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 P21
Counsel for Petitioner
QUESTIONS PRESENTED

1. Under 11 U.S.C. § 365, does a trademark licensee lose his rights to use the trademark when the licensor has rejected the license based on sound business judgment and when the statute’s language and legislative history support termination of the licensee’s trademark rights?

2. Is the presumption against extraterritoriality overcome when the Code’s text and legislative history—as well as public policy—support worldwide application of the Code in its entirety?
CERTIFICATE OF INTERESTED PARTIES

Pursuant to Rule 24(1)(b) of the Rules of the Supreme Court of the United States, the caption of this case contains the names of all parties involved in the proceeding under review.

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TEAM P21
COUNSEL FOR PETITIONER
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OPINIONS BELOW

The decisions and orders of the United States Bankruptcy Court for the District of Moot and of the district court are unreported and therefore unavailable. The decision of the United States Court of Appeals for the Thirteenth Circuit is also unreported. The opinion, dated October 14, 2013, is set forth in Case No. 13-4080 and is incorporated in the record on appeal (hereinafter “R.”).

STATEMENT OF JURISDICTION

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

RELEVANT STATUTORY PROVISIONS

The following federal statutes are relevant to the determination of the present case and are reproduced in the Appendices:

11 U.S.C. § 101(35A)
11 U.S.C. § 365
11 U.S.C. § 541(a)
28 U.S.C. § 1334(e)(1)
TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioner, FOODSTAR, INC., appellee before the United States Court of Appeals for the Thirteenth Circuit, respectfully submits this brief on the merits and asks this Court to reverse the judgment of the court of appeals.
STATEMENT OF THE CASE

Statement of the Facts. Foodstar, Inc., headquartered in the State of Moot, is the franchisor of the popular gourmet hamburger fast food restaurant chain, Burger Bites. (R. at 3.) Unlike most in the fast food industry, Foodstar concentrates its brand on miniature burgers instead of large ones. (R. at 3.) Originally, a citizen of Eastlandia developed the concept for miniaturized burgers and established the first Burger Bites restaurant. (R. at 4.) In fact, Foodstar acquired the worldwide rights to the Burger Bites trademark from the developer himself, along with all of his rights under an existing licensing agreement with another Eastlandian citizen—Ravi Vohra. (R. at 4–5.) Vohra’s licensing agreement granted him a 20-year exclusive license to use the Burger Bites trademark in Eastlandia. (R. at 4.) In addition, like most United States trademark licenses, the agreement gave the licensor control over many aspects of Vohra’s operations, including quality. (R. at 4.)

After Foodstar acquired the Burger Bites trademark rights, it worked to develop and expand the franchise throughout the United States and other nations, but not in Eastlandia where Vohra had already established thirty-two Burger Bites restaurants. (R. at 5.) Indeed, in an effort to continue its miniature trend and increase revenues before the initial public offering of its stock, Foodstar acquired a miniature cupcake chain and attempted to merge the miniature cupcake and hamburger product lines into combined franchised stores. (R. at 3.)

Unfortunately, miniature cupcakes were not as popular as Foodstar originally thought, and the company had to abandon its idea of combined franchised stores. (R. at 3.) Worse yet, the dismal failure of the miniature cupcake venture left Foodstar deep in debt and without enough operating capital to run its burger franchise. (R. at 3.) Consequently, Foodstar filed for bankruptcy under Chapter 11, and now plans to liquidate its primary asset—the Burger Bites
trademark—along with an assignment to the trademark buyer of all of Foodstar’s franchise agreements. (R. at 3–4.)

**Nature of the Proceedings.** In preparation for the sale of its worldwide Burger Bites trademark, Foodstar filed a motion under 11 U.S.C. § 365 to reject Vohra’s licensing agreement. (R. at 5.) In response, Vohra appeared in the bankruptcy case and filed an objection to Foodstar’s motion, arguing that rejection was not in the best interest of the estate because it would not terminate his right to use the Burger Bites trademark in Eastlandia; rather, rejection would merely deprive the estate of the benefits of the license. (R. at 5.) Further, Vohra argued that the rejection powers of § 365 did not apply extraterritorially. (R. at 5.)

Subsequently, the bankruptcy court held a hearing on Foodstar’s motion to reject Vohra’s license agreement, at which the parties filed a joint stipulation that (1) the Vohra licensing agreement was an executory contract, and (2) the worldwide Burger Bites trademark would sell for 10 to 15 percent less if it was subject to Vohra’s license. (R. at 5.) In reliance on the parties’ stipulations, the bankruptcy court entered an order authorizing rejection of the Vohra license because rejection was in the best interest of the estate. (R. at 5.)

Vohra immediately appealed the bankruptcy court’s order to the district court; meanwhile, he sent Foodstar several letters indicating that he intended to continue using the Burger Bites trademark, regardless of Foodstar’s rejection. (R. at 6.) As a result, Foodstar filed an adversary proceeding in the bankruptcy court against Vohra. (R. at 6.) Foodstar filed a motion for summary judgment, sought a declaration that its rejection terminated Vohra’s rights to use the Burger Bites trademark, and requested an injunction prohibiting Vohra from further use of the trademark. (R. at 6.) The bankruptcy court then entered a second order, affirming the
termination of Vohra’s trademark rights and enjoining him from using the trademark. (R. at 6.)

Upon Vohra’s appeal, the bankruptcy court stayed its injunction. (R. at 6.)

The district court combined the appeals and affirmed both orders, and the Thirteenth Circuit reversed, holding (1) that Vohra could continue to use the Burger Bites trademark in Eastlandia after Foodstar’s rejection of the licensing agreement in bankruptcy, and (2) that the presumption against extraterritoriality blocked application of 11 U.S.C. § 365 abroad, regardless of its potential contract-avoiding power. (R. at 6–7, 10.) This appeal followed. (R. at 1.)

**SUMMARY OF THE ARGUMENT**

The Thirteenth Circuit improperly reversed the district court on both points. First, when Foodstar terminated the Vohra licensing agreement, Vohra lost his right to use the Burger Bites trademark going forward. Under 11 U.S.C. § 365(n), Congress enacted special protections for licensees of certain types of intellectual property, such that those licensees could retain their rights to use the intellectual property after the licensor’s rejection in bankruptcy. But Congress excluded trademark licenses from the protections of § 365(n). Contrary to the types of intellectual property protected under § 365(n), trademarks require continuous quality control, a burden that would undermine the Code’s efforts under Chapter 11 to give the debtor-in-possession flexibility and breathing space. Here, Foodstar exercised sound business judgment when it rejected Vohra’s licensing agreement. The Burger Bites trademark is Foodstar’s primary source of funds by which it might emerge from bankruptcy. Further, it is undisputed that the trademark will sell for 10 to 15 percent less if it is subject to Vohra’s licensing agreement than if his rights terminate. Thus, rejection is in the best interest of the estate, and the necessary result in this case is Vohra’s preclusion from further use of the Burger Bites trademark.
Additionally, irrespective of the fact that the Vohra licensing agreement is a foreign agreement, § 365 applies for two reasons. First, this Court should evaluate the Code as a whole to determine Congress’s extraterritorial intent. Congress broadly defined property of the estate in § 541 to include property wherever located—inside and outside the territorial boundaries of the United States—thus enabling the courts to safeguard a debtor’s estate regardless of its location. Even though § 365 does not contain any specific language or legislative history that indicates an extraterritorial application, the rejection powers of § 365 are integral to the debtor’s ability to restructure its business, and thus, it is essential that courts have the ability to grant rejection of foreign licensing agreements like Vohra’s. Second, even if this Court finds that § 365 does not apply extraterritorially, this Court can nevertheless apply § 365 to the Vohra licensing agreement. Because trademarks and trademark licensing agreements fall within this Court’s jurisdiction under §§ 541 and 1334(e)(1), this Court has constructive possession and control over Vohra’s agreement. Therefore, this Court can reject Vohra’s licensing agreement under § 365 without applying the statute extraterritorially.

Accordingly, this Court should reverse the decision of the Thirteenth Circuit Court of Appeals and hold that § 365 permits the termination of a licensee’s trademark rights upon rejection and that § 365 applies to the Vohra license agreement even though it is a foreign agreement.

**STANDARD OF REVIEW**

This Court reviews a bankruptcy court’s conclusions of law and interpretations of the Code *de novo* and its findings of fact for clear error. *See River Rd. Hotel Partners, LLC v. Amalgamated Bank*, 651 F.3d 642, 647 (7th Cir. 2011); *Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 30 (1st Cir. 1994).
ARGUMENT

I. Foodstar’s rejection of the Burger Bites trademark licensing agreement necessarily terminates Vohra’s right to use the trademark.

Section 365(a) of the Bankruptcy Code allows a trustee,1 “subject to the court’s approval,” to “assume or reject any executory contract . . . of the debtor.” 11 U.S.C. § 365(a). Although the Code does not expressly define “executory contract,” this Court has found that a contract is executory if “performance is due to some extent on both sides.”2 NLRB v. Bildisco & Bildisco, 465 U.S. 513, 522 n.6 (1984). Further, the Code does not explain the consequences of rejection; rather, § 365(g) states only that “the rejection of an executory contract . . . constitutes a breach of such contract.” 11 U.S.C. § 365(g). Here, the parties have stipulated that the Vohra trademark license was an executory contract. (R. at 5.) Thus, the remaining question before the Court is: What is the legal effect of rejection?

“The effect of rejection is one of the great mysteries of bankruptcy law.” In re Henderson, 245 B.R. 449, 453 (Bankr. S.D.N.Y. 2000). Indeed, there is a circuit split on this issue. The Fourth Circuit has held that an intellectual property licensee is “entitled to treat rejection as a breach and seek a money damages remedy,” but it cannot “seek to retain its contract rights in the technology by specific performance even if that remedy would ordinarily be available upon breach of this type of contract.” Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc., 756 F.2d 1043, 1048 (4th Cir. 1985). The Seventh Circuit, however, has held that rejection of a trademark license does not terminate the licensee’s contractual rights to use the

1 There is no trustee in this case; however, Foodstar, acting as a debtor-in-possession, can itself assume or reject contracts. See 11 U.S.C. § 1107(a).

2 Professor Vern Countryman created and supported a more specific definition of executory contract as “a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.” Vern Countryman, Executory Contracts in Bankruptcy: Part I, 57 MINN. L. REV. 439, 460 (1973).

In Lubrizol, the Fourth Circuit had to determine whether an intellectual property licensee retained its ability to use a debtor’s intellectual property after the debtor rejected the license in bankruptcy. See Lubrizol, 756 F.2d at 1048. Richmond Metal Finishers (RMF) granted Lubrizol Enterprises a nonexclusive license to utilize RMF’s patented metal coating process technology. See id. at 1045. The next year, RMF filed for bankruptcy protection under Chapter 11 of the Code and sought to reject the Lubrizol license under § 365(a). See id. The Fourth Circuit upheld the bankruptcy court’s rejection of the license and held that RMF could “deprive Lubrizol of all rights to the process.” Id. at 1048. Noting that “the legislative history of § 365(g) makes clear that the purpose of the provision is to provide only a damages remedy for the non-bankrupt party,” the court held that Lubrizol could treat RMF’s rejection as a breach and seek money damages, but it “could not seek to retain its contract rights in the technology by specific performance.” Id. (citing H.R. REP. NO. 95-595, at 349 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6305).

Further, the court noted that “Congress had afforded remedies equivalent to specific performance for lessees of real property and special treatment to union members under collective bargaining agreements” in other sections of the Code, but it had not provided comparable treatment for intellectual property licensees. James M. Wilton & Andrew G. Devore, Trademark Licensing in the Shadow of Bankruptcy, 68 BUS. LAW. 739, 743 (2013) (citing Lubrizol, 756 F.2d

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3 The Third Circuit has faced a factually similar case, but the majority avoided deciding the issue at bar by holding that the parties’ agreement was not an executory contract. See In re Exide Techs., 607 F.3d 957, 965 (3d Cir. 2010). In a concurring opinion, Judge Ambro reasoned that courts should not use § 365 to let a licensor reclaim trademark rights it previously bargained away. See id. at 967 (Ambro, J., concurring).
at 1048). Therefore, in the Fourth Circuit, an intellectual property licensee loses its ability to use the debtor’s intellectual property upon rejection of the license. See Lubrizol, 756 F.2d at 1048.

In Sunbeam, however, the Seventh Circuit departed from Lubrizol’s interpretation of § 365(g). See Sunbeam, 686 F.3d at 376–78. In that case, Lakewood Engineering & Manufacturing Co. authorized Chicago American Manufacturing (CAM) to practice Lakewood’s patents and use its trademarks on box fans. See id. at 374. Shortly thereafter, Lakewood’s creditors filed an involuntary bankruptcy proceeding against it, and the court-appointed trustee sold Lakewood’s patents and trademarks to Sunbeam. See id. Because Sunbeam did not want CAM to sell the Lakewood-branded fans in competition with Sunbeam products, the “trustee rejected the executory portion of the CAM contract under 11 U.S.C. § 365(a).” Id.

The Seventh Circuit evaluated the effect of the trustee’s rejection and whether Lubrizol’s understanding of § 365(g) was correct. See id. at 375–76. The court acknowledged that after contract rejection, “a debtor is not subject to an order of specific performance”; however, it found that “nothing about this process implies that any rights of the other contracting party have been vaporized.” Id. at 377. The court then considered how rejection works for leases under § 365(h): “[A] lessor that enters bankruptcy could not, by rejecting the lease, end the tenant’s right to possession and thus re-acquire premises that might be rented out for a higher price. The bankrupt lessor might substitute damages for an obligation to make repairs, but not rescind the lease altogether.” Id. Ultimately, the court held that “[w]hat § 365(g) does by classifying rejection as [a] breach is establish that in bankruptcy as outside of it, the other party’s rights remain in place.” Id. Therefore, in the Seventh Circuit, an intellectual property licensee retains its ability to use the debtor’s trademarks after rejection of the license. See id.
The Thirteenth Circuit, following *Sunbeam*, held that Vohra could continue using the Burger Bites trademark in accordance with the licensing agreement after Foodstar’s rejection of the license. (R. at 6–7.) For the reasons that follow, this Court should reverse the judgment of the Thirteenth Circuit Court of Appeals and hold that rejection of a trademark license in bankruptcy terminates the licensee’s ability to use the debtor’s trademark.

**A. The plain language of § 365 reflects Congress’s intent that trademark licenses terminate upon rejection by the debtor-in-possession.**

Under § 365(g), rejection of an executory contract constitutes a breach of contract “immediately before the date of the filing of the petition.” 11 U.S.C. § 365(g). The non-debtor counter-party’s remedy is to file a claim under § 365(g) for damages, which courts treat as unsecured prepetition claims. *See Raima UK Ltd. v. Centura Software Corp. (In re Centura Software Corp.),* 281 B.R. 660, 668–69 (Bankr. N.D. Cal. 2002). In *Lubrizol*, the Fourth Circuit found that § 365(g) provides only for a damages remedy. *See Lubrizol,* 756 F.2d at 1048. “The *Lubrizol* court found support for its conclusion that, as a general rule, non-debtor parties to executory contracts are not entitled to remedies of specific performance based on Bankruptcy Code exceptions that prove the rule.” James M. Wilton & Andrew G. Devore, *Trademark Licensing in the Shadow of Bankruptcy,* 68 BUS. LAW. 739, 750 (2013). Indeed, Congress has enacted several exceptions to this general rule that preserve some of the non-debtor counter-party’s rights to certain executory contracts, demonstrating its awareness of the “adverse consequences for contracting parties” provided for by the rejection of such contracts. *Lubrizol,* 756 F.2d at 1048.

First, Congress has provided an exception for lessees of real property. *See* 11 U.S.C. § 365(h)(1). Section 365(h), upon rejection, allows a non-debtor lessee of an unexpired real property lease to treat the lease as terminated or “to remain in possession of estate property...
notwithstanding the debtor-in-possession’s decision to reject the lease.” *Precision Indus., Inc. v. Qualitech Steel SBQ, LLC*, 327 F.3d 537, 546 (7th Cir. 2003). Essentially, with the enactment of § 365(h), Congress sought to preserve the expectations of the debtor-lessee and the lessee by “codifying the balance between the [parties’] competing interests,” and “to prevent forcible evictions in all possible circumstances.” *In re Taylor*, 198 B.R. 142, 165–66 (Bankr. D.S.C. 1996).

Congress has also provided an exception for non-debtor purchasers of real property who are already in possession. See 11 U.S.C. §§ 365(i), (j). In *In re New York Investors Mutual Group, Inc.*, the court addressed whether “a vendee under a contract for the purchase of real property who has made a payment on account of the purchase price to the vendor, who before delivery of the deed is declared a bankrupt, [has] the right to compel specific performance against the vendor’s trustee.” 143 F. Supp. 51, 54 (S.D.N.Y. 1956). The court found that the vendee’s rights were subject to the trustee’s right to reject executory contracts “so as to achieve the overriding purpose of the bankruptcy law to secure an equitable distribution of the assets of the bankrupt,” and that the vendee’s only remedy was a claim for damages for breach of contract. *Id.* In response to *In re New York Investors*, Congress enacted §§ 365(i) and (j). See Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding Rejection*, 59 U. COLO. L. REV. 845, 911–12 (1988). Under § 365(i), like § 365(h), a purchaser for the sale of real property may remain in possession of such real property upon rejection. See 11 U.S.C. § 365(i). In addition, under § 365(j), a purchaser that is not in possession may recover any portion paid on the purchase price. See 11 U.S.C. § 365(j).

In 1984, Congress also provided an exception for owners of timeshare interests. See 11 U.S.C. § 365(h)(2); Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding*
Rejection, 59 U. COLO. L. REV. 845, 911–12 (1988). In Sombrero Reef Club, Inc. v. Allman (In re Sombrero Reef Club, Inc.), a resort-marina complex sought to reject approximately 200 valid timeshare purchase contracts. See 18 B.R. 612, 614 (Bankr. S.D. Fla. 1982). Finding that the timeshare interests did not fall within the ambit of §§ 365(h)(1) or (i), the court held that the timeshare purchasers had no special protection under § 365. See id. at 619–20. In addition, the court noted that rejection of the contract was a breach under § 365(g), and “the fact that the action constitute[d] a breach [was] not grounds for denying rejection”; rather, the timeshare purchasers were entitled to damages. Id. at 620. In response, Congress amended § 365 to explicitly extend the protections of §§ 365(h)(1) and (i) to timeshare interests. See Michael T. Andrew, Executory Contracts in Bankruptcy: Understanding Rejection, 59 U. COLO. L. REV. 845, 911–12 (1988). Thus, under § 365(h)(2), upon rejection, the purchaser of a timeshare interest may now treat the timeshare plan as terminated or retain its rights in the interest. See 11 U.S.C. § 365(h)(2).

Lastly, and especially pertinent to this case, in response to Lubrizol, Congress enacted § 365(n) to clarify the rights of intellectual property licensees when a trustee or debtor-in-possession rejects an intellectual property license in bankruptcy. See S. REP. NO. 100-505, at 2 (1988), reprinted in 1988 U.S.C.C.A.N. 3200, 3201. The statute, “provides for treatment of intellectual property licenses under Section 365 in a manner that parallels generally the treatment of real estate leases in the existing provisions of Section 365(h)(1).” S. REP. NO. 100-505, at 4, reprinted in 1988 U.S.C.C.A.N. 3200, 3203. Accordingly, under § 365(n), a licensee of intellectual property under a rejected executory contract can elect to retain its rights to use the intellectual property for the duration of the contract. See 11 U.S.C. § 365(n). Nevertheless, there are numerous indicators that Congress did not intend for § 365(n) to protect trademark licenses.
1. The language of §§ 365(n) and 101(35A) strongly indicate that the special protections of § 365(n) do not extend to trademark licenses.

When interpreting a statute, a court should always start with the plain language of the statute itself. See Green Tree Servicing, LLC v. Coleman (In re Coleman), 392 B.R. 767, 770 (B.A.P. 8th Cir. 2008). Of great significance to this case is the fact that Congress defined “intellectual property” to “mean[] (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.” 11 U.S.C. § 101(35A). Consequently, by definition, the plain language of § 365(n) excludes trademark licenses. See Dewsnup v. Timm, 502 U.S. 410, 434 (1992) (Scalia, J., dissenting) (noting that “the [statutory] text means precisely what it says”).

Consistent with the statutory language, the legislative history of § 365(n) states that despite Congress’s concern with the rejection of trademarks because of the interpretation of § 365 by Lubrizol and other courts, “such contracts raise issues beyond the scope of this legislation.” S. REP. No. 100-505, at 5–6, reprinted in 1988 U.S.C.C.A.N. 3200, 3204 (citing In re Chipwich, Inc., 54 B.R. 427 (Bankr. S.D.N.Y. 1985)). Indeed, Congress explicitly stated that “the [statute] does not address rejection of executory trademark . . . licenses by debtor-licensors” and that the definition of intellectual property includes virtually all types of intellectual property rights other than trademarks. S. REP. No. 100-505, at 7, reprinted in 1988 U.S.C.C.A.N. 3200, 3204. Therefore, Congress “expressly withheld § 365(n) protection from rejected executory trademark licenses.” In re Centura Software Corp., 281 B.R. at 670.
2. Because the plain language of § 365(n) expressly excludes trademarks, there is no need to resort to the statute’s legislative history.

Although the legislative history of § 365(n) suggests “the possibility that Congress intended an equitable treatment for rejected trademarks,” because the statutory language is clear, “it is not necessary to delve into its legislative history.” *Id.; see also Toibb v. Radloff*, 501 U.S. 157, 162 (1991). This Court has “stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.” *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 461–62 (2002) (internal citations omitted). In addition, this Court has held that rights depend on what the Code provides, not on notions of equity. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2073 (2012). Accordingly, because the language of §§ 365(n) and 101(35A) are clear, there is no need to resort to the statutes’ legislative history. *See Toibb*, 501 U.S. at 162.

3. Congress deliberately excluded trademark licenses from the special protections of § 365(n).

Contrary to the Seventh and Thirteenth Circuits’ opinions, an omission is not necessarily just an omission. *See Sunbeam*, 686 F.3d at 375; (R. at 9.) “Under the maxim of statutory interpretation of *expressio unius*, one infers from the inclusion of one thing the exclusion of another.” DOUGLAS G. BAIRD, *Elements of Bankruptcy* 121 (5th ed. 2010). Consequently, because § 365(n) does not specifically cover trademarks, courts may infer their exclusion from the protections of § 365(n). *See id.* at 126. Indeed, this Court has “endorsed reasoning from negative inference in the context of § 365.” *In re Exide Techs.*, 607 F.3d at 966 (Ambro, J., concurring) (citing *Bildisco*, 465 U.S. at 522–23). As then Justice Rehnquist stated in *Bildisco*: “Obviously, Congress knew how to draft an exclusion for collective bargaining agreements when
it wanted to; its failure to do so in this instance indicates that Congress intended that § 365(a) apply to all collective-bargaining agreements covered by the NLRA.” Bildisco, 465 U.S. at 522–23; see also Andrus v. Glover Constr. Co., 446 U.S. 608, 616–17 (1980) (“Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.”). To be sure, Congress did in fact enact § 1113 of the Code in response to this Court’s holding in Bildisco, which permitted a debtor-in-possession to reject a collective-bargaining agreement. See James M. Wilton & Andrew G. Devore, Trademark Licensing in the Shadow of Bankruptcy, 68 BUS. LAW. 739, 750 (2013). Thus, Congress has shown, on more than one occasion, its willingness to draft an exclusion from the general rule of § 365.

After the enactment of § 365(n), most courts continued to follow Lubrizol as it pertains to trademarks. Nevertheless, in the twenty-six years since Congress enacted § 365(n), it has not amended either §§ 365(n) or 101(35A) to include trademarks. See 11 U.S.C. §§ 101(35A), 365(n). It only took Congress three years to add § 365(n) after Lubrizol. See S. REP. NO. 100-505, at 1, reprinted in 1988 U.S.C.C.A.N. 3200, 3200. Accordingly, the fact that Congress has not yet amended either section to include trademarks strongly indicates its desire to exclude trademark licenses from the protections of § 365(n).

4. **Affording trademarks the special protections of § 365(n) curiously ignores the distinctive nature of trademarks and undercuts the fundamental purpose of § 365(n).**

Section 365(n) protects and facilitates the licensing of technology in order to advance technological development and innovation. See S. REP. NO. 100-505, at 3, reprinted in 1988 U.S.C.C.A.N. 3200, 3202. While patents, copyrights, and trade secrets are “categories of intellectual property related to innovation, technological development, and the expression of ideas,” trademarks are not. James M. Wilton & Andrew G. Devore, *Trademark Licensing in the Shadow of Bankruptcy*, 68 BUS. LAW. 739, 756 (2013). Certainly, this Court has consistently acknowledged the fundamental differences between copyrights and patents as they compare to trademarks. As well stated by this Court: “It is the province of patent law, not trademark law, to encourage innovation . . . .” *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 164 (1995).

Moreover, this Court has consistently rejected the suggestion that a similarity “exists between copyright law and trademark law, and in the process of doing so [has] recognized the basic similarity between copyrights and patents.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 439 n.19 (1984).

Unlike patents and copyrights, “trademark . . . licensing relationships depend to a large extent on control of the quality of the products or services sold by the licensee.” S. REP. NO. 100-505, at 5, reprinted in 1988 U.S.C.C.A.N. 3200, 3204; see also *Dawn Donut Co. v. Hart’s Food Stores, Inc.*, 267 F.2d 358, 367 (2d Cir. 1959) (noting that licensors who fail to exercise control and supervision over the operations of their licensees run the risk that the public will be unknowingly deceived). A trademark indicates the source of a good or service to the consumer and implies that the good or service will be of a consistent quality. *See Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992); *In re XMH*, 647 F.3d 690, 695 (7th Cir. 2011).
Trademark law requires that the owner of the trademark retain decision making authority over quality; however, if a trademark owner-licensor breaks off its business relations with a licensee, the licensor can no longer ensure the continued quality of the ex-licensee’s operation. See In re XMH, 647 F.3d at 695, 697. Consequently, “a court may find that the trademark owner has abandoned the trademark, in which case the owner would be estopped from asserting rights to the trademark.” Barcamera Int’l USA Trust v. Tyfield Imps., Inc., 289 F.3d 589, 596 (9th Cir. 2002).

Because of the need for licensors to maintain quality control of trademarks, Congress expressly excluded trademarks from the protections of § 365(n). See S. Rep. No. 100-505, at 5, reprinted in 1988 U.S.C.C.A.N. 3200, 3204. Thus, by holding in Sunbeam that an intellectual property licensee retains its ability to use the debtor’s trademark after rejection of the license, the Seventh Circuit essentially requires the debtor to maintain its obligation to monitor the licensee’s use of its trademark or risk trademark abandonment. See James M. Wilton & Andrew G. Devore, Trademark Licensing in the Shadow of Bankruptcy, 68 Bus. Law. 739, 774 (2013). Because “the authority to reject an executory contract is vital to the basic purpose to a Chapter 11 reorganization,” requiring such burdensome obligations undercuts the purpose of rejection under § 365(a) and runs directly counter to the Code’s attempt “to give a debtor-in-possession some flexibility and breathing space.” Bildisco, 465 U.S. at 528, 532; Lubrizol, 756 F.2d at 1048.

B. The Seventh Circuit erred by substituting its own unprecedented views of trademark license protection over those prescribed by Congress.

In Sunbeam, the Seventh Circuit analogized the treatment of trademark licensees to that of tenants under real estate leases under § 365(h), perhaps relying on Congress’s assertion that § 365(n) was meant to treat intellectual property licenses in the same general manner as real
estate leases. See James M. Wilton & Andrew G. Devore, Trademark Licensing in the Shadow of Bankruptcy, 68 BUS. LAW. 739, 763 (2013); S. REP. NO. 100-505, at 4, reprinted in 1988 U.S.C.C.A.N. 3200, 3203. In doing so, however, the court “failed to recognize that, in section 365(h), Congress explicitly granted non-debtor tenants favorable treatment in the event of rejection of real estate leases, a favorable treatment that was denied to trademark licensees when similar protections were granted to licensees of patents and copyrights under section 365(n).”

James M. Wilton & Andrew G. Devore, Trademark Licensing in the Shadow of Bankruptcy, 68 BUS. LAW. 739, 763 (2013). Congress’s statutory protections for non-debtor parties in the aforementioned Code sections demonstrate Congress’s awareness of the adverse consequences provided for by the rejection of executory contracts. See Lubrizol, 756 F.2d at 1048.

By affording trademark licensees the same special treatment as real estate lessees, the Seventh Circuit subverted the intent of Congress and essentially rendered § 365(n) unnecessary.5 Under Sunbeam, trademark licensees “receive the same treatment under [§] 365(g) that statutory intellectual property licensees receive under [§] 365(n).” John Thomas Ellwood, The Effects of the Sunbeam Decision on the Rejection of Trademark Licenses in Bankruptcy, Seton Hall Law eRepository, Student Scholarship, Paper 213, at 18 (2013). But if Congress had wanted to give trademark licensees the same rights as real estate lessees, or licensees of other types of intellectual property, it would have done so. Accordingly, this Court should find that Lubrizol, not Sunbeam, controls the rejection of trademark licenses.

5 “It is a well settled principle of statutory construction that a court should interpret a statute ‘as to avoid rendering superfluous’ any part of the [statute].” John Thomas Ellwood, The Effects of the Sunbeam Decision on the Rejection of Trademark Licenses in Bankruptcy, Seton Hall Law eRepository, Student Scholarship, Paper 213, at 18 (2013) (citing Astoria Fed. Sav. & Loan Ass’n v. Solimino, 501 U.S. 104, 112 (1991)).
C. Under *Lubrizol*, Foodstar should be allowed to reject its Burger Bites trademark licensing agreement with Vohra—holding otherwise would gravely undercut the purpose of bankruptcy reorganization.

Under *Lubrizol*, § 365 requires evaluation of (1) whether the contract is executory, and (2) “if so, whether its rejection would be advantageous to the bankrupt.” *Lubrizol*, 756 F.2d at 1045. As previously stated, the parties have stipulated that the trademark licensing agreement between Foodstar and Vohra is an executory contract. (R. at 5.) Courts generally accept a bankrupt debtor’s request to reject an executory contract unless “the decision of the debtor that rejection will be advantageous is so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, or whim or caprice.” *Lubrizol*, 756 F.2d at 1047. In *Lubrizol*, the bankruptcy court found that RMF’s principal asset was its metal coating process and that the process represented RMF’s “primary potential source of funds by which [it] might emerge from bankruptcy.” *Id.* There was also evidence that allowing Lubrizol to retain its rights under the agreement would hinder RMF’s ability to achieve more favorable terms when it sold or licensed the technology to other potential licensees. *See id.* Thus, the bankruptcy court found, and the Fourth Circuit affirmed, that RMF’s decision to reject was based on sound business judgment. *See id.*

Here, Foodstar exercised sound business judgment in rejecting the Vohra licensing agreement. Foodstar’s primary asset is its Burger Bites trademark, which it plans to sell along with an assignment of all of the Burger Bites restaurant franchise agreements for the restaurants franchised by Foodstar. (R. at 4.) Thus, similar to *Lubrizol*, the sale of the Burger Bites trademark represents “the primary potential source of funds by which [Foodstar] might emerge from bankruptcy.” *Lubrizol*, 756 F.2d at 1047. The bankruptcy judge had undisputed evidence in front of him that the worldwide Burger Bites trademark would sell for 10 to 15 percent less if
it was subject to the Vohra license. (R. at 5.) Appropriately, the bankruptcy judge found that Foodstar’s decision to reject the Vohra agreement was in the best interest of the estate. (R. at 5.)

Vohra asserts that rejection is not in the best interest of the estate because it would simply deprive the estate of the benefits of the license without terminating his right to use the trademark. (R. at 5.) To the contrary, under Lubrizol, Foodstar’s rejection does in fact terminate Vohra’s right to use the Burger Bites trademark. See Lubrizol, 756 F.2d at 1048. In addition, because the licensing agreement gives Foodstar control over quality, and because trademark licensing relationships depend on quality control, rejection of the agreement relieves Foodstar (and its successor) of the burdensome obligation to maintain quality control over the trademark in the thirty-two separate Burger Bites restaurant locations in Eastlandia. See S. Rep. No. 100-505, at 5, reprinted in 1988 U.S.C.C.A.N. 3200, 3204; (R. at 4.) Such a burden would undoubtedly be against the best interest of the estate and would likely require a significant expenditure of resources, thus undercutting the Code’s effort to “assist financially distressed business enterprises by providing them with breathing space in which to return to a viable state.” C-TC 9th Ave. P’ship v. Norton Co. (In re C-TC 9th Ave. P’ship), 113 F.3d 1304, 1310 (2d Cir. 1997). Accordingly, because Foodstar’s rejection of the Vohra license agreement is in the best interest of the estate, Foodstar has met the business judgment standard with respect to its decision to reject the agreement. See Lubrizol, 756 F.2d at 1045. Vohra, therefore, only has a claim for money damages under § 365(g). See id. at 1048.

Because the statutory language and history of § 365(n) strongly support Lubrizol’s interpretation of § 365 that rejection of the Vohra trademark licensing agreement terminates Vohra’s ability to use Foodstar’s trademark, this Court should adopt the Fourth Circuit’s rule and reverse the judgment of the Thirteenth Circuit Court of Appeals.
II. The presumption against extraterritoriality does not prevent the application of § 365 to the Vohra trademark licensing agreement because significant authority demonstrates international application of the Code in full.

Congress has the unquestioned authority to apply its laws extraterritorially. See Hong Kong & Shanghai Banking Corp., Ltd. v. Simon (In re Simon), 153 F.3d 991, 995 (9th Cir. 1998).

Traditionally, this Court analyzed the extraterritoriality of a statute using a three-pronged approach, including examination of the statute’s language, legislative history, and any administrative interpretations. See Suzanne Harrison, The Extraterritoriality of the Bankruptcy Code: Will the Borders Contain the Code?, 12 BANKR. DEV. J. 809, 816–17 (1996) (citing Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285–88 (1949)). In EEOC v. Arabian American Oil Co., this Court concluded that there is a presumption “that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.” 499 U.S. 244, 248 (1991) (Aramco). Although Justice Marshall’s dissent in Aramco interpreted the majority opinion as setting forth a “clear statement” rule, this Court has since made clear “that reference to nontextual sources is permissible.” Id. at 261 (Marshall, J., dissenting); Kollias v. D & G Marine Maint., 29 F.3d 67, 73 (2d Cir. 1994).

For example, in Smith v. United States, this Court looked at the language, structure, and legislative history of the Federal Tort Claims Act for “clear evidence of congressional intent” to apply the Act extraterritorially. 507 U.S. 197, 203–04 (1993). Subsequently, in Sale v. Haitian Centers Council, Inc., this Court examined “all available evidence” in search of any indication that Congress intended for § 243(h) of the Immigration and Nationality Act to apply extraterritorially, including its legislative history. 509 U.S. 155, 176–77 (1993); see also Morrison v. Nat’l Austl. Bank Ltd., 130 S. Ct. 2869, 2891 (2010) (Stevens, J., concurring) (observing that cases both before and after Aramco clearly indicate that this Court has continued
to give effect to all available evidence when considering a statute’s extraterritorial application).

Most recently, this Court held that the presumption against extraterritoriality requires a clear indication of extraterritorial application, yet the Court has continued its reliance on previously utilized tools of statutory construction such as a statute’s text, legislative history, purpose, and even its context. *See Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665–69 (2013); *Morrison*, 130 S. Ct. at 2878, 2883. Therefore, it is crucial to look to these sources to determine whether the Code applies extraterritorially.

A. The presumption against extraterritoriality applies in all cases; thus, the Code is subject to the presumption.

Courts often begin their analysis of the applicability of the presumption against extraterritoriality by considering whether it applies at all with respect to the statute at issue. *See Kollias*, 29 F.3d at 70. In *Maxwell Commc’n Corp. plc v. Barclays Bank (In re Maxwell Commc’n Corp. plc)*, Judge Brozman found that the facts of a particular case must have “a center of gravity outside the United States” to have an extraterritorial application of the law. 170 B.R. 800, 809 (Bankr. S.D.N.Y. 1994). In *Morrison*, however, this Court explained that judges must “apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects.” *Morrison*, 130 S. Ct. at 2881 (emphasis added); *see also Kiobel*, 133 S. Ct. at 1664 (applying the presumption even where the statute at issue was “strictly jurisdictional”). Consequently, the Code is subject to the presumption against extraterritoriality.

B. The Code’s integrated scheme strongly illustrates congressional intent to apply the Code internationally.

This Court has not indicated whether courts should evaluate an act as a whole or each section in isolation to determine Congress’s extraterritorial intent. *See Suzanne Harrison, The Extraterritoriality of the Bankruptcy Code: Will the Borders Contain the Code?, 12 Bankr.*
DEV. J. 809, 830–31 (1996). Nonetheless, in Aramco, this Court evaluated Title VII as a whole to determine Congress’s extraterritorial intent. See id. at 831 (citing Aramco, 499 U.S. at 249–56). Thus, contrary to the Thirteenth Circuit’s opinion that courts should evaluate each section independently, this Court should evaluate the Code as a whole. (R. at 23); see also Groupe v. Hill (In re Hill), 156 B.R. 998, 1006 (Bankr. N.D. Ill. 1993) (“[T]he Bankruptcy Code must be considered as a whole and the impact and application of one section cannot be viewed in isolation without proper thought to other relevant and perhaps controlling sections.”).

“The bankruptcy laws provide an integrated scheme for gathering and disbursing the assets of a debtor's estate,” and the Code “anticipates that this will take place within a single proceeding, rather than asset by asset in inefficient piecemeal litigation.” French v. Liebmann (In re French), 440 F.3d 145, 154 (4th Cir. 2006) (Wilkinson, J., concurring) (citing Grady v. A.H. Robins Co., 839 F.2d 198, 202 (4th Cir. 1988)). To be sure, a major purpose of the Code is to prevent the probable chaos created by uncoordinated proceedings in different courts as creditors race to gain access to the debtor’s assets. See Underwood v. Hilliard (In re Rimsat, Ltd.), 98 F.3d 956, 961 (7th Cir. 1996). Accordingly, numerous Code sections reflect congressional support for the Code’s extraterritorial application. See In re French, 440 F.3d at 155 (Wilkinson, J., concurring).

1. **Congress’s broad definition of property of the estate in § 541 includes property located both inside and outside the territorial boundaries of the United States.**

There is clear congressional intent to apply the Code beyond the territorial boundaries of the United States. See In re Simon, 153 F.3d at 996. Under § 541(a), the filing of a bankruptcy petition under §§ 301, 302, or 303 creates a bankruptcy estate. See 11 U.S.C. § 541(a). The bankruptcy estate includes all property “wherever located and by whomever held.” Id. (emphasis added). In addition, § 1334(e)(1) provides that the district court in which the
bankruptcy case “is commenced . . . shall have exclusive jurisdiction of all the property, wherever located, of the debtor . . . and of property of the estate.” 28 U.S.C. § 1334(e)(1) (emphasis added); see also In re Simon, 153 F.3d at 996 (discussing how a district court obtains exclusive in rem jurisdiction over all property of the estate). Thus, the “court’s exercise of custody over the debtor’s property, via its exercise of in rem jurisdiction, essentially creates a fiction that the property—regardless of actual location—is legally within the jurisdictional boundaries of the district court in which it sits.” In re Simon, 153 F.3d at 996 (internal citations omitted).

To be sure, this Court has found that bankruptcy courts have jurisdiction over property within their actual or constructive possession. See Katchen v. Landy, 382 U.S. 323, 327 (1966). Hence, property of the estate includes property within the bankruptcy court’s constructive possession, even property outside the territorial jurisdiction of the United States. See id.; In re Simon, 153 F.3d at 996. Accordingly, Congress’s use of the words “wherever located” indicate its intent to apply the Code extraterritorially with regard to property of the estate. See In re Simon, 153 F.3d at 996; David M. Green & Walter Benzija, Spanning the Globe: The Intended Extraterritorial Reach of the Bankruptcy Code, 10 Am. Bankr. Inst. L. Rev. 85, 86–87 (2002) (“Through its broad and borderless definition of what constitutes property of the estate, Congress intended to enable the bankruptcy courts to safeguard interests of a debtor’s estate regardless of their physical location.”).

While “generic terms like ‘any’ or ‘every’ do not rebut the presumption against extraterritoriality,” the statutory language “wherever located” suggests that Congress intended the Code to have extraterritorial reach. Kiobel, 133 S. Ct. at 1665. Indeed, in Aramco, this Court noted Congress’s awareness of the need to make a clear statement that a statute has
extraterritorial application. See Aramco, 499 U.S. at 258. As one example of such awareness, this Court cited the Logan Act, which applies to “[a]ny citizen . . . wherever he may be.” Id. (citing the Logan Act, 18 U.S.C. § 953) (emphasis added). This Court has found that “intent may be discerned with reference to similarly phrased legislation.” In re Simon, 153 F.3d at 995 (citing Aramco, 499 U.S. at 250–51). Surely then, if the words “wherever he may be” constitute a clear statement of congressional intent in the Logan Act, the fact that Congress defined property of the estate to include property “wherever located” in the Code is affirmative evidence of Congress’s intended extraterritorial application of the Code. See Aramco, 499 U.S. at 258; 11 U.S.C. § 541(a).

The plain language of § 541, when read in isolation and in conjunction with § 1334(e)(1) of the Code, indicates that Congress intended the Code to reach property located both inside and outside the territorial boundaries of the United States. The legislative history of § 541 further supports this conclusion.

2. The legislative history of § 541 provides striking support for its extraterritorial application.

In 1952, Congress amended § 70a of the Bankruptcy Act to make it clear that Congress intended § 70a to apply extraterritorially. See Thurmond v. Rajapakse (In re Rajapakse), 346 B.R. 233, 236 (Bankr. N.D. Ga. 2005). The amended § 70a read in relevant part as follows:

The trustee of the estate of a bankrupt . . . shall . . . be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located . . . (5) property . . . which prior to the filing of the petition he [the bankrupt] could by
any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized . . . .

Id. (quoting 11 U.S.C. § 70a (repealed 1978)). The House Report accompanying the bill resolved any ambiguity as to the extraterritorial effect of § 70a. See id. The Report provides that Congress amended § 70a “to make clear that a trustee in bankruptcy is vested with the title of the bankrupt in property which is located without, as well as within, the United States.” H.R. REP. NO. 82-2320 (1952), reprinted in 1952 U.S.C.C.A.N. 1960, 1976; see also 4A Collier on Bankruptcy ¶ 70.03 (14th ed. 1978).

When the Bankruptcy Code became effective in 1979, Congress repealed § 70a; however, the legislative history of § 541 states that it includes the property described in § 70a. See H.R. REP. NO. 95-595, at 367, reprinted in 1978 U.S.C.C.A.N. 5963, 6323. Specifically, the legislative history states that the scope of § 541(a)(1) is broad, and that “[i]t includes all kinds of property, including tangible or intangible property, causes of action (see Bankruptcy Act § 70a (6)), and all other forms of property currently specified in section 70a of the Bankruptcy Act § 70a . . . .” H.R. REP. NO. 95-595, at 367, reprinted in 1978 U.S.C.C.A.N. 5963, 6323. If, as this Court has stated, Congress says what it means and means what it says, there is no reason to doubt Congress’s continued intent to include foreign property in the estate. See Barnhart, 534 U.S. at 461–62. Moreover, this Court has often said that “absent a textual footing, [it] will not presume a departure from longstanding pre-Code practice.” Dewsnup, 502 U.S. at 433 (Scalia, J., dissenting). Here, Congress has provided no such textual footing worthy of departure from pre-Code practice. See id. Congress granted broad jurisdiction to permit bankruptcy courts to “deal efficiently and expeditiously with all matters connected with the bankruptcy estate.” Celotex Corp. v. Edwards, 514 U.S. 300, 308 (1995). Accordingly, as defined in § 541, property
of the estate includes property of the debtor located outside of the United States. See In re Rajapakse, 346 B.R. at 236; In re Nat’l Safe Ctr., Inc., 41 B.R. 195, 196 (Bankr. D. Haw. 1984) (holding that the debtor’s estate was comprised of property both within and without the United States). Thus, both the plain language and legislative history of § 541 support this conclusion.

3. Congress intended for the automatic stay to apply extraterritorially, as evidenced by the broad statutory language of §§ 541 and 1334(e)(1).

Several courts have looked to the broad language of §§ 541 and 1334(e)(1) in concluding that § 362 applies extraterritorially. See, e.g., Nakash v. Zur (In re Nakash), 190 B.R. 763, 768 (Bankr. S.D.N.Y. 1996). In In re Nakash, a debtor filed a voluntary petition for reorganization under Chapter 11 of the Code. See id. at 766. Subsequently, a foreign receiver filed a second involuntary proceeding against the debtor in Israel. See id. In connection with the debtor’s Chapter 11 filing, the court granted an automatic stay. See id. at 767. In evaluating whether the receiver’s actions were a violation of the automatic stay, then Chief Judge Lifland found that Congress intended the automatic stay of § 362 to apply extraterritorially. See id. at 768.

Chief Judge Lifland determined that the broad language of §§ 541 and 1334(e)(1), the applicability of the automatic stay to all entities, and the legislative history of § 541 supported his conclusion that the automatic stay applies extraterritorially. See id. The court emphasized that the stay “exists to protect the estate from a chaotic and uncontrolled scramble for the [d]ebtor’s assets” and “serves to protect and preserve the jurisdiction of the bankruptcy court so that the court can administer the debtor’s estate in an orderly fashion.” Id. (internal citations omitted). Accordingly, the interaction between §§ 541, 1334(e)(1), and 362 demonstrates how the entire Code can be utilized to support an extraterritorial application. See Suzanne Harrison, The Extraterritoriality of the Bankruptcy Code: Will the Borders Contain the Code?, 12 Bankr.

4. **In light of the purpose of § 365 and Chapter 11 reorganizations, the language of §§ 541 and 1334(e)(1) necessitate the extraterritorial application of § 365.**

In *Kiobel*, this Court held that the presumption against extraterritoriality can be overcome “where the claims touch and concern the territory of the United States . . . with sufficient force.” *Kiobel*, 133 S. Ct. at 1669. Notably, however, this Court did not define what constitutes sufficient force. *See id.* Nevertheless, § 365 is such “an integral facet of the bankrupt’s ability to restructure its business operations into an economically viable format,” that its provisions and protections necessarily touch and concern the United States. Raymond T. Nimmer, *Executory Contracts in Bankruptcy: Protecting the Fundamental Terms of the Bargain*, 54 U. COLO. L. REV. 507, 513 (1983); *Kiobel*, 133 S. Ct. at 1669.

ability to reject executory contracts is one of the most powerful rights afforded to a debtor in bankruptcy and generally aids greatly in the debtor’s successful reorganization.


Consequently, “a trademark owned by a title 11 debtor constitutes ‘property of the estate’ within the meaning of section 541 of the Bankruptcy Code.” *Id.* Thus, because property of the estate includes all property “wherever located and by whomever held,” the bankruptcy court has constructive possession of the trademark, and presumably any trademark licensing agreements, outside the territorial boundaries of the United States. 11 U.S.C. § 541(a); *In re Simon*, 153 F.3d at 996. Given that § 365 is vital to the debtor’s ability to “restructure its business operations into an economically viable format,” it is essential that a court’s ability to grant rejection extends beyond the territorial boundaries of the United States. Raymond T. Nimmer, *Executory Contracts in Bankruptcy: Protecting the Fundamental Terms of the Bargain*, 54 U. COLO. L. REV. 507, 513 (1983).

If § 365 does not apply extraterritorially, Vohra will benefit significantly from his use of the trademark at the expense of Foodstar and its successor, who still have the burdensome obligation to maintain quality controls over the trademark abroad, or risk abandonment of the trademark. *See Barcamerica*, 289 F.3d at 595–96. In addition, Foodstar will be at a severe disadvantage because its trademark will sell for 10 to 15 percent less if it is subject to Vohra’s license. (R. at 5.) Surely Congress did not intend to disadvantage licensors like Foodstar simply because their licensees are outside the territorial boundaries of the United States. *See Suzanne Harrison, The Extraterritoriality of the Bankruptcy Code: Will the Borders Contain the Code?*,
12 BANKR. DEV. J. 809, 834 (1996). As a result, this Court should find that the presumption against extraterritoriality does not prevent § 365 from applying to the Vohra licensing agreement.

5. **Other provisions of the Code affirm the notion that Congress intended for the Code to have extraterritorial effect.**

Because the Code has “numerous references to foreign entities and proceedings,” there is evidence of Congressional intent to apply the Code extraterritorially. David M. Green & Walter Benzija, *Spanning the Globe: The Intended Extraterritorial Reach of the Bankruptcy Code*, 10 AM. BANKR. INST. L. REV. 85, 93 (2002). Notably, in *Aramco*, this Court found that “Title VII consistently [spoke] in terms of ‘States’ and state proceedings, and [that it failed] to mention foreign nations or foreign proceedings.” *Aramco*, 499 U.S. at 256.

Moreover, pursuant to § 109(a), “only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under [Title 11].” 11 U.S.C. § 109(a). Accordingly, § 109 allows a foreign person to be a debtor under Chapter 11. See Suzanne Harrison, The Extraterritoriality of the Bankruptcy Code: Will the Borders Contain the Code?, 12 BANKR. DEV. J. 809, 837 (1996). As such, foreign debtors can benefit from the “arsenal of weapons provided under the Code.” In re Maxwell Commc’n Corp. plc, 170 B.R. at 812. Thus, contrary to Title VII, the Code does in fact contain specific references to foreign entities and proceedings, implying that its focus is not entirely domestic. See David M. Green & Walter Benzija, Spanning the Globe: The Intended Extraterritorial Reach of the Bankruptcy Code, 10 AM. BANKR. INST. L. REV. 85, 94–95 (2002).

C. Because the Vohra licensing agreement falls within the Court’s constructive possession, the application of § 365 is not extraterritorial.

Application of the Code to property in the court’s constructive possession, and therefore, in the United States, is not an extraterritorial application of the Code at all. See Katchen, 382 U.S. at 327; In re Simon, 153 F.3d at 996. In In re Rimsat, Ltd., the Seventh Circuit faced “the issue of whether . . . civil contempt sanctions imposed on [the receiver] for violation of the automatic stay was an impermissible extraterritorial application of the stay.” David M. Green & Walter Benzija, Spanning the Globe: The Intended Extraterritorial Reach of the Bankruptcy Code, 10 AM. BANKR. INST. L. REV. 85, 103 (2002) (citing In re Rimsat, Ltd., 98 F.3d at 961). Chief Justice Posner avoided the presumption against extraterritoriality by relying on the court’s ability to forbid a United States citizen from “conduct[ing] proceedings anywhere in the world that would affect the debtor’s property.” In re Rimsat, Ltd., 98 F.3d at 961. Moreover, Chief Justice Posner found that there was “no authority for allowing the presumption against the extraterritorial application of U.S. statutes . . . to defeat application of the automatic stay to a
U.S. citizen to prevent his interfering with a U.S. bankruptcy proceeding in which the debtor is a corporation headquartered in the United States.” *Id.* Noting its need to protect the efficacy of the bankruptcy proceedings, and its power under § 541(a) to control and marshal the debtor’s assets, the *Rimsat* court essentially held that application of the automatic stay was not extraterritorial. *See id.; T. Brandon Welch, The Territorial Avoidance Power of the Bankruptcy Code, 24 Emory Bankr. Dev. J. 553, 561 n.62 (2008).*

Similarly, applying § 365 to the Vohra licensing agreement would not constitute an extraterritorial application of the statute. Because trademarks and trademark licensing agreements constitute property of the estate within the meaning of § 541, the agreement with Vohra is within the Court’s jurisdictional boundaries under § 1334(e)(1), and thus, within its control. *See In re Simon, 153 F.3d at 996; Richard Lieb, The Interrelationship of Trademark Law and Bankruptcy Law, 64 Am. Bankr. L.J. 1, 6 (1990).* Accordingly, applying the rejection powers of § 365 to the Vohra licensing agreement and terminating Vohra’s ability to use Foodstar’s Burger Bites trademark, is not an extraterritorial application of § 365. Rather, application of § 365 to Vohra’s licensing agreement is simply an exercise of the broad jurisdiction granted by Congress to courts so that they may “deal efficiently and expeditiously with all matters connected with the bankruptcy estate.” *Celotex*, 514 U.S. at 308. Consequently, although the purpose of § 365 supports its extraterritorial application, even if this Court disagrees, it can nevertheless apply § 365 to the Vohra licensing agreement.

**D. Eastlandian law should not apply in this case; rather, the Code should control due to considerations of comity.**

The Thirteenth Circuit argued that standard choice of law principles point to the application of Eastlandian law. (R. at 13.) In *Hartford Fire Insurance Co. v. California*, Justice Scalia explained that lower courts have “tempered the extraterritorial application of [statutes]
with considerations of ‘international comity.’” 509 U.S. 764, 817 (1993). A comity analysis, however, is only necessary where there is an actual conflict between domestic and foreign law. See id. at 798 (citing Société Nationale Industrielle Aérospatiale v. United States Dist. Court for Southern Dist. of Iowa, 482 U.S. 522, 555 (1987)). Moreover, this Court has held that comity should not operate such that “any nation will suffer the laws of another to interfere with her own to the injury of her citizens.” Hilton v. Guyot, 159 U.S. 113, 164 (1895). Here, both United States and Eastlandian law permit rejection of trademark licenses; however, Eastlandian law does not terminate the licensee’s rights to use the trademark upon rejection, whereas United States law does under § 365 of the Code. See Lubrizol, 756 F.2d at 1048; (R. at 5.) Nevertheless, “[d]espite the strong mandate for comity and cooperation provided by both the [UNCITRAL] Model Law and [C]hapter 15,” this Court should hold that the fundamental policy of the Bankruptcy Code requires application of § 365 abroad. Daniel A. Nolan, Comment, A “Fundamental” Problem: The Vulnerability of Intellectual Property Licenses in Chapter 15 and the Meaning of § 1506, 28 EMORY BANKR. DEV. J. 177, 180 (2011).

Several provisions of the Code are absolutely crucial to the United States bankruptcy system, including the broad grant of jurisdiction in §§ 541 and 1334(e)(1). See id. at 207–08 (citing In re Gold & Honey, Ltd., 410 B.R. 357 (Bankr. E.D.N.Y. 2009)). Indeed, prohibiting United States courts from exercising jurisdiction over a debtor’s property for reasons of comity would inhibit the successful administration of the debtor’s bankruptcy case. See id. at 208. The automatic stay of § 362 is yet another fundamental component of bankruptcy, providing the debtor with “a breathing spell from litigation and collection activities.” In re Gold & Honey, Ltd., 410 B.R. at 368–69, 371.
Similarly, a debtor’s ability to reject trademark licenses under § 365 is fundamental to the “[e]ase and centrality of [bankruptcy] administration.” In re French, 440 F.3d at 155 (Wilkinson, J., concurring). In purely domestic cases, courts recognize the importance of the debtor’s ability to reject trademark licenses. See, e.g., Lubrizol, 756 F.2d at 1048. Failing to apply § 365 abroad, however, leaves a trademark licensor like Foodstar with uncertainty about which country’s laws govern its bankruptcy case. See Daniel A. Nolan, Comment, A “Fundamental” Problem: The Vulnerability of Intellectual Property Licenses in Chapter 15 and the Meaning of § 1506, 28 EMORY BANKR. DEV. J. 177, 222 (2011). Here, applying Eastlandian law would allow Vohra to continue his use of the Burger Bites trademark after Foodstar’s rejection of the contract. (R. at 5.) Such a result would subvert the basic purpose of rejection—“to release the debtor’s estate from burdensome obligations that can impede a successful reorganization.” Bildisco, 465 U.S. at 528.

To be sure, courts have applied § 365, specifically § 365(n), extraterritorially to promote fundamental United States policies. See Jaffé v. Samsung Elecs. Co., Ltd., No. 12-1802, at *42 (4th Cir. Dec. 3, 2013); In re Qimonda AG, 462 B.R. 165, 178–83 (Bankr. E.D. Va. 2011). Contrary to the Thirteenth Circuit’s opinion, the Jaffé court did not refuse to give extraterritorial effect to contrary German principles so much as it applied § 365(n) extraterritorially to a German insolvency proceeding under Chapter 15. (R. at 14.) In Jaffé, the Fourth Circuit noted that § 1506 “authorizes a bankruptcy court to refuse to take an action that would be manifestly contrary to U.S. public policy.” Jaffé, No. 12-1802, at *42 (citing 11 U.S.C. § 1506). Accordingly, the court found that the special protections of § 365(n) should apply abroad so as to allow a patent licensee to continue using the licensor’s patents, in contrast with German insolvency law. See id. at *6, *42. Although Congress did not extend the special protections of
§ 365(n) to trademark licenses, if the fundamental policies of protecting copyrights and patents under § 365(n) can be applied extraterritorially, then surely the fundamental policy of rejection under § 365 should apply extraterritorially as well. See 11 U.S.C. §§ 101(35A), 365(n).

Application of Eastlandian law to the Vohra licensing agreement would injure Foodstar’s reorganization; therefore, considerations of comity should not apply in this case. See Hilton, 159 U.S. at 164. Thus, this Court should hold that the fundamental purposes of the Code are best served by application of the § 365 power of rejection abroad.

Because the broad language and legislative history of § 541 strongly support an extraterritorial application of the entire Code, and because this Court can apply § 365 to the Vohra licensing agreement without applying it extraterritorially, this Court should reverse the judgment of the Thirteenth Circuit and hold that the presumption against extraterritoriality does not prevent the application of § 365 to a foreign licensing agreement.

**CONCLUSION**

For the foregoing reasons, Petitioner Foodstar, Inc. respectfully requests that this Court reverse the judgment of the Thirteenth Circuit Court of Appeals and hold that (1) rejection of a trademark license in bankruptcy terminates the licensee’s right to use the debtor’s trademark; and (2) the presumption against extraterritoriality does not prevent the application of § 365 to a foreign licensing agreement because the entire Code can be applied extraterritorially.

Respectfully Submitted,

__________________________
TEAM P21
COUNSEL FOR PETITIONER
APPENDIX A


(35A) The term “intellectual property” means—

(A) trade secret;

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

(C) patent application;

(D) plant variety;

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

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

(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.

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

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

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

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

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

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

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

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

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

(B) If the timeshare interest purchaser retains its rights under subparagraph (A),
such timeshare interest purchaser may offset against the moneys due for such
timeshare interest for the balance of the term after the date of the rejection of such
timeshare interest, and the term of any renewal or extension of such timeshare
interest, the value of any damage caused by the nonperformance after the date of
such rejection, of any obligation of the debtor under such timeshare plan, but the
timeshare interest purchaser shall not have any right against the estate or the
debtor on account of any damage occurring after such date caused by such
nonperformance.
(i) (1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) If such purchaser remains in possession—

(A) such purchaser shall continue to make all payments due under such contract, but may, \(^1\) offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

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

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

. . .

(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

IV
(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 C


(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:

...
APPENDIX D


(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

. . . .