorganizing, with its primary asset being the Burger Bites trademark. (R. 3). Accordingly, Foodstar sought to sell the Burger Bites trademark so as to satisfy the claims of its many creditors. (R. 3).

The Respondent in this case is Ravi Vohra (“Vohra”), an Eastlandian citizen. (R. 4). Vohra is the sole franchisor of the Burger Bites chain in Eastlandia. (R. 4). Prior to Foodstar’s acquisition of the Burger Bites trademark, pursuant to Eastlandian law, Vohra received an exclusive twenty-year license ("trademark agreement") from Deshmukh to use the trademark in Eastlandia. (R. 4). The trademark agreement contained provisions granting the licensor control over many aspects of Vohra’s operations and use of the trademark. (R. 4). Further, by virtue of its acquisition of the Burger Bites trademark, Foodstar inherited all of Deshmukh’s rights under the trademark agreement. (R. 4-5). Consequently, Foodstar received royalty payments from Vohra for his use of the Burger Bites trademark in Eastlandia. (R. 4-5).
The Dispute. The current dispute arises from a conflict between Foodstar and Vohra regarding the legal effect of Foodstar’s rejection of the trademark agreement. (R. 5-6). Foodstar maintains that the effect of rejection should be termination of the right to use the Burger Bites trademark, because termination will maximize the value of the estate and afford an equitable distribution of assets to all creditors. On the other hand, Vohra asserts he is not subject to the bankruptcy laws of the United States, and alternatively, contends that rejection should not terminate his right to continue using the Burger Bites trademark in Eastlandia because rejection would not be in the best interests of the estate. (R. 5). Yet, Vohra stipulated that the Burger Bites trademark would sell for ten to fifteen percent less if his rights were not terminated as a result of Foodstar’s rejection. (R. 5).

Proceedings Below. After Foodstar moved to reject the trademark agreement in the bankruptcy court, Vohra objected, and the United States Bankruptcy Court for the District of Moot granted the motion and entered an order authorizing rejection of the trademark agreement. (R. 5). Despite the rejection, Vohra refused to relinquish his rights to use the trademark in Eastlandia. (R. 6). Consequently, Foodstar filed an adversary proceeding in the bankruptcy court to: (1) declare that Vohra’s rights to use the Burger Bites trademark were terminated, (2) request that Vohra be enjoined from continued use of the trademark, and (3) move for summary judgment. (R. 6). The bankruptcy court granted summary judgment, entered an order declaring that Vohra’s rights were terminated, and enjoined Vohra from using the Burger Bites trademark. (R. 6). Vohra appealed both orders of the bankruptcy court to the United States District Court for the District of Moot. (R. 6). The district court affirmed both orders. (R. 6). Disagreeing with the district court’s decision, Vohra then appealed to the United States Court of Appeals for the Thirteenth Circuit. (R. 6). The Thirteenth Circuit reversed, holding that: (a) rejection does not
terminate Vohra’s right to use the Burger Bites trademark and (b) the presumption against extraterritorial application of statutes prevented the application of United States bankruptcy laws in Eastlandia. (R. 8, 13). Foodstar timely appealed the Thirteenth Circuit’s decision, and this honorable Court granted certiorari to consider the following questions: (1) whether rejection of a trademark licensing agreement under 11 U.S.C. § 365 terminates the licensee’s right to continue to use the trademark and (2) whether the presumption against extraterritorial application of statutes prevents the application of 11 U.S.C. § 365 to a foreign licensing agreement. (R. 1).

**SUMMARY OF THE ARGUMENT**

The Thirteenth Circuit’s decision is in error. The Thirteenth Circuit misinterpreted federal bankruptcy law and incorrectly applied a legal presumption in this case. First, the Thirteenth Circuit erred in holding that rejection under 11 U.S.C. § 365 does not terminate the rights of a trademark licensee. The lower court’s holding is a result of an overly narrow reading of the statute; one that examines the use of rejection in § 365(g) but ignores other provisions in § 365 that speak to rejection. Rejection is not defined in § 365, but its effect is clearly understood by looking at the entire statute, rather than just a single provision. Specifically, in § 365(n) Congress protects licensees of intellectual property rights by giving them the option to retain their rights. Under the Thirteenth Circuit’s reasoning, this provision would be useless because it held that licensees of all executory contracts already enjoy that right. To the contrary, Congress’ action to provide a remnant of executory contracts with the option to retain their rights implies that rejection terminates those rights for all other executory contracts.

Additionally, the Thirteenth Circuit confused rejection with a contract breach. Rejection is a term of art that provides a bankrupt debtor with the ability to sever existing obligations.
Because rejection is a tool unique to bankruptcy, it does not produce the same results as a normal contract breach. While rejection does create a breach, more importantly, it terminates the rights of the nonbankrupt party and changes the timing of the breach. Courts holding that rejection does not terminate the rights of a licensee have blurred the clear distinction between a breach and rejection.

Further, the Thirteenth Circuit’s holding is hostile to fundamental purposes of bankruptcy law because it prohibits a debtor from maximizing the value of the estate so as to satisfy all creditors’ claims, while permitting a single creditor to thwart the value of the estate at the detriment to all other creditors. In short, rejection has three main purposes: (1) to reduce the property of the estate to money, (2) to sever existing obligations, and (3) to ensure an equitable distribution to all creditors. Allowing a trademark licensee to continue using a trademark after rejection would impede these purposes. On the other hand, if rejection terminates the rights of a trademark licensee, the estate is able to (a) convert the trademark into money, (b) discontinue the supervision of the trademark as well as any other obligations associated with it, and (c) give all creditors an equitable portion of the trademark’s value. Thus, the latter option provides the most benefit to the estate by maximizing its overall value, and it also allows for an equitable distribution to all creditors.

Second, this Court should find that § 365 applies to the foreign trademark agreement in Eastlandia. Congress has the authority to carry out its laws in any foreign jurisdiction. However, our courts presume that U.S. laws do not apply beyond its territorial borders unless there is clear congressional intent to the contrary; this is known as the presumption against extraterritorial application of statutes. Yet, simply because a conflict contains both foreign and domestic elements, the presumption should not automatically be applied when the conduct sought to be
regulated is primarily domestic. In this case, because the conduct to be regulated is primarily domestic, the presumption does not apply.

Alternatively, even if this Court finds that the presumption is applicable, Congress’ clear intention for the Bankruptcy Code to apply extraterritorially rebuts the presumption. According to 11 U.S.C. § 541’s plain language and legislative history, property of the estate “wherever located”—including property in Eastlandia—is subject to the Bankruptcy Code and its substantive statutes. Because § 365 governs rejection of executory contracts concerning property of the estate, the presumption cannot prevent its extraterritorial application. Moreover, if there is any doubt as to congressional intent supporting § 365’s extraterritorial application in Eastlandia, this Court should still find the presumption inapplicable. And even when congressional intent is unclear or lacking, the presumption is inapplicable when the effect of preventing extraterritorial application of a given statute would cause damaging effects in the United States. Foodstar—and its creditors—would suffer harmful financial effects in the United States if § 365 could not be applied in Eastlandia and if Vohra were permitted to continue using the Burger Bites trademark there.

Therefore, this Court should find the Thirteenth Circuit erred in holding that the presumption against extraterritorial application prevented § 365’s application to the foreign trademark agreement in Eastlandia. Accordingly, this Court should reverse the Thirteenth Circuit’s decision in its entirety and find in Foodstar’s favor on both certified questions.
ARGUMENT

The Thirteenth Circuit erred on two fronts: (1) by misinterpreting § 365 and (2) incorrectly applying the presumption against extraterritorial application of statutes. The Court applies a de novo standard of review to a bankruptcy court’s legal conclusions, while accepting a bankruptcy court’s factual findings unless clearly erroneous. In re Barnet, 737 F.3d 238, 246 (2d Cir. 2013). Therefore, this Court should apply these standards in this case.

I. FOODSTAR’S REJECTION OF THE TRADEMARK AGREEMENT TERMINATES VOHRA’S RIGHT TO USE THE BURGER BITES TRADEMARK.

The first question before this honorable Court involves a disparity in legal interpretation amongst the federal circuits. The Fourth Circuit has previously addressed this specific query in Lubrizol and found that a licensee’s rights were terminated with the estate’s rejection of an executory contract. Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc., 756 F.2d 1043, 1048 (4th Cir. 1985). But, more recently, the Seventh Circuit ignored this line of reasoning and held that a licensee retains its rights under an executory contract even after the debtor rejects the contract. Sunbeam Products, Inc. v. Chicago Am. Mfg., LLC, 686 F.3d 372, 377 (7th Cir. 2012). The Thirteenth Circuit substantially relied on the Sunbeam rationale in rendering its opinion in the instant case. (R. 2-3). Yet, the Seventh Circuit’s reasoning in Sunbeam is not supported by § 365’s plain language or legislative history. Further, it defies fundamental principles of bankruptcy law.

Generally, a debtor’s rejection of an executory contract (a) terminates the rights of the licensee and (b) converts those rights into a pre-petition breach and claim for damages. 11 U.S.C. § 365(g) (2013). But Congress has chosen to treat intellectual property licensing agreements differently than other executory contracts by permitting intellectual property licensees to either (1) treat rejection as a termination of rights, as the general rule holds, or (2) retain their rights
under the contract for the duration of the agreement. 11 U.S.C. § 365(n) (2013). Nevertheless, through purposeful omission, Congress did not expressly define trademarks as intellectual property for purposes of § 365. As a result, trademark licensees are not afforded the post-rejection election to retain their rights as expressed under § 365(n); instead, a trademark licensee’s rights are terminated upon a rejection.

This Court should reverse the Thirteenth Circuit’s decision and hold that rejection terminates a trademark licensee’s right to continue using a trademark. Accordingly, this Court should render judgment in favor of the Foodstar for three reasons. First, § 365(n) allows specific licensees to keep their rights in a rejected contract, but trademark licensees are excluded. Second, rejection is a principle of bankruptcy law that results in a breach by the debtor, but also terminates the licensee’s rights to use a trademark. And third, the view proposed by Foodstar preserves fundamental principles that advance the purposes of a Chapter 11 bankruptcy.

A. Because Congress purposefully chose not to protect trademarks in § 365, Foodstar’s rejection terminates Vohra’s rights to use the Burger Bites trademark.

Section 365, when read in its entirety, illustrates that rejection terminates the rights of a trademark licensee. The term “rejection” in § 365(g) should not be viewed in a vacuum. The Court must look to the entire statute in order to properly define rejection. Congress has created exceptions to § 365(g), which help uncover the true effect of rejection. The addition of § 365(n) helped to clarify § 365(g) by showing that rejection must terminate the rights of a licensee. Because Congress felt it necessary to give specific intellectual property licensees the option to retain their rights upon rejection, the general effect of rejection must be to strip a licensee of those rights. 11 U.S.C. § 365(n).

Section 365(n)’s legislative history furnishes clear guidance on how the statute should be
interpreted. First, Congress purposefully excluded trademark agreements from the protections § 365(n). Next, because specific exceptions to § 365(g) are provided, a court should not infer that trademarks were also meant to be included. And lastly, because the courts are charged with applying the law as written, courts should not develop their own equitable analysis that is inconsistent with § 365.

1. **Congress intentionally omitted trademark licensees in § 365(n).**


The Fourth Circuit was the first to recognize the proper effect of rejection under § 365(g). *Lubrizol*, 756 F.2d at 1048. In *Lubrizol*, the court held that when a debtor files for bankruptcy and rejects an executory contract, the nonbankrupt party cannot “seek to retain its contract rights.” *Id.* In other words, “the purpose of . . . [rejection] . . . is to provide only a damages remedy.” *Id.* After this holding, Congress was concerned. S. Rep. No. 100-505, at 1. However, Congress’ concern was not for trademark licensees. Congress viewed *Lubrizol* as potentially troublesome for licensees of certain intellectual property agreements. *Id.* For that reason, Congress added § 365(n), excluding and protecting specific intellectual property agreements from the reach of § 365(g). *Id.* But, § 365(n) protections do not extend to trademark licensees.
Section 365(n) is only applicable to “intellectual property” as defined by 11 U.S.C. § 101(35A). Accordingly, Congress did not include trademarks in its definition of intellectual property. Vohra would have this Court venture outside of § 365(n)’s plain language to find that trademark agreements are among the protected class of intellectual property agreements. A large majority of courts have held that the “plain language of the statute . . . indicates that § 365(n) does not include trademark licenses.” In re Centura Software Corp., 281 B.R. 660, 669 (Bankr. N.D. Cal. 2002). Section 365(n) is reserved for “intellectual property” as defined by § 101(35A).¹ Section 101(35A) states “[t]he term ‘intellectual property’ means—

(A) trade secret;
(B) invention, process, design, or plant protected under title 35;
(C) patent application;
(D) plant variety;
(E) work of authorship protected under title 17; or
(F) mask work protected under chapter 9 of title 17;
to the extent protected by applicable nonbankruptcy law.”


The legislative history behind § 365(n) explains why trademarks were omitted—so the law could be more developed. Explaining the substance of § 365(n), the legislative history expressly recognized that “the bill [referring to § 365(n) as an amendment] does not address the rejection of executory trademark[s],” and explained that Congress decided “to postpone

¹ Section 101 was amended to include subsection (35A) at the same time § 365 was amended to include subsection (n); thus, these two statutes are coextensively linked in the Code and in legislative history. See Property Licenses in Bankruptcy Act, Pub. L. No. 100-506, 102 Stat. 2583 (1988).
congressional action in this area.” S. REP. NO. 100-505, at 5. Consequently, trademarks were not overlooked or omitted thoughtlessly from the ambit of § 365(n) protection. Yet, in the instant case, the Thirteenth Circuit opined that “[s]ometimes an omission is just an omission.” (R. 9). Such a legal conclusion or assumption is unfounded based upon Congress’ express intent.

Moreover, a recent bill known as the “Innovation Act” passed through the United States House of Representatives, indicating that Congress is aware that trademark licensees are excluded from § 365(n) protections. Innovation Act, H.R. 3309, 113th Cong. (2013) (as passed by House, Dec. 3, 2013) (“Innovation Act”). If enacted as currently written, the Innovation Act would extend § 365(n) protections that now cover intellectual property to trademarks.2 Id. Specifically, the Innovation Act would amend § 101(35A), which defines intellectual property, to include trademarks among the recognize classes of intellectual property. Nevertheless, to emphasize the current status of the law regarding rejection, this proposed bill would not be necessary if a trademark licensee’s rights were currently protected by § 365(n).

In the end, Congress enacted § 365(n) to guard intellectual property agreements from what it considered to be harsh results stemming from Lubrizol. S. REP. NO. 100-505, at 5. However, Congress did not go so far as to protect trademark licensees from complete termination of rights resulting from rejection. Congress explicitly stated that it was not ready to address trademarks when enacting § 365(n); therefore, the Thirteenth Circuit inappropriately applied § 365(n) to Foodstar’s rejection of the trademark agreement.

2. Congress provided protection for specific types of licensees, but trademark licensees are not among them.

Because specific exceptions are enumerated in § 365 that allow a licensee to retain its

---

2 To be clear, the Innovation Act is not law, but merely aspirational legislation. To date, the bill has been referred to the Senate. See Innovation Act, H.R. 3309, 113th Cong. (2013) (as referred in Senate, Dec. 9, 2013).
rights under an executory contract, the Court should not hold that trademarks are included by implication. Courts should not imply additional exceptions when specific exceptions are enumerated in a statute. *Andrus v. Glover Const. Co.*, 446 U.S. 608, 616-17 (1980). In light of rejection, § 365(n) provides a licensee with the ability to “retain its rights” in certain intellectual property agreements. Consequently, “. . . section 365(n)’s limited application means that other contract rights [such as trademark rights] are routinely stripped from non-debtor counterparties to other types of executory contracts.” Peter M. Gilhuly, et al, *Intelligently Bankrupt?: The Comprehensive Guide to Navigating IP Issues in Ch. 11, 21 AM. BANKR. INST. L. REV. 1, 38 (2013).

Congress chose to guard specific types of executory contracts from the ordinary legal effect of rejection—a complete termination of rights under the executory contract. Congress protected the following executory contracts:

(a) intellectual property, as defined by 11 U.S.C. 101(35A),
(b) unexpired real estate lease,
(c) timeshare interest,
(d) real property purchase, and
(e) collective bargaining agreement.

*See generally* 11 U.S.C. § 365. This Court has previously held that “a ‘legislative affirmative description’ implies denial of the nondescribed powers.” *Continental Cas. Co. v. United States*, 314 U.S. 527, 533 (1942) (quoting *Durousseau v. United States*, 10 U.S. 307, 314 (1810)). Consequently, because § 365 gives only a limited number of expressly named licensees the opportunity to keep their rights, the necessary conclusion is that a licensee generally does not retain its rights after rejection.

rejection terminated the rights of a licensee under a collective bargaining agreement. *Id.* After seeing the result of *NLRB*, Congress added § 1113 and § 1114 to protect laborers by requiring court approval before the debtor can terminate a collective bargaining agreement. *See generally* 11 U.S.C. §§ 1113-1114 (2013). Likewise, following the Fourth Circuit’s holding in *Lubrizol*, Congress took similar measures to protect certain intellectual property agreements and licensees. Since that time, Congress has not enacted legislation to protect trademark licensees. Furthermore, the intentional limitations that Congress has provided over the years should remove any doubt as to whether a court should read additional exceptions into the statute. Above all, for a court to do so would undermine Congress’ role as lawmaker.

Here, the Thirteenth Circuit confused the exception for the general rule. The root of its confusion stems from *Sunbeam*. There, the Seventh Circuit presented a hypothetical that confused § 365(g)’s general effect with the effect of certain exceptions. *Sunbeam*, 686 F.3d at 377. The court stated that a lessee could not rescind a contract by rejecting it, but could vacate the premises and pay money damages. The court went on to posit that if a lessor rejects a contract, it does not then have the right to evict the lessee; the lessor may only substitute damages for the obligation to make repairs. *Id.* But, this hypothetical has a major flaw—it is based on a type of executory contract that Congress has provided an exception for, namely unexpired real estate leases. 11 U.S.C. § 365(h)(1). Unexpired real estate leases have been protected from the general consequences associated with rejection. On the contrary, Congress has provided no such exception for trademark agreements. As a result, trademark agreements do not receive the same treatment as an unexpired real estate lease, and the Seventh Circuit’s hypothetical in *Sunbeam* is self-defeating and overall unhelpful.

In sum, when Congress acts to provide specific, enumerated exceptions to a general rule,
the Court should not imply additional exceptions. To do so would grossly undermine the
tility and role of Congress. Here, Vohra is not among a class protected by an exception
provided within § 365. Therefore, this Court should not apply such protections where Congress
has specifically excluded them.

3. Because courts are charged with applying the law as Congress has written it, they
cannot “step into the breach” to create a holding inconsistent § 365.

Courts should not go beyond applying the law as it currently exists. According to § 365, a
licensee’s right to use a trademark is terminated upon rejection. See 11 U.S.C. § 365(g). Some
courts have found this rule to be harsh. In re Exide Technologies, 607 F.3d 957, 965-68 (3d Cir.
2010) (J. Ambro, concurring). As a result, these courts have encouraged others to circumvent
what they found to be harsh consequences by employing “equitable” measures in analyzing
rejection of trademark agreements under § 365. Id. On these “equitable grounds,” a number of
courts have denied rejection of an executory contract, and by doing so, prohibited termination of
the licensee’s rights.3

The “equitable grounds” doctrine inappropriately sprouted from Judge Ambro’s
concurring opinion in In re Exide. Id. There, Judge Ambro stated that because Congress has not
protected trademark licensees, bankruptcy courts should use their “equitable powers” to do so.
Id. at 967. To the contrary, the Fourth Circuit in Lubrizol applied the law as it was written and
found that “equitable considerations may not be indulged by courts.” 756 F.2d at 1048. The
Fourth Circuit went on to state, “Congress has plainly provided for the rejection of executory

3 Some courts have gone so far as to develop a test for reviewing a debtor’s rejection. The majority of
courts apply the “business judgment test” and allow rejection as long as it benefits the estate, even if it burdens the
licensee. See Control Data Corp. v. Zelman, 602 F.2d 38, 43 (2d Cir. 1979) and Borman’s, Inc. v. Allied
Supermarkets, Inc., 706 F.2d 187, 189 (6th Cir. 1983). A small number of courts apply a “balancing of interest test,”
which balances the interest of the estate and other creditors with the interests of the licensee. See In re Chi-Feng
Huang, 23 B.R. 798, 801 (9th Cir. 1982).
contracts, notwithstanding the obvious adverse consequences for contracting parties thereby made inevitable.” *Id.*

Judge Ambro’s view encouraged the court in *In re Lakewood* to “step into the breach” and protect a licensee from unwanted or inequitable, though legal and statutory, consequences. *In re Lakewood Eng’g & Mfg. Co*, 459 B.R. 306, 345 (Bankr. N.D. Ill. 2011). The Seventh Circuit later affirmed *In re Lakewood* in the *Sunbeam* opinion. *Sunbeam*, 686 F.3d at 378. While the Seventh Circuit agreed with the result, it disagreed with the “development of equitable treatment”—further adding to the self-contradicting *Sunbeam* rationale. *Id.* at 376. In *Sunbeam*, the court found that “[w]hat the Bankruptcy Code provides, a judge cannot override by declaring that enforcement would be ‘inequitable . . . [because] [t]here are hundreds of bankruptcy judges, who have many different ideas about what is equitable in any given situation.’” *Id.* at 375-76 (emphasis added). Thus, begging the question: What should bankruptcy courts do when faced with legal consequences that may be subjectively inequitable?

There is a simple answer: courts should apply the law that Congress has provided without incorporating the personal beliefs and convictions of each bankruptcy judge. When courts “step into the breach,” the law becomes distorted by the subjective nature of the case and the court. This approach opposes a consistent reading of the law and leads to differing results that depend not on the law, but on the judge charged with resolving the dispute. In short, equitable powers cannot, and should not, be used to supersede § 365 so as to deny termination of a licensee’s rights in a rejected trademark agreement.

**B. Rejection is a bankruptcy law concept that goes beyond the ordinary effects of a contract breach.**

Rejection is a term of art and is not synonymous with a breach. The term “rejection” is used in § 365(g) to constitute a breach and also to define the timing of the breach. But, it does
more than that. The term does not merely convey the right to breach, but also terminates a licensee’s right in an executory contract. Two federal circuits have recognized that rejection terminates a licensee’s rights to use a trademark under an executory contract—the Fourth Circuit in *Lubrizol* (explicitly) and the Third Circuit in *In re Exide* (implicitly). *Lubrizol*, 756 F.2d at 1043; *In re Exide*, 607 F.3d at 964 (J. Ambro, concurring). In contrast, the Seventh Circuit stands alone in holding that rejection does not terminate a licensee’s rights. *Sunbeam*, 686 F.3d at 377.

Rejection equates to a breach that converts a post-petition rejection into a pre-petition breach. 11 U.S.C. § 365(g). And the legislative history underlying § 365(g) reveals that Congress enacted the provision for exactly that purpose. H.R. REP. NO. 95-595, 95th Cong., 2d Sess., at 349 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6305 (“H.R. REP. NO. 95-595”). Thus, rejection performs a crucial function for the debtor that goes beyond the concept of a breach. Further, to hold that rejection results in only a breach nullifies its intended legal effect.

1. Rejection of an executory contract under § 365(g) converts a post-petition rejection into a pre-petition breach, differentiating rejection from a contract breach.

Section 365(g) is a necessary tool that allows a debtor or trustee to reject contracts, such as trademark agreements, after filing for bankruptcy, and avoid having to pay damages as administrative expenses. For purposes of § 365(g), rejection is treated as a pre-petition breach and a non-debtor licensee is treated as an unsecured creditor of the estate. And once an executory contract is rejected, “the contract is deemed breached on the date ‘immediately before the date of the filing of the petition,’ . . . and the nondebtor party has a prepetition general unsecured claim for breach of contract damages, one not entitled to administrative priority.” *In re FBI Distribution Corp.*, 330 F.3d 36, 42 (1st Cir. 2003); see also *In re Stewart Foods, Inc.*, 64 F.3d 141, 144 (4th Cir. 1995). Foodstar does not argue that the trademark agreement at bar is void as a result of rejection. Both parties, and the majority of federal circuits, agree that rejection does
not rescind the contract altogether. *See Thompkins v. Lil’ Joe Records, Inc.*, 476 F.3d 1294, 1304 (11th Cir. 2007), *Eastover Bank for Sav. v. Sowashee Venture*, 19 F.3d 1077, 1082 (5th Cir. 1994), *O’Neill v. Cont’l Airlines, Inc.*, 981 F.2d 1450, 1459 (5th Cir. 1993), and *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 687, 708 (Bankr. S.D.N.Y. 1992). Rejection is not to be confused with an avoiding power. *See 11 U.S.C. § 544 (2013) and In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. at 709. However, even though rejection does not avoid the contract altogether, it does terminate the rights of the licensee to use such a contract and leaves only a claim for damages. If the contract were somehow avoided, Foodstar would not be required to pay damages to Vohra. But, Foodstar does not argue this. Instead, Foodstar argues that the contract is still effective but Vohra’s remedies are limited by rejection.

Although rejection and contract breach share common characteristics, they are different concepts that should not be considered interchangeable equals. The *Sunbeam* court incorrectly considered both concepts interchangeable, and held that because a rejection is similar to breach, the licensee must keep its rights after rejection; much like a non-breaching party keeps its rights after a breach of contract. 686 F.3d at 376. Further, the Seventh Circuit agreed that a “debtor’s unfulfilled obligations are converted to damages.” *Id.* at 377. But, the Seventh Circuit failed to recognize the appropriate distinction between a breach and a rejection. Even though it recognized that rejection has unique characteristics—such as altering the timing of the breach and not being subject to an order of specific performance—the Seventh Circuit still maintained that a rejection does not strip a licensee of its rights because a breach, apart from bankruptcy law, does not have that effect. *Id.* Thus, the Seventh Circuit’s position in *Sunbeam* is diametrically opposed to the principle of rejection Congress laid out in § 365.

Simply put, rejection should not be assimilated as a normal contract breach because
rejection has its own purposes in bankruptcy that are different from a standard breach of contract. Here, the Thirteenth Circuit erred by holding that rejection amounts to only a breach that does not alter Vohra’s rights to use the trademark. Instead, rejection by Foodstar should have resulted in the following: (1) a pre-petition breach of the executory contract by Foodstar, (2) a claim for monetary damages that Vohra could make against the estate, and (3) a complete termination of Vohra’s rights to use the Burger Bites trademark. Therefore, because the Thirteenth Circuit failed to distinguish rejection from a contract breach, this Court should reverse its ruling.

2. Defining rejection as only a breach would rob § 365(g) of its intended effect.

Equating rejection to simply a breach is troublesome because it leads to an interpretation that Congress did not intend. Rejection was meant to be a useful tool for the debtor to employ, no matter what type of executory contract was involved. Further, Congress intended rejection of an executory contract, such as a trademark agreement, to provide a licensee with more than the simple right to claim damages already afforded to the licensee under basic contract law. H. REP. No. 95-595, at 349.

Basic contract law already gives both parties the choice to breach and pay damages. Treating rejection as only conferring the right to breach—as did the Thirteenth Circuit—would provide a right that the parties already possess and, ultimately, marginalize rejection and its intended legal effect. Consequently, the Thirteenth Circuit’s ruling and interpretation debilitated § 365(g) of and deprived Foodstar of its statutory right to rejection’s intended legal effect. Congress meant rejection to be a tool for the debtor to use to remove continuing burdens or obligations that would decrease the value of the estate. And because it is the Court’s duty to “‘give effect, if possible, to every clause and word of a statute,’ rather than to emasculate an entire section,” Foodstar should not be deprived of its statutory right to terminate Vohra’s rights.
under the trademark agreement so as to maximize the value of its estate in bankruptcy. *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (citing *Inhabitants of Montclair Twp. v. Ramsdell*, 107 U.S. 147, 152 (1883)).

Moreover, § 365(g) should be interpreted so that the law applies consistently to all executory contracts. By holding that rejection does not terminate a licensee’s rights, a court would neuter the statute’s effect in trademark cases but continue to extend benefits in other executory contracts. If this position is adopted and rejection deprives Foodstar of its benefits in the trademark without terminating Vohra’s right to use the trademark, then rejection would be a useless tool. In essence, under such a premise, rejecting an executory contract would uniquely disadvantage the debtor trademark-licensor because the estate would be deprived of one less asset, and typically a very valuable asset. Whereas, by holding that rejection terminates a licensee’s rights, the law would have the same consistent effect for all executory contracts.

To illustrate this point, a hypothetical is helpful. Consider the effect of rejection in a contract for the sale of goods, and alternatively, the effect in a trademark agreement. First, consider the consequences of the Thirteenth Circuit’s interpretation—that rejection does not terminate the rights of a licensee. In an executory contract where the debtor has agreed to sell widgets to another party, rejection could be used to discontinue the obligation to perform on that contract; in other words, it would dissolve the debtor’s obligation to supply widgets. After rejection, the buyer would not be able to force specific performance but could only bring his claim for damages resulting from the rejection. On the other hand, under a trademark agreement, the licensee would have the same right to claim damages. But, in addition, under the Thirteenth Circuit’s approach, the licensee could also choose to continue using the trademark, negating any benefit for the debtor—rejection would only accomplish a waste of valuable time.
Next, consider the consequences of Foodstar’s interpretation—that rejection terminates the rights of the licensee. In a contract to sell widgets, the result is no different than if the buyer’s rights were not terminated by rejection. The difference is shown in the case of a rejected trademark agreement. If the trademark licensee’s rights were terminated upon rejection, then his right to use the trademark ends and is replaced with a right to claim damages. In this scenario, the unencumbered trademark benefits the estate, and the licensee becomes a creditor of the estate. In the end, the effects under Foodstar’s approach are consistent, whether it’s a trademark agreement or any other executory contract.

In that vein, the Thirteenth Circuit erred by misinterpreting the true legal effect of rejection and by incorrectly applying § 365(n) to the case at bar. The Thirteenth Circuit’s holding robbed Foodstar of any benefit in rejecting Vohra’s trademark license. Also, Vohra’s continued use of the Burger Bites trademark has diminished the mark’s attractiveness on the open market, resulting in a ten to fifteen percent diminution of the trademark’s value. (R. 5). Ultimately, the Thirteenth Circuit’s holding impairs the effectiveness of rejection on trademark agreements, but not for other executory contracts. Thus, this Court should reverse the Thirteenth Circuit’s ruling.

C. Notwithstanding Foodstar’s rejection, allowing Vohra to retain his rights in the trademark agreement contradicts the fundamental purposes of bankruptcy law.

The goal of Chapter 11 bankruptcy is the “ultimate rehabilitation of the debtor.” Nicholas v. United States, 384 U.S. 678, 687 (1966). In furthering this purpose, Congress has given debtors a tool to purge themselves of continuing obligations and “reduce to money the property of the estate.” 11 U.S.C. § 704(a)(1) (2013). Not only is rejection intended to aid the debtor in its “ultimate rehabilitation,” but it also is meant to maximize the return to a bankrupt party’s creditors. Rejection “is rooted in the principle of maximizing the return to creditors by permitting a debtor in possession to renounce title to and abandon burdensome property if such action is in
the best interests of the estate.” *In re Trans World Airlines, Inc.*, 261 B.R. 103, 117 (Bankr. D. Del. 2001). Holding that a licensee may retain its rights in a trademark agreement even after rejection would be detrimental to both of these purposes—it would frustrate the equitable distribution of the debtor’s assets and also burden the debtor by imposing ongoing obligations that are attached to the property.

1. **Vohra’s continued use of the Burger Bites trademark would hinder the equitable distribution of Foodstar’s estate.**

   Primarily, the Bankruptcy Code seeks to protect the interest of the debtor’s estate. *In re Taylor* 103 B.R. 511, 516 (D.N.J. 1989). In that light, the bankrupt debtor possesses a duty to maximize the value of its estate for the collective benefit of all its creditors. Rejection is a mechanism used to maximize a bankrupt estate’s value and helps allocate the debtor’s remaining resources. To divide Foodstar’s assets among its many creditors, it must be able to “reduce to money the property of the estate.” 11 U.S.C. § 704(a)(1).

   Further, a trademark can be, and usually is, a very valuable asset to a debtor and plays a substantial role in satisfying creditors’ claims. The value of a trademark is greatly affected by the debtor’s ability—or inability—to terminate a licensee’s use of that trademark. Essentially, allowing a trademark licensee, one creditor of the estate, to keep its rights to a trademark deprives other creditors of the maximum benefit. For that reason, the court in *In re G. Survivor Corporation* found that where rejection of a contract increased the value of the debtor’s assets and benefited the debtor’s creditors, rejection was appropriate. *In re G. Survivor Corp.*, 171 B.R. 755, 759 (Bankr. S.D.N.Y. 1994). More so, all unsecured creditors should receive an equitable distribution proportional to their claims against the estate. Yet, under the Thirteenth Circuit’s interpretation, Vohra—as the licensee and a single unsecured creditor among many to the estate—would get significantly more than what is equitable.
In the case at hand, the Burger Bites trademark is Foodstar’s primary asset, making it the most valuable asset to both Foodstar’s bankrupt estate and its creditors. (R. 3-4). Despite Foodstar’s rejection of the trademark agreement, Vohra was permitted to retain his rights to the Burger Bites trademark. (R. 6-7). As a result, the trademark’s value was diminished by ten to fifteen percent—impeding Foodstar’s duty to maximize the value of the estate, and allowing one creditor, Vohra, to benefit at the expense of the estate’s numerous other creditors. (R. 5). Consequently, Vohra’s position that he should retain his rights is collectively damaging to the debtor’s estate and its creditors.

By holding that rejection did not terminate Vohra’s rights to use the trademark, the Thirteenth Circuit frustrated the purpose of rejection and hindered Foodstar’s financial rehabilitation. Accordingly, this Court should reverse and hold that rejection terminates Vohra’s rights to use the Burger Bites trademark because such a ruling would (1) allow rejection to be properly utilized as intended and (2) ultimately further the purpose of bankruptcy.

2. **Severing ongoing obligations is a fundamental purpose of bankruptcy, and Vohra’s continued use of the Burger Bites Trademark thwarts that purpose.**

One of the fundamental purposes of rejection is to allow a trustee or debtor to “abandon burdensome property.” *In re Taylor*, 103 B.R. at 516. By doing so, the debtor is allowed a “fresh start” without being encumbered by his past debts or obligations. *Segal v. Rochelle*, 382 U.S. 375, 380 (1966). Rejection serves to dispel burdensome obligations from the estate so that the bankruptcy can proceed quickly and efficiently. Because post-petition performance can be “detrimental to an estate’s other creditors,” rejection serves as a means to rid the debtor of “the burden of postpetition performance.” *In re Ames Dept. Stores, Inc.*, 306 B.R. 43, 51 (Bankr. S.D.N.Y. 2004); *In re Old Carco LLC*, 406 B.R. at 196.
The court in *In re Ames Department Stores, Inc.* held that rejection allows a debtor to “avoid the incurrence of additional administrative expenses which lack a corresponding benefit to the estate.” 306 B.R. at 51. Once a debtor rejects an executory contract, it “is treated as abandoned and not part of the bankruptcy estate.” *In re Ciena Capital LLC*, 2009 WL 2905759, at *5 (Bankr. S.D.N.Y. 2009). To the contrary, allowing a licensee to retain its rights in a trademark would burden the debtor with a continuing obligation. *In re BankVest Capital Corp.*, 360 F.3d 291, 296 (1st Cir. 2004). Further, if the nonbankrupt party keeps its rights to use a trademark, the licensee will receive a benefit to which he has no corresponding burden. The licensee will have no more obligations to the licensor, but is still allowed to benefit from using the trademark; additionally, the oversights and regulation of that trademark will reduce substantially.

Here, if his rights were not terminated as a result of rejection, Vohra would be in a position to impose a significant burden on Foodstar’s estate by continuing to utilize the Burger Bites trademark, while not incurring a reciprocal burden. Although Foodstar would not be obligated to supervise Vohra’s use of the Burger Bites trademark, the incumbent owner of the trademark would likely opt to perform such supervision to ensure that Vohra does not further diminish the trademark’s value. The burden of supervising Vohra’s use of the Burger Bites trademark is an unattractive one—making the trademark less marketable and valuable because prospective buyers will be more reluctant to pay full value for the trademark. Vohra’s continued use of the Burger Bites trademark has already fostered a ten to fifteen percent decrease in the mark’s value on the open market. (R. 5). Such a burden is exactly what Foodstar’s rejection was meant to avoid.

Accordingly, the Thirteenth Circuit’s holding places an unreasonable financial burden on
Foodstar’s estate. If Vohra’s rights to use the trademark were properly terminated, as the Bankruptcy Code required, Foodstar’s bankruptcy would have proceeded more efficiently and seamlessly. Thus, this Court should reverse the decision of the Thirteenth Circuit and hold that rejection terminates Vohra’s rights to use the Burger Bites trademark.

II. THE PRESCRIPTION AGAINST EXTRATERRITORIAL APPLICATION OF STATUTES DOES NOT PREVENT THE APPLICATION OF § 365 TO A FOREIGN LICENSING AGREEMENT.

Congress has the authority to implement its laws in any foreign jurisdiction. *Hong Kong & Shanghai Banking Corp. v. Simon (In re Simon)*, 153 F.3d 991, 995 (9th Cir. 1998). But, our courts presume that United States law does not apply beyond its territorial borders unless an intent to do so appears to the contrary. *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991). This legal maxim is known as the presumption against extraterritorial application of statutes (“presumption” or “presumption against extraterritorial application”). *Id.* The presumption does not apply, however, to all legal controversies involving foreign conduct. *French v. Liebmann (In re French)*, 440 F.3d 145, 149 (4th Cir. 2006). Under any given statute, if the conduct Congress endeavors to regulate is primarily domestic, rather than foreign, then the presumption simply does not apply. *Id.* If courts cannot determine which jurisdiction is prevalent in a given controversy, then the presumption against extraterritorial application applies; however, it may be rebutted by a clear expression of congressional intent to apply United States law extraterritorially. *Aramco*, 499 U.S. at 248.

A. The presumption does not apply to Foodstar’s rejection of the trademark agreement because the conduct at issue principally occurred in the United States.

This Court should find that the presumption against extraterritorial application does not prevent United States law, specifically 11 U.S.C. § 365, from applying to a foreign trademark agreement in Eastlandia. When the reach of United States law is in question, a court should first
consider whether the presumption applies at all before delving into the mechanics of how it affects the foreign application of a given statute. *Envl. Def. Fund v. Massey*, 986 F.2d 528, 532 (D.C. Cir. 1993). Accordingly, a court should look to whether a particular statute seeks to “regulate conduct in the United States or in another sovereign country." *Id.* And if regulated conduct is domestic, courts must forego applying the presumption. *In re French*, 440 F.3d at 149.

The Fourth Circuit in *In re French* presented a test for courts to determine (1) whether the presumption applies, and (2) what analysis courts should employ in instances where the presumption applies. *Id.* at 149-50. Indeed, other courts have utilized similar approaches that resulted in a complete avoidance of the presumption entirely. *See Underwood v. Hilliard, (In re Rimsat, Ltd.),* 98 F.3d 956, 961 (7th Cir. 1996) and *Florsheim Group, Inc. v. USAsia Int’l Corp. (In re Florsheim Group Inc.),* 336 B.R. 126, 130–31 (Bankr. N.D. Ill. 2005). Nevertheless, because Foodstar’s trademark agreement with Vohra presents primarily a domestic issue, this Court should find that the presumption against extraterritorial application does not apply.

The *In re French* opinion laid out a reasonable and flexible test to aid courts in distinguishing “foreign” and “domestic” conduct (“conduct test”). *440 F.3d* at 149. In developing the conduct test, the *In re French* court recognized the difficult task of defining conduct as foreign or extraterritorial when there is a mixture of foreign and domestic elements at play within a given case. *Id.* Nonetheless, the mechanics of the Fourth Circuit’s conduct test are simple. The conduct test focuses on deciphering or characterizing conduct involved in, or giving rise to, a given controversy. *Id.* Accordingly, “a court should consider whether the participants, acts, targets, and effects involved in the transaction at issue are primarily foreign or primarily domestic . . . taking into account all component events” of the transaction to determine whether the presumption applies or not. *Id.* at 150. In essence, the conduct test employs a quantified
totality of the circumstances analysis. Consequently, after considering the totality of the circumstances or events involved in a given case, if the overall conduct can reasonably be defined as foreign or extraterritorial conduct, the presumption applies. And when the overall conduct can be characterized as domestic, the presumption does not apply.

Here, looking at all the components surrounding the rejection of the foreign trademark agreement between Vohra and Foodstar, this Court should observe an overwhelming domestic issue. The case at hand is analogous to that of In re French, whereby the presumption did not apply. Id. In dealing with a fraudulent property transfer claim, the Fourth Circuit looked first at the “participants.” Id. The court noted that all of the parties—except one Bahamian creditor and attorney—were located in the United States. Id. Next, the court looked to the “acts” involved. The transfer of the property in dispute, and the recordation of the deed, had taken place overseas in the Bahamas; thus the property transfer was a foreign act. Id. Even so, the other “act” considered was the debtor’s bankruptcy proceeding, which took place in the United States. Id.

The Fourth Circuit continued its analysis by contemplating the “targets.” Id. The court found that because the real property at issue was located or owned in the Bahamas, then the target of the controversy was foreign. Id. Further, the court noted that when the property at issue is part of an aggregate, the best way to deal with it is as a whole. Id. at 154. Lastly, the court looked to the “effects” of the conduct and found the effects were most strongly felt in the United States and not in the Bahamas—finding that the fraudulent transfer of the property affected the debtor’s estate primarily in the United States. Id. at 150. In the end, weighing these factors collectively, the court concluded the presumption did not apply. Id. at 151.

Here, the Vohra trademark license is part of an aggregate worldwide trademark. (R. 4). Applying the conduct test to the instant case reveals that the dispute before this Court involves
primarily domestic conduct. First, on the whole, there are more domestic participants in the instant controversy than foreign participants. Vohra is the only foreign participant in this case, while domestic participants include Foodstar and its many employees, franchises, and creditors located in the United States. (R. 4). Second, the “acts” involved in this dispute are more domestic than foreign. A single foreign act may be recognized in this case—the mere consummation of the trademark agreement in Eastlandia. (R. 4). But, the worldwide rights to the trademark are owned, exercised, and monitored by Foodstar centrally in the United States; also, the instant bankruptcy was filed in the United States, not in Eastlandia. (R. 3). Third, as the chief target property in dispute, the Burger Bites trademark is owned and managed by Foodstar—a United States corporation; thus, the target element here is solely domestic. (R. 4).

And last, the “effects” of the trademark agreement are felt more in the United States, than Eastlandia. In exchange for using the trademark in Eastlandia, Vohra paid royalty payments to Foodstar—payments of which were sent to Foodstar in the United States. (R. 4). Additionally, Vohra’s continued use of the license in Eastlandia encumbers the trademark’s overall value by ten to fifteen percent—an effect that is felt by Foodstar’s estate and other creditors in the United States. (R. 5). Therefore, on the whole, the instant case on appeal concerns primarily domestic conduct. This Court should hold that the presumption against extraterritorial application does not apply.

B. Even if this Court finds the presumption applicable, Congress’ clear intention to apply the Bankruptcy Code extraterritorially rebuts the presumption.

Given the Bankruptcy Code’s clear language, as well as the legislative intent underlying certain statutes, this Court should find that rebutting the presumption against extraterritorial application is easily accomplished. The presumption can be overcome only by “clear evidence of congressional intent.” United States v. Gatlin, 216 F.3d 207, 211-12 (2d Cir. 2000) (quoting
Smith v. United States, 507 U.S. 197, 201-03 (1993)). In determining whether “clear evidence” exists, courts consider “all available evidence” about congressional intent, including (1) the language and (2) legislative history of the relevant statute. Id. at 212.

1. Congress intended for the Bankruptcy Code to apply to a debtor’s entire estate—including foreign property of the estate.

In reviewing “all available evidence,” this Court should recognize that the Bankruptcy Code (“Code”), and therefore § 365, applies extraterritorially in Eastlandia. In order to rebut the presumption against extraterritorial application, a court must find that Congress intended a particular statute to reach beyond the United States’ physical boarders. Aramco, 499 U.S. at 248. Given the definition of “estate” provided in 11 U.S.C. § 541 (“§ 541”), § 365’s language provides concrete evidence of Congress’ intent to apply the Code to foreign jurisdictions. 11 U.S.C. § 541 (2013); see generally 11 U.S.C. § 365.

Section 541 provides that a debtor’s “estate is comprised of . . . property, wherever located and by whomever held . . . .” 4 11 U.S.C. § 541(a) (emphasis added). Accordingly, interpreting § 541(a), the Ninth Circuit has found the “wherever located” language exemplifies clear congressional intent to apply the Code extraterritorially. In re Simon, 153 F.3d at 996 (9th Cir. 1998). In re Simon involved the issue of whether a United States debtor’s discharge injunction against a Hong Kong creditor was enforceable in China. Id. at 994-5. The Hong Kong creditor asserted that the Code could not be applied extraterritorially, and therefore, the injunction and accompanied court sanctions could not be enforced in China. Id. at 995. The Ninth Circuit disagreed. Id. at 996. Focusing on the defining language of “estate” in § 541(a), the

---

4 Foodstar recognizes that the same “wherever located” language in § 541 is also found in 28 U.S.C. § 1334. Compare 28 U.S.C. § 1334(1) (2013), with 11 U.S.C. § 541(a). However, § 1334 serves as a procedural, or jurisdictional, statute, while § 541 serves as substantive law. Though § 1334 grants federal courts the authority to exercise in rem jurisdiction over property of the estate “wherever located,” it has no bearing on the substantive law to be applied in the instant case.
Ninth Circuit held that “[g]iven this clear expression of intent by Congress in the express language of the Bankruptcy Code, we conclude that Congress intended extraterritorial application of the Bankruptcy Code as it applies to property of the estate.” *Id.* Thus, the Ninth Circuit recognized that all property of a debtor’s estate, including property located outside the United States, is subject to the Code. *Id.*

Applying the Ninth Circuit’s interpretation here, trademarks and contractual rights associated with trademark agreements are “property of the estate” for the purposes of bankruptcy. *In re Gucci*, 202 B.R. 686, 691 (Bankr. S.D.N.Y. 1996). And like the debtor in *In re Simon*, here, Foodstar has property—comprised of the Burger Bites trademark and trademark agreement—located in Eastlandia, which transcends the United States’ territorial boundaries. (R. 4). Further, like the Chinese creditor in *In re Simon*, Vohra is not immune from the bankruptcy laws of the United States. Suitably, § 365 may be applied in Eastlandia given the Ninth Circuit’s analysis of § 541’s language and its rationale that the Code, in whole, applies extraterritorially when property of the estate is located outside the United States. Therefore, this Court should reverse the Thirteenth Circuit’s opinion, and find that the presumption is rebutted by clear congressional intent to apply the Code and its substantive statutes extraterritorially.

Furthermore, looking at a statute’s plain language is but one means to discern congressional intent—it is not the only means. As stated by the *Gatlin* court, “all available evidence” is to be considered including the text, structure, and legislative history of the statute. 216 F.3d at 212. However, Vohra incorrectly suggests that the presumption is a bar for § 365 to apply extraterritorially with respect to the trademark agreement. This argument is based on this Court’s decision in *Kiobel*. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665 (2013). The premise upon which Vohra argues is that the language of § 365 does not seemingly
manifest a “clear indication of extraterritoriality.” *Id.* But, this argument is flawed because it rests on the incorrect assumption that congressional intent of a statute must be shown only by the plain language of the statute’s text. *See Smith,* 507 U.S. at 201-03. Accordingly, this Court should hold that it is clear by § 541’s structure and substantive language of “wherever located” that Congress intended for the Code to reach beyond its domestic jurisdiction.

2. *According to the legislative history behind § 541, Congress intended the Bankruptcy Code and its substantive laws to be applied extraterritorially.*

Legislative history underlying § 541 provides yet another indication that Congress intended for United States bankruptcy laws, such as § 365, to apply extraterritorially. Though the statutory language of § 541(a) may be characterized as somewhat “broad and could be interpreted to cover [tangible or intangible] property owned by a debtor located outside, as well as within, the United States,” “the legislative history, however, is not ambiguous” at all. *In re Rajapakse,* 346 B.R. 233, 235 (Bankr. N.D. Ga. 2005) (citing H.R. Rep. No. 95-595, at 367 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6323 and S. Rep. No. 95-989, at 82 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5868).

Section 541 was meant to replace an older, though contextually identical statute, § 70(a) of the Bankruptcy Act of 1898 (“§ 70(a)”).* S. Rep. No. 95-989, 95th Cong. 2d Sess., at 82 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5868 (“S. Rep. No. 95-989”). Thus, the meaning of § 70(a) under the predecessor Bankruptcy Act of 1898 may be used to discern the congressional intent of § 541(a) in the current Code, and subsequently illustrate congressional intent to apply the Code extraterritorially. Before being repealed in 1978 and subsequently replaced with § 541(a), Congress amended § 70(a) to expand and provide a clear explanation of its applicable scope. The House explained, “section 70a [is amended] to make clear that a trustee in bankruptcy is vested with the title of the bankrupt in property which is located without, as well

Thus, § 70(a) was amended in such a fashion as to eliminate any doubts that it intended bankruptcy statutes to reach beyond the United States borders. Because § 70(a) is the clear predecessor to § 541(a), the same “wherever located” language and extraterritorial scope is instilled in § 541 of the current Code. Compare 11 U.S.C. § 541(a) (2013), and 11 U.S.C. § 70(a) (repealed 1978). Therefore, the Code, including § 365, applies extraterritorially to any and all property, tangible or intangible, “wherever located”—even in Eastlandia.

Nevertheless, in a feeble attempt to avoid clear congressional intent to apply the Code extraterritorially, Vohra suggests that the history of § 70(a) is proof that Congress did not aim to extend § 541’s reach to foreign jurisdictions. Vohra contends § 541 does not provide specific language that the Code is meant to be applied outside the United States. For example, he irrationally argues that language such as “the Code applies extraterritorially” is not contained verbatim in § 541’s text. Consequently, Vohra asserts that the history of § 70(a) is proof that Congress did not intend the Code to apply extraterritorially because Congress had the opportunity to provide such specific language in § 541, and it did not do so. Following this unreasonable chain of logic, Vohra maintains that Congress did not intend for “wherever located” to actually mean “wherever” per se, rather that it should mean “wherever located in the United States.”

Vohra’s reasoning and interpretation contradict one another because Vohra’s interpretation adds language (“in the United States”) to the statute, which by his own reasoning, Congress had the opportunity to add but did not do so. Also, Vohra’s arguments fail because it is
unreasonable to expect Congress to enact laws that are as specific as Vohra contends. Moreover, what Vohra asserts simply did not happen. Congress purposefully enacted § 541 with language “wherever located” with no verbal qualifiers, so as to intentionally mimic the congressionally-granted, broad scope exemplified in its predecessor § 70(a). Consequently, the Code, including § 365, is intended to apply extraterritorially in Eastlandia.

3. The Code should be applied in whole, and rejection under § 365 should be achieved in a single proceeding.

In order to carry out the collective purpose of bankruptcy, “the Bankruptcy Code establishes an integrated judicial procedure for the adjustment of debts and reorganization of a debtor, and that is an all-or-nothing proposition,” whereby breaking the Code into pieces distorts its purpose. (R. 23). This Court, therefore, should err on the side of efficiency and apply the Code as a whole. Specifically, this Court should recognize “property of the estate” as defined in § 541(a) as the definitional authority of the word “property” used in § 365; thus, as “wherever located” is applicable to property in § 541(a), it is equally applicable to foreign property of the estate subject to § 365.

In Javino, the Second Circuit held that the Code should be applied as a whole to determine whether there is some Congressional intent to apply a particular section extraterritorially. U.S. v. Javino, 960 F.2d 1137, 1142 (2d Cir. 1992); see also Lujan v. Defenders of Wildlife, 911 F.2d 117, 125 (8th Cir. 1990) and Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668, 674-75 (S.D.N.Y. 1991). Additionally, Justice Wilkinson’s concurrence in In re French was explicit that the entire Code is meant to be applied extraterritorially when he stated, “[t]he Code anticipates that [the bankruptcy proceedings] will take place within a single proceeding, rather than asset by asset in inefficient piecemeal litigation.” 440 F.3d at 154.
Contrary to the preceding line of reasoning, Vohra contests that even if one statute of the Code were to apply extraterritorially, like § 541(a), there is no basis to apply § 365 abroad. Vohra bases this assertion on the Court’s reasoning in *Microsoft Corporation* and *Smith*. See *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007); *Smith*, 507 U.S. at 197. In these cases, the Court held that one section’s stance on extraterritoriality does not defeat the entire presumption. *Microsoft Corp.*, 550 U.S. at 455-56; *Smith*, 507 U.S. at 204. However, the Court’s reasoning in both of those cases was based on entirely different statutes and claims than the one presented here.

*Microsoft Corp.* involved a patent infringement claim brought under 35 U.S.C. § 271, while *Smith* concerned a claim brought under the Federal Tort Claims Act. Neither of these cases involved a bankruptcy claim brought under any statute of the Code. Thus, these cases are easily distinguishable from the instant case. More so, the Code is materially different from other acts seeking to overcome the presumption against extraterritorial application because the Code seeks to avoid “a chaotic and uncontrolled scramble for the debtor’s assets in a variety of uncoordinated proceedings in different courts.” *In re Rimsat, Ltd.*, 98 F.3d at 961. Therefore, this Court should find that a single proceeding is crucial to uphold the integrity of the Code, and subsequently rule that § 365 applies extraterritorially in Eastlandia.

**C. Even where congressional intent was not clear, the Supreme Court and several federal circuits have found the presumption inapplicable.**

Applying the presumption against extraterritorial application in this case would cause harmful effects in the United States. Following the Court’s precedent, this Court should find that § 365 must apply in Eastlandia to avoid causing harmful effects in the United States. Traditionally, as expounded on earlier, courts presume United States laws only apply domestically unless there is an “affirmative intent” by Congress otherwise. *Aramco*, 499 U.S. at
248. However, substantial case law has held that even when congressional intent is unclear, otherwise strictly domestic laws can still be applied in foreign jurisdictions if: (1) the failure to apply that statute would result in negative effects within the United States, or (2) when the conduct sought to be regulated is “intended to, and results in, substantial effects within the United States.” *Laker Airways, Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909, 925 (D.C. Cir. 1982).

The Court has held that domestic laws apply to foreign nations when American residents or companies would endure harmful effects but for the extraterritorial application of a statute (“effects test”). *Steele v. Bulova Watch Co.*, 344 U.S. 280, 286 (1952). In the *Steele* decision, the Court rebutted the presumption when it applied the American Trade-Mark Act of 1946 (“Lanham Act”) in Mexico. *Id.* at 287. In order to suppress the harmful effects to a domestic watch company resulting from trademark infringement, the Court held that the defendant’s operations in Mexico were not beyond the reach of the Lanham Act. *Id.* Another Supreme Court decision—*Kiobel*—is further judicial ratification of the *Steele* effects test. 133 S. Ct. at 1669 (holding that claims must significantly “touch and concern” the United States in order to rebut the presumption). And the Ninth Circuit adopted the Court’s effects test by finding the presumption did not apply because allowing a foreign creditor to disregard bankruptcy court orders would have “substantial” negative effects in the United States. *In re Simon*, 153 F.3d at 997.

In this case, Foodstar and its estate will fall victim to harmful financial effects in the United States if the presumption prevents application of § 365 in Eastlandia and Vohra’s rights

---

are not terminated accordingly. Thus, this Court should find the presumption inapplicable and interpret § 365 to terminate a trademark licensee’s rights upon rejection. Like the petitioner in Steele, Foodstar will be the direct target of adverse effects if the presumption is applied. It is undisputed that Foodstar’s trademark would sell for ten to fifteen percent less if Vohra is permitted to continue using the trademark in Eastlandia. (R. 5). Consequently, if the presumption applies here and Vohra is permitted to continue exercising his rights under the rejected trademark agreement, then Foodstar’s estate will be deprived of substantial value, and Foodstar will be unable to maximize the estate so as to satisfy its collective debt. Thus, both Foodstar and its creditors will be subject to harmful effects if the presumption applies and § 365 is prevented from applying in Eastlandia.

 Conversely, it could be asserted that “substantial effects” felt in the United States must be a high burden to prove after the Court’s decision in Aramco. 499 U.S. at 278. In an employment discrimination case, the Court concluded that the Civil Rights Act of 1964 could not be applied overseas due to the presumption, despite the fact that an American citizen experienced unfavorable effects as a result. Id. at 250-52. But, this argument is flawed. The Aramco decision was thought to be bad law and was subsequently addressed by Congress through the Civil Rights Act of 1991, whereby Congress specifically included protections for U.S. citizens employed in foreign countries. William S. Dodge, Understanding the Presumption against Extraterritoriality, 16 Berkeley J. Int’l Law 85, 87 (1998).

 Thus, even if congressional intent is not necessarily obvious, the presumption can still be rebutted if adverse effects are felt in the United States. This Court should find that Foodstar’s substantial monetary loss—and its creditor’s subsequent loss—qualifies as “adverse effects” under the Court’s precedent in Steele and, therefore, should find that the presumption against
extraterritorial application of statutes should not apply. Accordingly, this Court should reverse and render a decision in favor of Foodstar on both certified issues.

CONCLUSION

A single creditor has thwarted a vital component of bankruptcy. Ravi Vohra has inhibited Foodstar’s duty to maximize the value of its estate and provide an equitable distribution to satisfy its debts. Foodstar’s rejection of the trademark agreement should have terminated Vohra’s right to use the Burger Bites trademark. But, despite clear statutory authority to the contrary and much to the financial detriment of Foodstar’s estate and many creditors, Vohra was permitted to retain his rights and continue using the trademark in Eastlandia. This Court should allow rejection to take its proper effect by finding that it terminates Vohra’s rights to use the Burger Bites trademarks. Additionally, this Court should find that the presumption against extraterritorial application of statutes does not prevent the application of § 365 in Eastlandia.

WHEREFORE, PREMISES CONSIDERED, Foodstar respectfully requests that this Court reverse the holding of the United States Court of Appeals for the Thirteenth Circuit on both certified questions.

Respectfully Submitted,

Team P13
Counsel for Petitioner Foodstar, Inc.
APPENDIX A:


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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(C) the licensee shall be deemed to waive--

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

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

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

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

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

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

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

(i) perform such contract; or

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

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


(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 C


(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. Subsection (c) and this subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction--

(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and

(2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.