No. 13-628

In The

Supreme Court of the United States

IN RE FOODSTAR, INC., DEBTOR

FOODSTAR, INC.,

PETITIONER,

v.

RAVI VOHRA,

RESPONDENT.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF APALSA

BRIEF FOR THE PETITIONER

TEAM P3
Counsel for the Petitioner
QUESTIONS PRESENTED

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.

2. Whether the presumption against the extraterritorial application of statutes extinguishes a multinational debtor’s power to reject an unfavorable, foreign executory contract containing domestic elements under § 365 of the Bankruptcy Code.
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OPINIONS BELOW

The decisions and orders of the U.S. Bankruptcy Court for the District of Moot and of the District Court are unreported and therefore are unavailable. The decision for the U.S. Court of Appeals for the Thirteenth Circuit is also unreported. The opinion is set forth in the Decision of the U.S. Court of Appeals for the Thirteenth Circuit in Case No. 13-4080, dated October 14, 2013, 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.

STATEMENT OF CONSTITUTIONAL AND STATUTORY PROVISIONS

The statutory provisions listed below are relevant to determine the present case, and selected statutes are reproduced in Appendices A and B:

11 U.S.C. §§ 101, 362, 365, 541, 1113, 1502, 1521 (2006);

STATEMENT OF FACTS

The Parties. This case involves the classic story of a creditor attempting to warp the law to maximize his profits at the expense of a debtor and his fellow creditors. Foodstar Systems, Inc. is the franchisor for the popular Burger Bites fast food franchise and holder of the United States patented Burger Bites trademark. Burger Bites is the quintessential depiction of ingenuity: its creator, Viraj Deshmukh, seized a chance to diversify the corporation by serving mini burgers, while similar companies fixated on large burgers. Deshmukh, an Eastlandian citizen, introduced his innovation in Eastlandia. There, he granted a 20-year license to fellow Eastlandian Ravi Vohra, approving use of the Burger Bites trademark in Eastlandia.

The License Agreement. The Vohra license agreement was executed in Eastlandia and is governed by Eastlandian Law, but operates similarly to a United States trademark license by granting the licensor control over quality of Vohra’s trademark use. After execution of the Vohra license agreement, Deshmukh sold all of his trademark rights, including those under the agreement, to Foodstar. Foodstar now holds the exclusive rights to the trademark and is the restaurant franchisor in all twenty-six countries, except for Eastlandia. Since acquiring these rights, Foodstar has expanded Burger Bites in all countries besides Eastlandia.

The Cupcake Fiasco and Ensuing Bankruptcy. Looking to further capitalize on the fast food industry, Foodstar acquired a miniature cupcake chain, Minicakes. Through Minicakes, Foodstar aspired to create a franchise that exclusively crafted and sold petite treats. Although innovative, the tiny-treat franchise was ultimately unsuccessful due in large part to operational struggles. The failed miniature cupcake/hamburger franchise landed Foodstar in a financial tizzy—depleted of operating capital and overleveraged with debt.
3. Thus, Foodstar filed a Chapter 11 bankruptcy to reorganize its affairs. (R. at 3).

**The Vohra Objection.** Foodstar now seeks to liquidate through Chapter 11. (R. at 3). The Burger Bites trademark is Foodstar’s principal asset and creditors’ best hope of recuperating their investment. (R. at 3-4). Because the Vohra license agreement substantially devalues the Burger Bites trademark, Foodstar filed a motion to reject the agreement under § 365. (R. at 5). Despite having no connection to the United States other than the agreement, Vohra filed an objection to Foodstar’s motion. (R. at 5). The parties filed a joint stipulation of facts asserting that the license was an executory contract and that the trademark would sell for 10-15 percent less with Vohra’s rights intact. (R. at 5). It was also stipulated that rejection of a trademark license under Eastlandian law does not extinguish the licensee’s rights to use the trademark. (R. at 5). The Bankruptcy Judge for the District of Moot found that rejection of the agreement was valid because it was in the best interest of the estate, and Vohra appealed the order. (R. at 5.)

**Subsequent Appeals.** Despite the court order, Vohra expressed that he would continue to use the Burger Bites trademark in Eastlandia. (R. at 5-6). Hence, Foodstar filed an adversary proceeding in the bankruptcy court requesting an injunction against Vohra’s trademark use and a declaration that Foodstar’s rejection terminated Vohra’s rights. (R. at 6). The judge granted summary judgment in favor of Foodstar, confirming termination of Vohra’s rights and enjoining Vohra from further trademark use. (R. at 6). Vohra appealed, and the district court affirmed the bankruptcy court order. (R. at 6). Vohra then appealed to the Thirteenth Circuit, where the court reversed the bankruptcy and district court decisions, holding that rejection of a trademark license does not terminate a licensee’s rights, and the presumption against the extraterritorial application of statutes prohibits the application of § 365 to the Vohra license agreement. (R. at 6). This appeal followed. (R. at 1).
SUMMARY OF THE ARGUMENT

The bankruptcy court properly terminated Ravi Vohra’s (“Vohra”) rights to use the Burger Bites trademark following Foodstar’s rejection of the Vohra license agreement. To hold otherwise would allow Vohra, an aggressive foreign creditor, to skirt United States bankruptcy law at the expense of Foodstar’s liquidation and other similarly situated domestic creditors.

Foodstar’s rejection of the agreement constitutes more than a mere breach—it wholly extinguished Vohra’s rights to use the trademark. The Thirteenth Circuit’s holding essentially snubbed thirty years of trademark precedent, the Bankruptcy Code (“Code”), and Congressional intent. Even if this Court accepts a narrow reading of rejection, Vohra’s continued trademark use is impermissible. The license agreement granted Vohra a contractual right to use the mark—not a property interest. A grant of specific performance is not an available remedy upon rejection of a contract. Finally, interpreting Foodstar’s rejection as a mere breach permits Vohra to make an end-run around well-established bankruptcy principles to the detriment of other creditors.

The Thirteenth Circuit’s holding that 11. U.S.C. § 365 does not apply extraterritorially in this instance was similarly misguided. Both the Judicial Code and several provisions within the Bankruptcy Code unmistakably invite application of § 365 beyond United States boundaries. Moreover, the legislative history and historical background surrounding § 541’s inception cement Congress’ intent to apply § 365 worldwide. Even if this Court finds all of this evidence insufficient, the Vohra license agreement displaces the presumption because it touches and concerns United States’ property by directly conflicting with the chief focus of the Code. Finally, there exists no option more feasible or practical than the extraterritorial application of § 365.

For these reasons, this Court should reverse the decision of the Thirteenth Circuit, remand with instructions to reinstate the bankruptcy court order, and allow Foodstar to proceed with its injunction.
ARGUMENT

I. REJECTION OF A TRADEMARK LICENSING AGREEMENT UNDER 11 U.S.C. § 365 TERMINATES THE LICENSEE'S RIGHT TO CONTINUED USE OF THE MARK.

The Thirteenth Circuit erred by concluding that Foodstar’s rejection of the Vohra license did not terminate Vohra’s right to continued use of the Burger Bites mark. For nearly three decades, a trustee’s rejection of a trademark licensing agreement under 11 U.S.C. § 365(a) terminated a licensee’s rights to the mark, thus breaching the agreement and giving the licensee a general claim for damages. See Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc., 756 F.2d 1043 (4th Cir. 1984). With the ever-growing importance of intellectual property to American business, the rejection power remains an important tool for debtors and creditors alike. However, the Seventh Circuit recently gutted the rejection power in response to misplaced criticism of the Fourth Circuit’s Lubrizol decision. See Sunbeam Products, Inc. v. Chicago American Mfg., LLC, 686 F.3d 372 (7th Cir. 2012), cert. denied, ___ U.S. ___, 133 S.Ct. 790 (2012). Unfortunately, Sunbeam introduced its own problems while tilting at Lubrizolian windmills. Now, without addressing any of the weaknesses of Sunbeam, the Thirteenth Circuit has joined the Seventh Circuit’s careening departure from well-established precedent, (R. at 2). Under both courts’ narrow interpretation of rejection, an important tool of bankruptcy has been read out of the Code entirely.

The proper meaning of rejection should be restored and the Thirteenth Circuit should be reversed. First, the Fourth Circuit—not the Seventh or Thirteenth Circuits—properly discerned rejection’s function. Second, even under the lower court’s narrow view of rejection, Vohra’s right to continued use of the trademark was effectively terminated. Finally, permitting Vohra continued use of the Burger Bites mark would unfairly elevate Vohra's position above other unsecured creditors merely because he is party to an executory licensing agreement.
A. **Rejection is a special bankruptcy power that converts the right to a debtor's future performance, like the promise not to sue a licensee for infringement, into a general, unsecured claim for damages.**

Congress gave debtors the power to reject future obligations that would diminish the value of the bankruptcy estate. Rejection is an important tool that, in conjunction with other powers under the Code, enables a debtor to address all obligations, both past and future, while in bankruptcy. The Supreme Court has described the rejection power as “vital to the basic purpose to a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful reorganization.” *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). The recent Chrysler bankruptcy case provides a good example. Chrysler had to dramatically reduce its dealer network in order to save the business. *In re Old Carco LLC*, 406 B.R. 180, 193-96 (Bankr. S.D.N.Y.), aff’d mem., 420 Fed. Appx. 89 (2d Cir. 2011). This involved the termination of dealership franchise agreements that included licenses of the Chrysler trademark. The ability to address the costly obligations saved the American automotive industry. *Id.* at 211.

In *Lubrizol*, the Fourth Circuit found that rejection terminated a patent licensee’s rights. 756 F.2d at 1048. Despite *Sunbeam’s* criticism of the decision, *Lubrizol’s* holding is still founded upon solid legal ground whose reasoning applies equally well to trademarks. Under *Lubrizol*, the Vohra license is an executory contract\(^1\) that may be rejected under § 365(a). Although Congress later added a special exception to § 365(a) to allow intellectual property licensees to retain their rights after rejection, the exception specifically excluded trademarks from its scope. See 11 U.S.C. § 365(n) (allowing the licensee of intellectual property to retain its rights under such

\(^1\) Vohra stipulated that the license agreement was executory at a bankruptcy court hearing below. (R. at 5.) While the Supreme Court is not bound to accept stipulations as to questions of law, *Estate of Sanford v. Comm’r*, 308 U.S. 39, 51 (1939), nothing in the record indicates that either party has sufficiently performed their obligations under the licensing agreement so as to remove it from the realm of executoriness.
contract); 11 U.S.C. § 101(35A) (defining “intellectual property” as a trade secret; invention, process, design, or plant protected under title 35; patent application; plant variety; work of authorship protected under title 17; or mask work protected under chapter 9 of title 17;”). Although the Seventh Circuit created confusion over rejection’s meaning by splitting with the Fourth, a faithful construction of § 365 affirms Lubrizol’s view.

1. Because rejection is not clearly defined under § 365, its meaning must be drawn from the structure, legislative history, and purpose of the Bankruptcy Code.

If the meaning of a statute’s text is plain and does not produce an absurd result, the sole function of the courts is to enforce it according to its terms. Lamie v. United States Trustee, 540 U.S. 526, 534 (2004). However, where the text admits more than one reasonable meaning, its interpretation is guided by canons of statutory construction. A statute’s text, however plain, cannot be divorced from context. The Court has traditionally explored a provision’s meaning within the structure of the statute that surrounds it. Courts should “give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.” Montclair v. Ramsdell, 107 U.S. 147, 152 (1883). A statute’s legislative history can also be a helpful tool to guide the Court’s analysis. Ultimately, any interpretation of the text must be consistent with the purpose behind the statute.

(a) Statutory Language

Rejection is not defined\(^2\) in the Bankruptcy Code and has no established meaning in non-bankruptcy contract law. The common English meaning of reject is “to refuse to accept, consider, submit to, take for some purpose, or use.” Merriam-Webster, http://merriam-

\(^2\) The term “rejection” does not appear anywhere in § 101, which is the definition section of the Bankruptcy Code. The fact that § 101 defines other § 365 terms, such as “intellectual property,” strongly suggests that rejection’s omission was not an oversight.
In everyday usage, rejection signals the termination of some relationship or avenue forward.

Beyond rejection’s ordinary meaning, § 365, itself, offers few textual clues. § 365(a), which is the first and broadest provision concerning rejection, provides that “the trustee, subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a). Notably, § 365(a) applies both to executory contracts and unexpired leases. Unless otherwise limited, rejection should be read to encompass both. Because Congress chose a single term to apply both to executory contracts and unexpired leases, it is reasonable to assume that rejection works similarly, if not identically, in either case.

The only provision in § 365 that directly ascribes any meaning to rejection is Subsection (g), which explains that rejection “constitutes a breach of such contract or lease . . . .” 11 U.S.C. 365(g). Because of the operation of Subsection (g), the breach from rejecting an agreement is considered to have arisen pre-petition, and the non-debtor party is placed in the position of a general unsecured creditor. This also ensures that the debtor will be protected from undue harassment during the bankruptcy process. See 11 U.S.C. § 362(a)(1) (automatically staying all actions that arise before the commencement of the bankruptcy case). Far from defining rejection, as the lower court maintains, the section appears to have been intended as a timing mechanism to treat rejection damages as a prepetition claim. (R. at 15.) According to the legislative history, “Subsection (g) defines the time as of which a rejection of an executory contract or unexpired lease constitutes a breach of the contract or lease. . . . the purpose is to treat rejection claim as prepetition claims.” H.R. REP. No. 95-595, 95th Cong., 2d Sess. 349, reprinted in 1978 U.S. Code Cong. & Ad.News 5963, 6305. Notably, the legislative history does not indicate that Subsection (g) defines breach. Because of this fairly clear statement of
congressional intent, the Lubrizol court found that the purpose of § 365(g) was to limit the remedies available to a non-bankrupt party to prepetition damages only. Lubrizol, 756 F.2d at 1048.

There is little dispute that rejection breaches the contract. (R. at 15.) The debate, then, centers on whether rejection does something more. (Cf. R. at 8.) Unlike the creation of some statutory powers, Congress did not assemble rejection’s meaning, component by component, through definitions and provisions as a mason might construct a brick wall. Rejection is not so easily cabined. Instead, rejection’s meaning is revealed through a subtractive process, piece by piece, like chiseling away unshaped marble to reveal the sculptor’s subject; its contour illuminated by bankruptcy’s structure, purpose, and legislative history.

(b) Structure

Where the text falls short of adequately explaining rejection’s meaning, the structure and legislative history of § 365 help fill in some of the missing details. For example, the location of § 365 within the overall Code offers some insight into Congressional intent. The authorization to reject an executory contract flows from Chapter 3, Subchapter IV, of the Bankruptcy Code, which is titled “Administrative Powers.” From its placement, it seems clear that Congress intended rejection to be a special bankruptcy power. Other administrative powers in the same subchapter, such as the automatic stay, provide the debtor with protection and powers that do not exist outside of bankruptcy. See 11 U.S.C. § 362.

In addition to the placement of § 365 with respect to the rest of the Code, subsequent amendments to § 365 provide further clues as to rejection’s meaning. “When Congress acts to amend a statute, [the Court] presume[s] it intends its amendment to have real and substantial effect.” Stone v. INS, 514 U.S. 386, 397 (1995).

§ 365(a) is limited by several exceptions, which share a common theme. In certain
circumstances, Congress chose to let non-debtors retain rights that would otherwise have terminated upon rejection of a contract or lease. To give meaning to these exceptions, the rejection power should be interpreted to have otherwise included their content. For instance, §365(h) allows a lessee to “retain its rights under such lease” if the debtor rejects a lease that arose pre-bankruptcy. 11 U.S.C. § 365(h)(1)(A)(ii). If rejection generally does not terminate a creditor’s rights (either under an executory contract or lease), then Subsection (h) becomes mere surplusage. Therefore, to give meaning to the exception, rejection must be read not to allow a non-debtor party to retain its rights under a lease. Because rejection is a power that governs both executory contracts and unexpired leases, we can infer that rejection likewise terminates a party’s rights under an executory contract.


The case is even stronger for trademark licenses. After *Lubrizol* was decided, Congress

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3 For example, imagine a principle first authorizes her agent to purchase any blue car on her behalf, and then restricts that authority by specifying that no convertible should be purchased. We can infer from the subsequent restriction that a convertible is a type of car and the restriction narrows the set of authorized options. Any interpretation where convertible is not a type of car renders the restriction superfluous.
amended § 365 to allow a patent licensee to retain its rights despite the debtor-licensor’s decision to reject the contract. Subsection (n) provides, “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 . . . to retain its rights . . . under such contract . . . .” 11 U.S.C. § 365(n)(1)(B).

Importantly, Congress intentionally left trademarks out of the definition of “intellectual property” that was protected by § 365(n). As the Senate Judiciary Committee report stated, “since [matters related to trademark] could not be addressed without more extensive study, it was determined to postpone congressional action in this area and to allow the development of equitable treatment of this situation by the bankruptcy courts.” See S. Rep. No. 100-505, at 5 (1988), reprinted in 1988 U.S.C.C.A.N. 3200, 3204 (noting that trademark licenses “raise issues beyond the scope of this legislation” because these “licensing relationships depend to a large extent on control of the quality of the products or services sold by the licensee”). Where Congress explicitly enumerates certain exceptions, additional exceptions are not to be implied, in the absence of contrary legislative intent. Andrus v. Glover Const. Co., 446 U.S. 608, 616-17 (1980).

(c) Statutory Purpose

Rejection is not simply a breach, nor is it a vaporization, termination or rescission of the contract. As Judge Lutfy observed, “These formulations are too simplistic.” (R. at 14.) Rejection draws its meaning from bankruptcy policy, not from contract law. When Congress chooses a term with no pre-established meaning, a faithful construction interprets the term in light of the policies underlying the Bankruptcy Code. Courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy. Brotherhood of Locomotive Engineers v. Atchison, T. &
S.F.R.R., 516 U.S. 152, 157 (1996) (purpose of Hours of Service Act of promoting safety by ensuring that fatigued employees do not operate trains guides the determination of whether employees’ time is “on duty”).


Without § 365, a debtor would not have the ability to ensure performance of creditors (assumption) or to protect itself from burdensome future obligations that may defeat a successful reorganization (rejection). David M. Brent, Executory Contracts and Section 365: A Doctrine in Search of A Policy, 1 J. Bankr. L. & Prac. 180, 188-89 (1992). The purpose of reorganization may be frustrated if a debtor cannot address future obligations using the bankruptcy process. In cases like a trademark license, where the licensee’s continued use of the trademark imposes on the debtor a continuing relationship with the licensee and continuing duties in order to protect the underlying estate asset, it must be read to convert the use right into a damage claim.

(d) Legislative History

Congressional action supports the view that Lubrizol was correctly decided. If courts had
misinterpreted the essence of rejection over the years, Congress has had many occasions to amend § 365(a) to correct it. Nor has Congress sat idly by. Instead, Congress has enacted several exceptions to § 365(a), thus affirming the general rule not correcting it. All of these exceptions preserve some of the non-debtor counter-party’s contractual rights, for lessees under unexpired real estate leases (11 U.S.C. § 365(h)(1)), owners of timeshare interests (11 U.S.C. § 365(h)(2)), and purchasers of real property or timeshare interests who are already in possession (11 U.S.C. § 365(i & j)).

The reasonable interpretation is that Congress added the exceptions because § 365 converts those rights into damage claims.

2. In contrast, Sunbeam’s “breach-only” view of rejection is inconsistent with the text and structure of the Code, and frustrates the purpose of the bankruptcy remedy.

Sunbeam’s breach-only view is inconsistent with the text and structure of the Code. A fair reading of the Code suggests that rejection cannot be confined to breach. § 365(g) establishes that rejection constitutes breach and defines when it occurs. However, § 365(g) does not equate rejection with breach. First, it is not clear why Congress would have chosen the term "rejection" if it intended it to be nothing more than breach. Second, Congress would not need to create a special section of the bankruptcy code to give trustees the authorization to do what they could already do under substantive state law. Third, interpreting rejection in such a narrow manner does not advance the policy interests of bankruptcy. If a debtor cannot avoid burdensome future obligations that impede reorganization or liquidation, then bankruptcy may not provide much of

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4 Pending legislation in Congress reinforces the correctness of Lubrizol with regard to rejection of trademarks. The Innovation Act (2013 U.S. Cong. H.R. 3309) includes proposed amendments to the bankruptcy code, which would add trademarks to the definition of “intellectual property” under § 101. The rejection of trademark licenses would then fall under § 365(n), which would permit a licensee to retain its rights after rejection. If Congress passes the Act, it would decide the present matter. Until such a time, rejection is governed by § 365(a), which does not permit a licensee to retain its rights upon rejection of an executory contract.
a remedy to franchisors.

The Thirteenth Circuit, blindly following the Seventh’s lead, maintained that § 365(g) defines rejection as breach. (R. at 8 (“The plain language of the Code could not be clearer. § 365(g) provides, ‘the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease . . . .’”).) Contrary to the lower court’s position, the plain meaning of the text is not so clear. The lower court gives too much weight to a provision for which ample evidence suggests a different purpose. See Section I(A)(1), supra. As Justice Breyer explained in his dissent in FCC v. NextWave Personal Communications, Inc., 537 U.S. 293, 311 (2003), “[i]t is dangerous . . . in any case of interpretive difficulty to rely exclusively upon the literal meaning of a statute’s words divorced from consideration of the statute’s purpose.” In NextWave, Justice Breyer cited the stock example that “‘no vehicles in the park’ does not refer to baby strollers or even to tanks used as part of a war memorial,” as well as Justice Field’s opinion for the Court in United States v. Kirby, 74 U.S. (7 Wall.) 482, 486 (1869) (prohibition on obstructing mail does not apply to local sheriff’s arrest of mail carrier on a murder charge; “[g]eneral terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence”).

Nor would Congress need to create a special section of the bankruptcy code to give trustees the authorization to breach a contract. A failure to fulfill a promise is not an exercise of power, and a trustee certainly does not need the blessing of Congress to breach a contract. As the dissent noted below, “[a] debtor needs no special bankruptcy power in order to commit a breach; it can simply stop performing or repudiate the contract and cause an anticipatory breach.” (R. at 15.) If Congress had intended rejection to be nothing more than a procedural mechanism for dealing with breach by the debtor, then it would be more sensibly located under Chapter 5,
“Creditors, Debtors, and the Estate,” which specifies what happens to creditor and debtor interests at the commencement of the bankruptcy case.

Finally, *Sunbeam’s* narrow view of the rejection power produces absurd results inconsistent with the purpose of the bankruptcy remedy. If rejection does little more than breach a license agreement, then it would achieve absurd results inconsistent with the purpose of the bankruptcy remedy. Under the breach-only interpretation of § 365, the non-debtor licensee may continue use of the mark while still maintaining a claim for damages against the debtor-licensor. Because rejection constitutes breach, the licensee may be excused from its obligations on other covenants. The licensor could lose the ability control use of the trademark through the breached licensing agreement, which could cause damage\(^5\) to the brand or result in the loss of the trademark entirely.\(^6\)

In sum, *Sunbeam’s* reasoning threatens to upset the carefully crafted balance of the Code because it cannot be confined to intellectual property licenses alone. If a creditor that has already performed is given an unsecured claim for damages, it would seem absurd that a creditor, who is party to an executory contract and thus has not completely performed its obligations and may cut its losses, should be entitled to full performance of its unfulfilled obligations and a claim for damages.

\(^5\) A trademark is valuable because it identifies the manufacturer of goods and allows the manufacturer to cultivate the goodwill associated with a reputation for quality goods. If a particular franchisee fails to maintain the same quality consumers have come to expect from a manufacturer or service provider, the overall brand is damaged because it has become a less reliable indicator of quality.

\(^6\) A trademark is only protectable where it is discernible as the source of goods and not descriptive of the goods themselves. Even a mark that was once identifiable as the source of goods or service can slip into common usage such that the mark no longer serves its purpose and is rendered unprotectable as a matter of law. For example, the THERMOS mark slipped into common usage such that it no longer identified a particular manufacturer, but instead became a name for any container that was insulated. The mark fell into common usage because the owner of the THERMOS mark failed to stop competitors from using it to describe their competing products, and consumers began to confuse the mark for the device itself. Consequently, a licensor’s control over the mark is an important aspect of any licensing agreement, and a licensor’s inability to monitor a trademark’s use in the marketplace could result in the loss of the trademark altogether.
B. **Even under a breach-only view of rejection, Vohra’s right to continued use of the trademark was effectively terminated.**

Even if rejection did not terminate the Burger Bites license, it rendered the agreement nugatory. The Thirteenth Circuit mistakenly concluded that Foodstar’s rejection of the Vohra license did not terminate Vohra’s right to continued use of the Burger Bites mark because “[r]ejection does not ‘nullify,’ ‘rescind,’ or ‘vaporize’ the contract or terminate the rights of the parties.” (R. at 8.) In doing so, the Thirteenth Circuit misunderstood the nature of rejection, confused principles of property and contract law, and neutered an important legislative creation without cause. While rejection does not terminate or “vaporize” a contract altogether, that is start of the inquiry not its end. Rejection terminates or suppresses rights a creditor has with respect to the debtor while leaving intact other rights that do not obligate the debtor. Below, the lower court concluded that the Vohra license still existed after Foodstar’s rejection, but the court failed to analyze whether some other operation or effect of rejection would nevertheless terminate Vohra’s rights under the contract.

1. **The Burger Bites license granted Vohra a contractual right to use the mark, but did not convey a property interest in it.**

The Thirteenth and Seventh Circuits misconstrued the effect of rejection in part because both courts misunderstood the nature of trademark licenses. A license is the right to enter upon or use another’s property in a manner that would otherwise be illegal if unlicensed. *Black's Law Dictionary* (9th ed. 2009). A trademark license gives a licensee the right to use the licensor’s trademark, or goodwill, in a way that would otherwise be considered illegal infringement. In terms of contract law, a trademark license is essentially a promise by the licensor to abstain from suing the licensee for infringing its mark in exchange for the licensee’s promise to pay the licensor ongoing royalties. *Macmahan Pharmacal Co. v. Denver Chemical Mfg. Co.*, 113 F. 468 (C.C.A. 8th Cir. 1901).
A trademark license is not a property right. *Hanover Milling Co. v. Metcalf*, 240 U.S. 403, 412-414 (1916) (“There is no such thing as property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark is employed . . . .”). No interest in the underlying mark is transferred to the licensee by virtue of the license. Contrary to the *Sunbeam* court’s characterization, there is nothing for the licensee to retain simply because the agreement in its entirety is not destroyed. Any rights a licensee has with respect to a trademark are given effect only because of the enforceability of the licensor’s promise not to sue the licensee for infringement of the licensor’s property. Thus, the efficacy of a license is only maintained if the licensee can prevent the licensor from suing for infringement.

As the Seventh Circuit acknowledges, “After rejecting a contract, a debtor is not subject to an order of specific performance.” *Sunbeam*, 686 F.3d at 377); see also *In re Nickels Midway Pier, LLC*, 341 B.R. 486, 498-500 (D.N.J. 2006), aff’d, 255 F. App’x 633 (3d Cir. 2007). Preventing specific performance of the debtor’s unfulfilled obligations protects other general unsecured creditors by ensuring that the non-debtor party to an executory contract is not given preferential treatment.

2. **Because rejection protects Foodstar from an order of specific performance, Vohra can no longer enforce the license to prevent Foodstar from suing for infringement.**

Rejection relieves the estate of the debtor’s remaining obligations under the contract. George M. Treister, et al., *Fundamentals of Bankruptcy Law*, § 5.04(f), at 249 (5th ed. 2004, Richard Levin ed.). Within the context of trademark licenses, rejection relieves the bankruptcy estate of its obligation to refrain from suing the licensee. Because a contract must be either assumed or rejected *cum onere*, the licensee is likewise freed from its obligation to continue to pay royalties. The rejection breaches the agreement, but does not terminate it. Instead, the non-debtor party maintains its claim for damages as a general unsecured creditor, but has not right to
specific performance under the agreement.

Most courts hold that bankruptcy accelerates a claim for damages. Jay Lawrence Westbrook, *A Functional Analysis of Executory Contracts*, 74 Minn. L. Rev. 227, 326-27 (1989); *cf.* 11 U.S.C. § 502(b)(6) restricts rejection damages for leases. Thus, the entire value of the contract is converted to a general claim for damages. Discharge then extends the effects of rejection post-bankruptcy.

**C. Permitting Vohra continued use of the Burger Bites mark would unfairly elevate Vohra's position above other unsecured creditors merely because he is party to an executory licensing agreement.**

Under any circumstance, the bankruptcy court should be permitted to use its equitable powers to prevent Vohra from diminishing the Foodstar estate. Vohra’s continued use of the mark diminishes the value of the Foodstar estate to the detriment of other creditors and deprives Foodstar of any meaningful control of the mark. Ideally, equity would require all creditors to be paid in full. When a creditor seeks to recover the full benefit of any bargain, rejection diminishes that benefit to his detriment. However, bankruptcy represents a practical compromise to the unfortunate reality that the bankrupt cannot meet all its obligations. Equity in the bankruptcy context often requires a court to make difficult decisions that elevate the interests of the many over the interests of the one. Fairness demands that no one creditor (of a particular class) is given special treatment over another. Here, adopting the Thirteenth Circuit’s narrow construction of rejection contorts the Code to save the interests of one creditor and instead diminishes the rights of the many.

**II. THE PRESUMPTION AGAINST EXTRATERRITORIALITY DOES NOT SERVE AS A BARRIER TO FOODSTAR’S RIGHT TO REJECT AN ADVERSE LICENSE AGREEMENT UNDER 11 U.S.C. § 365.**

The Thirteenth Circuit erroneously held that § 365 of the Code does not apply extraterritorially, thwarting Foodstar’s right to reject a financially onerous license agreement. 11
U.S.C. § 365 is arguably a liquidating entity’s most formidable tool; it allows a fraught debtor to reject an executory contract that is detrimental to the estate. See 11 U.S.C. § 365. The Thirteenth Circuit stripped Foodstar of this statutorily provided right when it misconstrued statutory language, legislative history, and the nature of bankruptcy.

It is undisputed that Congress has broad authority to enforce its laws beyond the territorial boundaries of the United States. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (2010). Because Congress is primarily concerned with domestic policy, there exists a presumption against the extraterritorial application of statutes. Foley Bros. v. Fildaro, 336 U.S. 281, 285 (1949). Indeed, this presumption is important to safeguard our nation from unintended international discord arising out of conflict between foreign laws. Aramco, 499 U.S. at 248. But the presumption must heed Congress’ undeniable power to administer its laws overseas if it so chooses. French v. Liebmann (In re French), 440 F.3d 145, 151 (4th Cir. 2006). A court therefore cannot interfere with extraterritorial application if a statute manifests a clear expression of an affirmative intention to apply outside of the United States. Aramco, 499 U.S. at 248.

If the Vohra license agreement implicates the presumption, this Court should nevertheless apply § 365 extraterritorially because the Code reveals an unambiguous intent for the section to apply worldwide. Even if this Court finds that Congress’ evidenced intent is insufficient, the Vohra license agreement touches and concerns United States territory in a manner that displaces the presumption. Finally, extraterritorial application of § 365 is the most effective way to reach a foreign asset. Because Congress intended § 365 to apply universally, and any alternative lacks practicality, Foodstar respectfully requests this Court to reverse and

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7 Rejection of the Vohra License Agreement under § 365 arguably does not even implicate the presumption against extraterritoriality. The presumption may not arise if the conduct’s effects are localized domestically, rather than extraterritorially. See French, 440 F.3d at 148; H.K. & Shanghai Banking Corp. v. Simon (In re Simon), 153 F.3d 991, 996-97 (9th Cir. 1998). Because the Vohra License Agreement involves domestic participants and a United States patented trademark, this Court could find that application of § 365 in this instance is not extraterritorial.
remand the Thirteenth Circuit’s erroneous and harmful holding.

A. § 365 manifests an unequivocal intent to apply extraterritorially.

Contrary to the Thirteenth Circuit’s holding, there is ample affirmative evidence of Congressional intent to apply § 365 of the Code beyond the territorial boundaries of the United States. Notably, only one court has made an extraterritorial determination regarding § 365. See Europe Movieco Partners, Ltd. v. United Pan-Europe Comms. N.V. (In re United Pan-Europe Comms. N.V.), No. 03 Civ. 1060 DC, 2004 WL 48873 (S.D.N.Y. Jan. 9, 2004). In In re United Pan-Europe Comms. N.V., the extraterritorial application of § 365 was not even questionable: the Code contains numerous indications of intent to apply § 365 extraterritorially. Id. at *5.

In order for a statute to have worldwide reach, Congress must supply an “affirmative indication” that the statute applies globally. Morrison v. Nat’l Australia Bank Ltd., 130 S.Ct. 2869 (2010). The presumption is not a clear-statement rule. Id. at 2883 (“we do not say . . . that the presumption against extraterritoriality is a ‘clear statement rule’). Rather, it invites evidence of context that guarantees the most faithful reading of a statute. See Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659, 1665 (2013) (taking into consideration the historical background of which the Alien Tort Statute was enacted for extraterritoriality determination). The most faithful reading of the Code, as buttressed by express statutory language and legislative history, is that Congress intended § 365 to apply to foreign debtors, creditors, property, and contracts. This evidence, coupled with the nature of bankruptcy, enable Foodstar to reject the foreign Vohra license agreement.

1. Affirmative indications within the Code expressly extend § 365’s reach to foreign assets.

Congress liberally strewed the Code with its intentions for § 365 to apply to foreign executory contracts. The Thirteenth Circuit mistakenly proclaimed that “each and every section”
of the Code must evidence intent to apply extraterritorially. See (R. at 12). This notion misconstrues the nature of bankruptcy and flies in the face of accepted statutory construction. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (“it is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme”); *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 370 (1988) (statutory construction is a “holistic endeavor”); *Sun Fin. Co. v. Howard* (In re Howard), 972 F.2d 639, 640 (5th Cir. 1992) (“provisions of the Bankruptcy Code cannot be read in isolation”) (emphasis added). The Bankruptcy Code is not a typical statutory scheme; it is a scrupulous, multifaceted machine. Each provision within the Code plays a distinct and essential role in the functionality of the entire bankruptcy remedy. Reading a section of the Code in isolation from its counterparts is akin to attempting to decipher an entire picture from a single puzzle piece; it is illogical.

Reading the Code as a whole, the most faithful interpretation is that Congress intended § 365 to apply worldwide. A debtor’s rights under an executory contract are “legal and/or equitable interest[s]” acquired prior to a bankruptcy filing, and, if assumed, they are included in the sweeping definition of property of the estate under § 541(a). See 11 U.S.C. § 541(a); *In re ERA Cent. Reg’l Serv., Inc.*, 39 BR 738, 740 (Bankr CD Ill 1984) (finding an agreement which licensed trademark rights was property of the estate); *In re Joyner*, 46 BR 130, 135 (Bankr MD Ga 1985) (asserting that a franchise agreement that licensed trademark rights was property of the estate); Scott W. Putney, *Bankruptcy Code v. Lanham Act and Controlled Licensing*, 80 Trademark Rep. 140, 141 (1990) (“agreements which usually involve trademark licenses . . . are properties of the estate). Since a debtor’s foreign assets become property of the estate upon a bankruptcy filing, it follows that these assets are subject to sections governing the actions
involving property of the estate. 11 U.S.C. § 541. This is crucial, because in crafting an extraterritorial determination on various provisions of the Code, courts customarily examine the statutory language and legislative history of § 541. See In re French, 440 F.3d at 151 (analyzing § 541 and its legislative history to permit extraterritorial application of § 548); Underwood v. Hilliard (In re Rismat), 98 F.3d 956, 961 (7th Cir. 1996) (providing for extraterritorial application of the Automatic Stay because § 541 exists to control and marshal assets of the debtor “wherever located”); Hong Kong & Shanghai Banking Corp., Ltd. v. Simon (In re Simon), 153 F.3d 991, 996 (9th Cir. 1996) (using § 541 to allow for extraterritorial application of a discharge injunction (§ 524)); Maxwell Commc’n Corp. PLC v. Societe Gen. PLC et al. (In re Maxwell Commc’n Corp.), 186 B.R. 807, 824 (S.D.N.Y. 1995) (examining § 541 to make an extraterritorial determination of preferential transfers (§ 547)).

§ 541 defines “property of the estate” as “all . . . property” enumerated within the section, “wherever located and by whomever held.” 11 U.S.C. § 541. While it is true that “generic terms” like “any” or “every” fail to rebut the presumption, Kiobel, 133 S. Ct. at 1665, § 541 goes far beyond standard congressional terminology. “Wherever located” is a locational phrase seeking to extend the Code’s reach to property situated anywhere in the world. Cf. Id. (rationalizing that “any civil action” does not imply extraterritorial reach of the Alien Tort Statute because “any” is a generic term). Unlike “any,” “wherever located” is neither ambiguous nor generic; it emphasizes a lack of restriction. This lack of restraint makes sense in the context of a multinational corporate liquidation, where foreign creditors and assets are the norm rather than the exception. In an era of globalization, liquidating conglomerates have assets and creditors \textit{wherever}. Congress’ use of broad locational language in § 541 reflects an understanding that property of the estate must have borderless application to effectuate an equitable distribution to

Further bolstering § 541, § 1334 of the Judicial Code expressly extends the Code’s reach to foreign assets, including assumed executory contracts that were subject to § 365. 28 U.S.C. § 1334. § 1334 provides that “the district court in which a case under Title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.” Id. (emphasis added). The Thirteenth Circuit misguidedly likened § 1334 to the mere jurisdictional grant at issue in *Kiobel*. See *Kiobel*, 133 S.Ct. at 1665 (holding that the Alien Tort Statute did not apply extraterritorially because it was merely a jurisdictional statute). § 1334 is not simply a jurisdictional grant. Rather, it gives the bankruptcy court custody and control over property of the estate through an invocation of *in rem* jurisdiction. *In re Simon*, 153 F.3d at 996. *In rem* jurisdiction is a legal fiction, treating property as assets located within the jurisdiction regardless of the actual physical location. *Katchen v. Landy*, 382 U.S. 323, 327 (1966). By virtue of this custody, bankruptcy courts have broad authority to determine disputes over entitlement to the *res*, which, according to § 1334 of the Judicial Code and § 541 of the Bankruptcy Code, includes trademark license agreements *wherever located*. Id.

Evidence of the Code’s extraterritorial application does not cease at § 541 or the invocation of *in rem* jurisdiction at § 1334 of the Judicial Code. In fact, this purpose is manifested in the very section providing the most fundamental protection afforded to a debtor in bankruptcy: the Automatic Stay. 11 U.S.C. § 362(a). Upon the filing of a Chapter 11 plenary
case, the Automatic Stay comes into effect to shield the debtor from acts against “property of the estate.” *Id.* The stay operates against “all entities,” which, according to § 101(15), includes a foreign state or government. *Id.; 11 U.S.C. § 101(15); see also 11 U.S.C. § 101(27)* (defining a “Governmental Unit,” among other things, as a “foreign state” or “other foreign or domestic government”). Interpreting § 362 as inapplicable to foreign entities would render a portion of the definition of “governmental unit” superfluous, which violates a “cardinal principle of statutory construction.” *Alaska Dept. of Environ. Conservation v. EPA*, 540 U.S. 461, 489 (2004). (“a statute ought . . . to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant”). Moreover, the fact that Congress intended for the Stay, a debtor’s most significant protection in bankruptcy, to be effective against foreign states or governments reflects an awareness that a debtor’s creditors and assets may not always lie within the United States. *See Green*, 10 Am. Bankr. Inst. L. Rev. at 93.

Invocation of *in rem* jurisdiction over property of the estate, the broad locational language used in § 541, and the Automatic Stay’s application to foreign entities all provide affirmative indications of Congress’ intent to allow a debtor to reject a foreign contract under § 365 of the Code and are sufficient to rebut the presumption of extraterritoriality.

2. **Legislative history confirms that § 365 operates worldwide.**

If express language of the Code leaves any doubt as to whether Congress intended § 365’s reach to extend beyond territorial boundaries, the legislative history is undeniable. As aforementioned, it is evident that the presumption is not a clear statement rule. *See Kiobel*, 133 S. Ct. at 1666 (considering the historical background against which the Alien Tort Statute was enacted); *Aramco*, 499 U.S. at 258 (analyzing the EEOC’s interpretation of Title VII in an extraterritoriality determination). In fact, courts routinely examine “extrinsic indicia of legislative intent” when making an extraterritoriality determination. *See Sale v. Haitian Centers,*
509 U.S. 155, 177 (1993) (analyzing “all available evidence” to make an extraterritoriality determination); *Kollias v. D & G Marine Maint.*, 29 F.3d 67, 73 (2d Cir. 1994) (“the Supreme Court has made clear since *Aramco* that reference to nontextual sources is permissible”).

§ 1334 of the Judicial Code and § 541 expand the Code’s reach to foreign executory contracts by invoking a legal fiction that foreign property of the estate is actually within the territorial boundaries of the United States. *Katchen*, 382 U.S. at 327; *In re French*, 440 F.3d at 151. Thus, the legislative history of § 541 is instrumental in deciphering Congress’ extraterritorial intentions on § 365. In 1952, Congress amended § 70a of the Bankruptcy Act, extending its reach to “all” of the enumerated “kinds of property wherever located.” 11 U.S.C. § 70a (repealed 1978) (emphasis added). The House Report accompanying the amendment iterated that the inclusion of the “wherever located” language “makes clear that a trustee in bankruptcy is vested with the title of the bankruptcy in property which is located without, as well as within, the United States.” H.R. REP. No. 2320 (1952), reprinted in 1952 U.S.C.C.A.N. 1960. Congress amended the Code with the understanding that “it will often be fair and just for a bankruptcy proceeding initiated under the legislation of this country to administer completely an estate which includes property located abroad.” Frank R. Kennedy, *The Bankruptcy Legislation of 1962*, 2 BCLR 241, 247 (1963).

Although no reasoning for the addition of this new broad language is available, one can simply look to the historical context of the amendment for clarity. Around the time Congress drafted § 70a of the former Bankruptcy Act, opportunists began to realize the potential of worldwide corporate success. Ships could sail ideas and ingenuity over seas, airplanes flew entrepreneurs over mountains, automobiles transported goods and services long-distance; territorial boundaries became a fiction. Congress, being a culturally sensitive body, responded to
these revelations in 1952 by closing potential loopholes created by this new borderless world. See 11 U.S.C. § 70a. Without the power to reach foreign assets, which were quickly becoming commonplace, Congress realized that our bankruptcy laws could become ineffective. See id.

Our world has become no less global today. Hence, Congress has never recoiled from the report or the inclusion of the “wherever located” language, and it was never devoid of the opportunity to do so. When § 541 of the current Bankruptcy Code replaced § 70a of the former Bankruptcy Act in 1978, Congress chose to keep the broad “wherever located” language when defining property of the estate. H.R. REP. No. 95-595, at 367 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6323. Explaining § 541, 1978 House and Senate reports provide: “[t]he scope of this paragraph is broad. It includes all kinds of property, including tangible or intangible property, causes of action . . . and all other forms of property currently specified in § 70a of the Bankruptcy Act.” Id.; S. REP. No. 95-989, at 82 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5868. Congress not only kept the same broad language of § 70a of the former Bankruptcy Act, it reiterated the expansive reach of the Code to all kinds of property. Id. With no mention of the scope of § 541 since 1978, the most logical conclusion is that Congress adopted this broad, extraterritorial view in its most recent amendment. After all, if Congress perceived the scope of “property of the estate” as too broad, it would have made an effort to confine the Code’s reach.

The vesting of title in foreign assets, as proven by the legislative history of § 541, provides evidence that Congress permitted rejection of foreign executory contracts under § 365. Congress’ numerous affirmative indications of the extraterritorial application of § 365 coupled with the legislative and historical background surrounding Title 11 provide evidence sufficient to rebut the presumption against the extraterritoriality of statutes.

B. The burdensome Vohra license agreement touches and concerns territory of the United States in such a way that it significantly displaces the presumption.
Even if this Court finds that there is insufficient evidence of Congressional intent to apply the Code beyond the boundaries of the United States, § 365 should apply extraterritorially in this instance because the Vohra license agreement substantially touches and concerns territory of the United States. The presumption against extraterritoriality may be displaced if relevant conduct “sufficiently touches and concerns the territory of the United States.” Kiobel, 133 S.Ct. at 1669. Admittedly, the “touch and concern” test is a new phenomenon, and neither Kiobel nor Morrison provides adequate insight into what kind of conduct may oust the presumption under this analysis. See Al Shimari v. CACI Intern., Inc., No. 1:08–cv–827, 2013 WL 3229720, at *10 (E.D.V.A., Alexandria 2013) (“it is unclear how to apply a ‘touch and concern’ inquiry”); Mwani v. Laden, 947 F. Supp.2d 1, 5 (D.C.D.C. 2013) (“The Supreme Court left open the question of ‘just when the presumption against extraterritoriality might be “overcome”’”).

The phrase “touch and concern” is drawn specifically from the Kiobel court, but Morrison is cited for the underlying concept. Kiobel, 133 S.Ct. at 1669. In making an extraterritorial determination, the Morrison court addressed situations in which conduct has both foreign and domestic effects. Morrison, 130 S.Ct. at 2884. When conduct has both territorial and extraterritorial elements, a court should consider a statute’s “focus” or the “objects of the statute’s solicitude” in determining whether the activity can displace the presumption. Id. The Code’s chief focus is to provide a struggling debtor with a fresh start, and the power to reject an executory contract under § 365 is an indispensable tool in effectuating this clean slate. See Grogan, Because the Vohra license agreement is the type of executory contract that Foodstar would reject under § 365 in order to aid in its liquidation, the agreement touches and concerns territory of the United States in such a way that it displaces the presumption against extraterritorial application of statutes.
1. The Code's primary purpose is to effectuate a successful reorganization or liquidation through a fresh start and an equitable distribution to creditors.

The Thirteenth Circuit erred when it failed to take into account the principal underpinnings of the Code in its extraterritorial determination. The first step of the “touch and concern” inquiry involves an analysis of the purpose underlying the statute in question. *Morrison*, 130 S. Ct. at 2884. It is well accepted that the Code has two dominant underpinnings: (1) to provide a “fresh start” to “the honest, but unfortunate debtor;” and (2) to obtain an equitable distribution for creditors. *Grogan*, 498 U.S. at 287. For a business enterprise like Foodstar, this “fresh start” takes the form of a reorganization or liquidation coupled with a breathing spell from aggressive creditors. *Id.* This breathing spell not only aids Foodstar in its liquidating efforts, but it permits an equitable distribution to creditors by halting an unjust race to the courthouse.

Congress envisioned that a bankrupt debtor in need of a fresh start would likely be a party to unbeneificial and burdensome executory contracts. See Jesse M. Fried, *Executory Contracts and Performance Decisions in Bankruptcy*, 46 Duke L.J. 517, 521 (1996) (explaining that executory contracts are either assets or liabilities entering the estate). Hence, § 365 was drafted, permitting the debtor-in-possession or trustee to reject unreasonably onerous contracts and accept those that could contribute to a fruitful restructuring. Alan N. Resnick, *Collier Guide to Chapter 11: Key Topics and Selected Industries* 35 (Lexis Nexis 2013). This is one of the most powerful tools afforded to a debtor, and it is absolutely essential to the liquidation of a multinational debtor who likely has thousands of executory contracts. *Id.*

The Vohra license agreement has no conceivable benefit to Foodstar. Refusing to permit Foodstar to reject the Vohra license agreement under § 365 works an injustice to both policies underlying the Code: a fresh start for Foodstar and an equitable distribution to creditors.
Therefore, the Vohra license agreement touches and concerns territory of the United States in such a way that it displaces the presumption against extraterritorial application of statutes.

2. **The Vohra license agreement taints the focus of the bankruptcy remedy and is therefore subject to rejection under § 365.**

Viewing Foodstar’s plan to liquidate through the lens of the Code’s underpinnings, it is clear that the Vohra license agreement sufficiently touches and concerns territory of the United States to oust the presumption. The Vohra license agreement contains domestic elements that are far beyond the “mere corporate presence” that the *Kiobel* court found insufficient to displace the presumption. *Kiobel*, 133 S.Ct. at 1670. Admittedly, the license agreement was executed in Eastlandia, is governed by Eastlandia law, and involves an Eastlandian citizen. (R. at 3). However, in the present case—unlike in *Kiobel*, where a foreign plaintiff sued a foreign defendant for violations of international law committed on foreign soil—the debtor and party to the Vohra license agreement is an American corporation, the underlying bankruptcy filing was initiated in the United States, and the financial impact of the executory contract directly devalues a United States’ patented trademark. *Kiobel*, 133 S.Ct. at 1662-64; (R. at 3-5). Because the Vohra license agreement has a substantial amount of domestic elements, and it interferes with a debtor’s liquidation and the Code’s underlying policy, the agreement sufficiently touches and concerns United States’ territory, and the presumption is displaced.

The Thirteenth Circuit’s decision barring Foodstar from rejecting the Vohra license agreement under § 365 interferes with the bankruptcy remedy. As aforementioned, § 365 is one of the strongest tools provided to a debtor; it permits a liquidating or reorganizing entity to reject executory contracts and leases. 11 U.S.C. § 365. The Vohra license agreement is the quintessential executory contract that the debtor would be expected to reject in a Chapter 11 liquidation: it is devaluing one of Foodstar’s most lucrative assets, the opposing party is not one
that Foodstar would do business with in the future, and rejection is in the best interest of the estate. It is a vast understatement to say that the Vohra license agreement is an unbeneﬁcial contract for Foodstar. The Burger Bites trademark is valued at 10-15% lower with Vohra’s license rights still intact. (R. at 5). While this loss may seem negligible, when put into context, it is a huge setback. If the Burger Bites trademark is valued at even $10 million dollars, which is likely a low estimate considering that it is used in twenty-six different countries, Foodstar would lose one million dollars at a minimum with Vohra’s license rights intact. That is one million dollars that could be distributed to similarly situated creditors. These creditors would hardly argue that the 10-15% ﬁnancial blow that the trademark takes with Vohra’s license rights intact is a “modest ﬁnancial impact,” as the Thirteenth Circuit concluded. (R. at 13).

Moreover, barring Foodstar from rejecting the Vohra license agreement under § 365 would permit Vohra to have an edge over other creditors merely because his claim is one with foreign elements. Rejection of disadvantageous executory contracts and leases increases the pool of assets for unsecured creditors and ensures a more equitable distribution, particularly in a liquidating Chapter 11. 

_Fried_, 46 Duke L.J. at 522. If creditors such as Vohra are permitted to duck rejection merely because property of the estate contains foreign elements, this court would essentially be incentivizing creditors to handle their affairs extraterritorially in the future. The Thirteenth Circuit’s logic sanctions the exact behavior the Code seeks to extinguish: making an end-run-around the structured bankruptcy remedy.

Because the court’s refusal to permit Foodstar to reject the unfavorable Vohra license agreement under § 365 directly impedes the Code’s primary focus, the agreement sufﬁciently touches and concerns territory of the United States such that it displaces the presumption.

C. Extraterritorial application of § 365 is the most feasible and practical means for Foodstar to rid itself of the unproﬁtable Vohra license agreement.
The Thirteenth Circuit’s reluctance to apply the Code extraterritorially despite ample evidence of congressional intent leaves Foodstar no practical opportunity to disparage itself of a fruitless agreement. Confining § 365 to the territorial boundaries of the United States, the Thirteenth Circuit gave Foodstar two alternatives: (1) apply Eastlandian law; or (2) commence an ancillary proceeding in Eastlandia. (R. at 13). Neither of these alternatives are practical solutions that outweigh Foodstar’s right to reject an executory contract under § 365.

1. **Standard choice of law principles implore the application of United States law with respect to rejection of the Vohra license agreement.**

Application of the Code to rejection of the Vohra license agreement comports with choice of law principles followed by this court. Absent a statutory directive of choice of law, courts balance several factors relevant to the choice of the applicable rule of law, including: the needs of international systems; the relevant policies of interested states and the underlying field of law; the protection of expectations; the predictability of result; and ease in the determination and application of the law to be applied. Restatement (Second) of Conflict of Laws § 6 (1971). These factors weigh precipitously in favor of applying United States law.

Neither the needs nor policies of Eastlandia could offset the deleterious effects applying Eastlandian law would have on the policy underlying bankruptcy. While Eastlandia may have an interest in protecting one citizen that is a party to a contract, the application of Eastlandian law would undermine the fundamental policy of bankruptcy. As aforementioned, the bankruptcy remedy exists to provide a struggling debtor with a fresh start through a liquidation or reorganization and creditors with an equitable distribution of assets. If Foodstar’s rejection is relegated to Eastlandian law, it will be to the detriment of Foodstar and its creditors. Eastlandian law dilutes the value of Foodstar’s most lucrative asset by 15%. (R. at 3). Foodstar has worked hard to cultivate the Burger Bites trademark in all countries, except for Eastlandia. (R. at 3). It is
fundamentally unfair to apply law that mitigates all of that effort for one creditor. Moreover, it is inequitable to allow a creditor to profit off of Foodstar’s bankruptcy at the expense of other creditors.

Additionally, the application of United States law to rejection of the Vohra license agreement is more convenient and logical. Foodstar already has its main proceeding in the United States, which is governed by the Code. (R. at 1). Moreover, Vohra has made contact with the United States courts by appearing in a bankruptcy court and filing an objection. (R. at 1, 5). There is no indication that Foodstar is well-versed in Eastlandian bankruptcy law. Hence, if Eastlandian law is applied, any preparation needed translates to fewer resources available for distribution to creditors.

Application of United States law would also protect expectations. While Vohra entered into the license agreement in Eastlandia, the majority of Foodstar’s trademark use has occurred elsewhere. (R. at 3). Indeed, Eastlandian law is about as unpredictable as possible; Foodstar has not even expanded Burger Bites or further developed the trademark in Eastlandia since it acquired exclusive, worldwide rights to the trademark. (R. at 3). Hence, one would predict that American law would govern Foodstar’s trademark activity. Moreover, Vohra had knowledge of Foodstar’s bankruptcy and filed an objection to an action under American law. Because United States law would better protect expectations, respect the policy underlying bankruptcy law, and would be easier to apply, the Thirteenth Circuit erred when it suggested that standard choice of law principles pointed to the application of Eastlandian law in this case.

2. Initiating an ancillary proceeding in Eastlandia is not a sensible option for Foodstar.

Contrary to the Thirteenth Circuit’s reasoning, instituting an ancillary proceeding in Eastlandia is an impractical and unnecessary step for Foodstar. Such an action would be
prohibitively expensive and may not even be effective. The bankruptcy remedy is meant to be as
cost-effective as possible; after all, the entire foundation of Chapter 11 is to afford a debtor a
successful reorganization and creditors an equitable distribution of assets. Grogan, 498 U.S. at
287. Forcing Foodstar to institute an ancillary proceeding in Eastlandia would frivolously waste
time and further dilute money available to Foodstar’s creditors. Perhaps a UNCITRAL ancillary
proceeding would be worthwhile if Foodstar had multiple assets and numerous creditors in
Eastlandia. But Foodstar has a single asset in Eastlandia. What a poor message it would send to
Foodstar’s domestic creditors to give a similarly situated, foreign creditor such special treatment.
It is nonsensical to force Foodstar down this path when a more logical and feasible option
exists—simply grant Foodstar its statutorily provided right to reject the unfavorable Vohra
license agreement.

A UNCITRAL ancillary proceeding would not only be cost-prohibitive, but it may not
even be a workable solution to the Eastlandian predicament. First, it is possible that an
Eastlandian court may refuse to recognize Foodstar’s ancillary proceeding. Recognition is not a
“rubber stamp exercise.” In re Chiang, 437 B.R. 397, 402 (Bankr. C.D. Cal. 2010). To the
contrary, it is a rigid procedural mechanism, requiring the debtor at the very least to have an
“establishment” within a country to gain recognition as a foreign nonmain proceeding.8 Id. An
establishment is defined as “any place of operations where the debtor carries out a non-transitory
economic activity.” 11 U.S.C. § 1502(2). While this may seem like an easy obstacle to
overcome, one of our own courts denied recognition on facts arguably displaying more economic
activity than Foodstar’s Eastlandian operations. See In re Bear Stearns High-Grade Structured

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8 A foreign proceeding may also be recognized as a main proceeding. 11 U.S.C. § 1517(a)(1). A foreign main
proceeding requires the debtor to have its “center of main interests” in the country in which the proceeding was
initiated. 11 U.S.C. § 1502(4). Because the nucleus of Foodstar’s business activity and its main bankruptcy
proceeding is in the United States, recognition as a foreign main proceeding is not a viable option for Foodstar.
Credit Strategies Master Fund, Ltd., 389 B.R. 325, 339 (S.D.N.Y. 2008) (denying existence of “establishment” despite the fact that the corporation had investors, board of directors, attorneys, auditors, and bank accounts in the country where the proceeding was initiated).

Even if the court does grant nonmain recognition to Foodstar, all relief provided for in a UNCITRAL ancillary nonmain proceeding is discretionary. 11 U.S.C. § 1521(a). Hence, if the presiding judge decides that granting Foodstar relief would violate some vague, subjective concept of comity, the ancillary proceeding would be a complete waste of time and resources. Indeed, an American court recently denied relief to a foreign representative due to a conflict of law dispute. Vitro S.A.B. de C.V. v. ACP Master, Ltd. (In re Vitro, S.A.B. de C.V.), 473 B.R. 117, 133 (Bankr. N.D. Tex. 2012). In In re Vitro, S.A.B. de C.V., a Texas bankruptcy court refused to enforce a confirmed plan from a Mexico court because the plan paid equity classes before senior debt classes in violation of the American Absolute Priority Rule. Id. Like the foreign debtor’s plan in In re Vitro, S.A.B. de C.V., Foodstar’s requested relief would directly conflict with the foreign country’s law. Foodstar would request a rejection of the Vohra license agreement and subsequently a severance of Vohra’s rights. Eastlandian bankruptcy law does not permit termination of a trademark licensee’s rights to use the trademark upon rejection of a license agreement. (R. at 5). Hence, Eastlandian courts could inflict the very same treatment on Foodstar as that the debtor in In re Vitro, S.A.B. de C.V. experienced.

An ancillary proceeding in Eastlandia simply involves too much speculation, cost, and effort. While it is essential to afford other countries respect and comity in multinational bankruptcies, an ancillary proceeding does not make sense for Foodstar. The application of the Code to the Vohra license agreement works contrary to one foreign creditor; the application of Eastlandian law and the initiation of an ancillary proceeding in Eastlandia directly injures
Foodstar and all of its creditors. As *In re Vitro, S.A.B. de C.V.* illustrated, it is essential that courts avoid abandoning their own citizens’ rights under the guise of comity.

**CONCLUSION**

The bankruptcy remedy is not a malleable tool that may conform to any shape a desperate creditor seeks at a specified moment, especially not at the expense of the estate, debtor, and fellow creditors. It is a structured machinery, demanding uniform application and equitable treatment to all unfortunate enough to land in its domain. Ravi Vohra is attempting to fashion the bankruptcy remedy into something its not—a sword that hacks away at the resources and value of the debtor’s estate. Vohra, or any similarly situated creditor, is undeserving of such preferential treatment.

Rejection is not a mere breach in the bankruptcy context. Statutory language, legislative history, and the nature of bankruptcy all point to this conclusion. Regardless, Vohra’s right to use the trademark was contractual; he did not retain a property interest in the trademark. Hence, rejection of the agreement left Vohra only with a claim for damages—not specific performance. To hold otherwise would be to grant Vohra preferential treatment to the detriment of other creditors and Foodstar’s liquidation.

Likewise, the presumption against the extraterritorial application of statutes does not bar Foodstar from rejecting the Vohra license agreement under § 365. Congressional intent to apply § 365 universally is manifested throughout the Code, the Judicial Code, and legislative history. Even if this Court finds this evidenced intent unpersuasive, the Vohra license agreement directly interferes with a multinational debtor’s opportunity to successfully liquidate and creditors’ right to an equitable distribution. Hence, it touches and concerns territory of the United States in a manner sufficient to displace the presumption. Finally, no practical alternative exists
to applying § 365 abroad.

Accordingly, this Court should reverse the Thirteenth Circuit’s erroneous holdings and reinstate the bankruptcy court orders enjoining Vohra from further use of the trademark and recognizing Foodstar’s rejection of the license agreement.

CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing Brief for the Respondent was served to the competition committee on January 24, 2014.

Team P3
Counsel for Petitioner
APPENDIX A: SELECTED SECTIONS FROM TITLE 11 OF THE U.S. CODE

§ 101. Definitions

(15) The term “entity” includes person, estate, trust, governmental unit, and United States trustee.

(27) The term “governmental unit” means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

(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.

§ 362. Automatic Stay

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

§ 365. Executory Contracts and Unexpired Leases

(a) Except as provided in section 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) 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.

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.

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.

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.

(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.

§ 541. Property of the Estate

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

§ 1113. Rejection of Collective Bargaining Agreements

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

§ 1502. Definitions

(1) [omitted]

(2) “establishment” means any place of operations where the debtor carries out a nontransitory economic activity;

(3) [omitted]

(4) “foreign main proceeding” means a foreign proceeding pending in the country where the debtor has the center of its main interests;

(5) “foreign nonmain proceeding” means a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment;

§ 1521. Relief That May Be Granted Upon Recognition
(a) Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—

(1) staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities to the extent they have not been stayed under section 1520(a);

(2) staying execution against the debtor's assets to the extent it has not been stayed under section 1520(a);

(3) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520(a);

(4) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

(5) entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court;

(6) extending relief granted under section 1519(a); and

(7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).
APPENDIX B: SELECTED SECTIONS FROM TITLE 28 OF THE U.S. CODE

§ 1334. Bankruptcy Cases and Proceedings

(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 (c)(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.