No. 12-628

In The

Supreme Court of the United States

IN RE SINGSONG ELECTRONICS, INC., DEBTOR
PLUM, INC.

Petitioner,

v.

SINGSONG ELECTRONICS, INC.

Respondent.

On Writ of Certiorari To The United States Court Of Appeals
For The Thirteenth Circuit

BRIEF FOR RESPONDENT

R34
Counsel for Respondent
QUESTIONS PRESENTED

1. Contractual waivers and state receivership orders seeking to strip an entity of its right to file bankruptcy are unenforceable as contrary to law and public policy. Singsong amended its by-laws under pressure from Plum, purporting to strip Singsong’s ability to file for bankruptcy. Is Singsong’s by-law amendment unenforceable?

2. The automatic stay applies to any action that could have been brought before the commencement of the bankruptcy case, and to any action purporting to exercise control over the debtor’s property. Plum’s motion seeks to enjoin Singsong’s alleged post-petition patent infringement, which began pre-petition, and to prevent Singsong from displaying, distributing, selling, or taking orders for the infringing product. Does the automatic stay apply to Plum’s motion?
# TABLE OF CONTENTS

Questions Presented ................................................................................................................. i

Table of Contents ..................................................................................................................... ii

Table of Authorities .................................................................................................................. iv

Opinions Below ......................................................................................................................... vii

Statement of Jurisdiction ......................................................................................................... viii

Statutory Provisions ................................................................................................................ viii

Statement of the Facts .............................................................................................................. 1

Summary of Argument .............................................................................................................. 3

Argument ................................................................................................................................ 5

I.  THE COURT SHOULD AFFIRM THE JUDGMENT OF THE THIRTEENTH CIRCUIT AND DENY PLUM’S MOTION TO DISMISS THE BANKRUPTCY ACTION BECAUSE BY-LAW PROVISIONS PURPORTING TO STRIP SINGSONG OF ITS RIGHT TO FILE BANKRUPTCY ARE INCONSISTENT WITH LAW AND CONTRARY TO PUBLIC POLICY ........................................................................................................................................ 5

   A.  Bankruptcy is an essential component of our economy, providing orderly distribution of assets and reorganization of insolvent businesses ............................................................................................................................................... 5

   B.  Singsong’s by-law purporting to strip it of its right to file bankruptcy is inconsistent with law and thus unenforceable .................................................................................................................................................. 5

   C.  *In re DB Capital Holdings LLC* does not support a finding to enforce Singsong’s by-law provision purporting to strip Singsong of its right to file bankruptcy. ......................................................... 9

   D.  Special purpose entities and classic “bad boy” guaranties are not instructive in determining the outcome of this case because the factual situations in which they arise are too dissimilar to the facts of this case ................................................................................................ 12

   E.  Adoption of the dissenting opinion of the Thirteenth Circuit by this Court will inevitably lead to an inferior contractually driven system for insolvent businesses ............................................. 15

   F.  Finally, the Court should not enforce Singsong’s by-law provision stripping it of its right to file bankruptcy because Singsong is a viable business that would succeed in a Chapter 11 reorganization. .......................................................................................................................... 16

II.  THE COURT SHOULD AFFIRM THE JUDGMENT OF THE COURT OF APPEALS THAT THE AUTOMATIC STAY APPLIES TO ACTIONS SEEKING TO ENJOIN ALLEGED POST-PETITION PATENT INFRINGEMENT .................................................................................................................. 17

   A.  11 U.S.C. § 362(a)(1) and (3) apply to Plum’s motion seeking to enjoin Singsong’s continued sale of Galactica phones .......................................................................................................................... 17
B. 28 U.S.C. § 959(a) does not allow Plum to bypass the automatic stay. And even if it does, Plum’s motion should be stayed because allowing the motion to proceed without leave of the bankruptcy court would unduly burden Singsong’s reorganization. ............ 23

Conclusion ............................................................................................................................................................................. 31
# TABLE OF AUTHORITIES

## United States Supreme Court Cases

<table>
<thead>
<tr>
<th>Citation</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Barton v. Barbour, 104 U.S. 126 (1881)</td>
<td>28</td>
</tr>
<tr>
<td>Price v. Garney, 324 U.S. 100 (1945)</td>
<td>7, 10</td>
</tr>
</tbody>
</table>

## United States Circuit Court of Appeal Cases

<table>
<thead>
<tr>
<th>Citation</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allard v. Wietzman (In re DeLorean Motor Co.), 991 F.2d 1236 (6th Cir. 1993)</td>
<td>24</td>
</tr>
<tr>
<td>Austrian v. Williams, 216 F.2d 278 (2d Cir. 1954)</td>
<td>25</td>
</tr>
<tr>
<td>Beck v. Fort James Corp. (In re Crown Vantage, Inc.), 421 F.3d 963 (9th Cir. 2005)</td>
<td>25</td>
</tr>
<tr>
<td>Carter v. Rodgers, 220 F.3d 1249 (11th Cir. 2000)</td>
<td>26</td>
</tr>
<tr>
<td>Cash Currency Exch., Inc. v. Shine (In re Cash Currency Exch., Inc.), 762 F.2d 542 (7th Cir. 1985)</td>
<td>7</td>
</tr>
<tr>
<td>Curry v. Castillo (In re Castillo), 297 F.3d 940 (9th Cir. 2002)</td>
<td>24</td>
</tr>
<tr>
<td>Diners Club, Inc. v. Blumb, 421 F.2d 396 (9th Cir. 1970)</td>
<td>28</td>
</tr>
<tr>
<td>Dominic’s Restaurant v. Mantia, 683 F.3d 757 (6th Cir. 2012)</td>
<td>20</td>
</tr>
<tr>
<td>E.I. du Pont de Nemours &amp; Co. v. McDonald, 525 F.3d 1353 (Fed. Cir. 2010)</td>
<td>19</td>
</tr>
<tr>
<td>FDIC v. Prince George Corp., 58 F.3d 1041 (4th Cir. 1995)</td>
<td>13</td>
</tr>
<tr>
<td>Hillis Motors, Inc. v. Hawaii Auto Dealers’ Ass’n, 997 F.2d 581 (9th Cir. 1993)</td>
<td>20</td>
</tr>
<tr>
<td>In re Linton, 136 F.3d 544 (7th Cir. 1998)</td>
<td>26</td>
</tr>
<tr>
<td>In re VistaCare Group LLC, 678 F.3d 218 (3d Cir. 2012)</td>
<td>24</td>
</tr>
<tr>
<td>In re Yaryan Naval Stores Co., 214 F. 563 (6th Cir. 1914)</td>
<td>7</td>
</tr>
<tr>
<td>International Bus. Machs. v. Fernstrom Storage &amp; Van Co., 938 F.2d 731 (7th Cir. 1991)</td>
<td>29</td>
</tr>
<tr>
<td>Jaytee-Penndel Co. v. Bloor (In re Investors Funding Corp. of New York, IFC Collateral Corp.), 547 F.2d 13 (2d Cir. 1976)</td>
<td>28</td>
</tr>
<tr>
<td>Lebovits v. Scheffel (In re Lehal Realty Assocs.), 101 F.3d 272 (2d Cir. 1996)</td>
<td>25</td>
</tr>
<tr>
<td>Merritt v. Mt. Forest Fur Farms of Am. (In re Mt. Forest Fur Farms of Am., Inc.), 103 F.2d 69 (6th Cir.), cert. denied, 308 U.S. 583 (1939)</td>
<td>7</td>
</tr>
<tr>
<td>Muratore v. Darr, 375 F.3d 140 (1st Cir. 2004)</td>
<td>24, 25, 26, 27</td>
</tr>
<tr>
<td>Plum, Inc. v. Singsong Electronics, Inc. (In re Singsong Electronics, Inc.) 1, 2, 3, 6, 10, 11, 12, 13, 15, 19, 20, 22, 28, 29, 30</td>
<td></td>
</tr>
</tbody>
</table>
Hudson River Sloop Clearwater, Inc. v. Revere Copper Prod. (In re Revere Copper and Brass, Inc.), 32 B.R. 725 (S.D.N.Y. 1983) .................................................. 29

In Re Mahurkar Double Lumen Hemodialysis Catheter Patent Litig., 140 B.R. 969 (N.D. Ill. 1992) ..... 18

In re Weitzen, 3 F.Supp 698 (S.D.N.Y. 1993) ........................................................................ 6


Melvin v. Klein, 49 Misc. 2d (N.Y. Spec. Term 1965) ................................................................. 25

Singsong Electronics, Co. Ltd. v. Ad Hoc Consortium of Floating Rate Noteholders, 2010 WL 2636115 (D. Del. 2010) ................................................................. 28


United States Bankruptcy Court Cases

In re Joe DeLisi Fruit Co., 11 B.R. 694 (Bankr. D. Minn. 1981) .................................................. 17


DB Capital Holdings, LLC v. Aspen HH Ventures, LLC (In re Capital Holdings, LLC) 463 B.R. 142, Nos. CO-10-046, 10-23242, 2010 WL 4925811 (10th Cir. B.A.P. 2010) ......................... 4


Constitutional Provisions

U.S. CONST. art. I, § 8, cl. 4. ........................................................................................................ 5

Statutes


11 U.S.C.§ 101(a)(41) .............................................................................................................. 5

11 U.S.C.§ 109(a) .................................................................................................................. 5


11 U.S.C. § 362 ..................................................................................................................... 6

11 U.S.C. § 362(a)(1) ............................................................................................................ 4, 17, 18, 19, 20, 23


11 U.S.C. § 362(b) ................................................................................................................ 18

11 USC § 362(d)(3) ................................................................................................................ 13

11 U.S.C. § 365(e)(1) ............................................................................................................ 6

11 U.S.C. § 541(a)(1) ............................................................................................................. 21

28 U.S.C. § 959(a) ................................................................................................................ 4, 23, 24, 25, 26, 27, 28, 31

Moot Bus. Corp. Act ............................................................................................................. 6, 8
Treatises

Lawrence P. King, Collier on Bankruptcy, ¶ 23.20 (14th ed.) ................................................................. 26

Secondary Sources

OPINIONS BELOW

On April 16, 2012, Petitioner Plum, Inc. (“Plum”) filed a patent infringement lawsuit against Respondent Singsong Electronics, Inc. in the United States District Court of the Western District of Washington, alleging an infringement on patented software in Singsong’s Galactica phone. On June 11, 2012, the district court granted summary judgment to Plum and invited Plum to file a motion for injunction against Singsong.

Singsong filed for Chapter 11 bankruptcy on June 13, 2012. The following day, after receiving notice of Singsong’s bankruptcy filing, Plum filed a motion for injunction in the Washington district court. In response to Plum’s motion, Singsong filed a motion in the bankruptcy court, alleging that Plum had violated the automatic stay and asking the court to enforce the stay against Plum. Plum responded by alleging first that 28 U.S.C. § 959(a) served as an exception to the stay, and second that there was no automatic stay because Singsong lacked the authority to file a bankruptcy petition. Additionally, Plum moved to dismiss the bankruptcy case on the grounds that Singsong lacked authority to file for bankruptcy.

The bankruptcy court denied Singsong’s motion to enforce the stay, agreeing with Plum’s response. Further, the bankruptcy court granted Plum’s motion to dismiss the bankruptcy case. Due to lack of precedent on the legal issues, the bankruptcy court stayed its dismissal order to allow for appeal. Singsong immediately appealed to the district court.

The district court reversed both orders. On further appeal to the Thirteenth Circuit, the court affirmed the district court on both orders.
STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

11 U.S.C. § 101(a)(41)
11 U.S.C. § 109(a)
11 U.S.C. § 362(a)(1)
11 U.S.C. 362(d)
11 U.S.C. § 365(e)(1)
11 U.S.C. § 362
11 U.S.C. § 362(b)
11 U.S.C. § 541(a)(1)
28 U.S.C. § 959(a)
Moot Bus. Corp. Act
STATEMENT OF THE FACTS

The present dispute arises between two corporations engaged in the business of consumer electronics, namely mobile phones and computers. These two corporations are Singsong Electronics, Inc. ("Singsong") and Plum, Inc. ("Plum").

Singsong is a manufacturer and producer of consumer electronics for well-established brand names. Additionally, Singsong produces its own brand of products, which have become popular in the consumer electronics market. *Plum, Inc. v. Singsong Electronics, Inc.* (In re *Singsong Electronics, Inc*.), Case no. 12-628, *2* (13th Cir. 2012).

Unlike Singsong, Plum designs, but does not manufacture, any products. In fact, Singsong is the exclusive manufacturer for Plum’s products. In 2011, Plum released the e-Phone, a multifunctional mobile smart phone. The e-Phone was extremely popular and millions of orders were placed within days of its release. Although Singsong was the sole manufacturer of the e-Phone, its business in the mobile phone market began to suffer as a result of the e-Phone’s release. To compete with the e-Phone, Singsong produced its own multifunctional smart phone, called the Galactica. *Id.* at *3.*

On April 16, 2012, Plum, believing that the Galactica would hurt e-Phone sales, filed a patent infringement suit against Singsong in the United States District Court of the Western District of Washington. The suit alleged that the Galactica infringed on Plum’s patented e-phone software. In spite of the division among federal circuits regarding the patentability of smartphone software, the district court granted summary judgment against Singsong on the issue of infringement on June 11, 2012. At the same time, the district court invited Plum to file a motion requesting an injunction on further sales of the Galactica. *Id.* at *4.*
By this time, Singsong had manufactured approximately 100 million Galactica phones with the patent-infringing software. Following the entry of summary judgment, Singsong attempted to negotiate a settlement with Plum which would allow sale of the existing Galacticas while Singsong rushed a new, non-infringing model into production. Plum refused. Due to Singsong’s large investment in the now unsellable Galactica phones and Plum’s unwillingness to negotiate, Singsong filed for Chapter 11 bankruptcy in the Eastern District of Moot on June 13, 2012. Id.

Singsong immediately informed Plum of its petition, but the following day, Plum filed a motion with the Washington District Court in the patent infringement action, seeking to enjoin Singsong from displaying, distributing, selling, or taking orders for the Galactica. During a hearing in the bankruptcy court, Singsong testified that it would need three months to switch production to a new, non-infringing version of the Galactica. It is undisputed that if the court granted Plum’s injunction motion, Singsong’s business would not survive and the reorganization would fail. Id.

Several years before these developments, when Singsong first became the exclusive manufacturer of Plum’s products, Plum demanded additional protection from Singsong to assure Singsong would not go into bankruptcy. Under intense pressure from Plum, Singsong amended its corporate by-laws, effectively stripping it of its corporate authority to file a petition in bankruptcy. The amended by-law provision stated, in part, “[n]otwithstanding any other provision to the contrary, the Corporation is not authorized to file a petition in bankruptcy under section 301 of the United States Bankruptcy Code or to consent to the institution of bankruptcy, reorganization, or insolvency proceedings against it. Further, the Board of Directors of the Corporation does not have authority to consider or approve a resolution to file a voluntary
petition in bankruptcy and no Officer has any authority to sign any such petition or to cause it to be filed.” Despite the provision, Singsong’s Board of Directors unanimously approved a resolution authorizing the filing of the chapter 11 case. Singsong’s Chief Executive Officer signed the petition. *Id.* at *5*.

In response to Plum’s motion to enjoin further sales of the Galactica, Singsong filed a motion in the bankruptcy court, alleging that Plum had violated the automatic stay under 11 U.S.C. § 362 with its district court injunction motion. Singsong’s motion before the bankruptcy court sought to enforce the automatic stay against Plum, and prevent Plum from pursuing its patent infringement claim and from seeking injunctive relief. *Id.*

Plum responded by alleging first that 28 U.S.C. § 959(a) served as an exception to the stay, and second that the automatic stay did not apply because Singsong lacked the authority to file a bankruptcy petition. Additionally, Plum moved to dismiss the bankruptcy case on the grounds that Singsong lacked authority to file for bankruptcy. The bankruptcy court denied Singsong’s motion to enforce the automatic stay, agreeing with Plum’s response. Further, the bankruptcy court granted Plum’s motion to dismiss the bankruptcy case. Due to lack of precedent on the legal issues, the bankruptcy court stayed its dismissal order to allow for appeal. Singsong immediately appealed to the district court. The district court reversed both orders. On further appeal to the Thirteenth Circuit, the court affirmed the district court on both orders. *Id.* at 6.

**SUMMARY OF ARGUMENT**

The Court should affirm the judgment of the Court of Appeals for the Thirteenth Circuit and deny Plum’s motion to dismiss the bankruptcy case because bankruptcy is an essential component of our market economy, providing orderly distribution of assets and reorganization of
insolvent businesses. The by-law provision purporting to strip Singsong of its right to file bankruptcy is inconsistent with law and therefore unenforceable. Further, DB Capital Holdings, LLC v. Aspen HH Ventures, LLC (In re Capital Holdings, LLC) 463 B.R. 142, Nos. CO-10-046, 10-23242, 2010 WL 4925811 at *2 (10th Cir. B.A.P. 2010) (unpublished decision) upon which the dissent relied in the Thirteenth Circuit opinion, is not instructive. Additionally, special purpose entities and classic “bad boy” guaranties do not support enforcement of the by-law provision. Finally, if the Court reverses the Thirteenth Circuit and grants Plum’s motion to dismiss, future business insolvencies will be governed by a contractually-driven system which is inferior to the current bankruptcy model. For these reasons, the Court should affirm the ruling of the Thirteenth Circuit and deny Plum’s motion to dismiss the bankruptcy case.

The Court should affirm the judgment of the Court of Appeals for the Thirteenth Circuit that the automatic stay applies to Plum’s motion to enjoin Singsong’s alleged post-petition patent infringement. 11 U.S.C. § 362(a)(1) stays Plum’s motion because Singsong’s infringement is a continuation of pre-petition conduct. Likewise, 362(a)(3) stays Plum’s motion because the motion seeks to exercise control over Singsong’s property.

28 U.S.C. § 959(a) does not operate as an exception to the automatic stay in this case. Singsong at all relevant times acted in accordance with its role and duty as reorganizing trustee, so Plum’s motion may only proceed with leave from the bankruptcy court. Finally, even if the Court finds that 28 U.S.C. § 959(a) does operate as an exception, the Court should exercise its equity jurisdiction and hold that the motion should not proceed before confirmation of the plan because allowing the motion to proceed would unduly burden Singsong’s reorganization. If the Court declines to make this determination, it should remand the case to the bankruptcy court to decide this issue.
ARGUMENT

I. THE COURT SHOULD AFFIRM THE JUDGMENT OF THE THIRTEENTH CIRCUIT AND DENY PLUM’S MOTION TO DISMISS THE BANKRUPTCY ACTION BECAUSE BY-LAW PROVISIONS PURPORTING TO STRIP SINGSONG OF ITS RIGHT TO FILE BANKRUPTCY ARE INCONSISTENT WITH LAW AND CONTRARY TO PUBLIC POLICY

A. Bankruptcy is an essential component of our economy, providing orderly distribution of assets and reorganization of insolvent businesses

The necessity of bankruptcy was apparent from the founding of our nation, when our framers constitutionally vested the power to establish uniform bankruptcy laws in Congress.

U.S. CONST. art. I, § 8, cl. 4. Bankruptcy functions as:

. . . the forum in which our society makes its final decisions about the life and death of a business and who gets what. To that forum come bank lenders and pensioners, tort victims and trade creditors, unpaid doctors and disappointed bondholders, each with a different economic role in society and each with a different economic relationship with the debtor. It is a sort of economic Judgment Day to which society and its members refer as they create those multiple obligations.


This description of the bankruptcy system raises important questions relevant to the present case. If a debtor can unilaterally extinguish its right to file bankruptcy, what alternative exists in the event of insolvency? What are the ramifications of a corporate debtor becoming insolvent under state law, as opposed to bankruptcy? If this corporation is able to extinguish its right to bankruptcy relief, how will future loan negotiations and insolvencies be structured?

B. Singsong’s by-law purporting to strip it of its right to file bankruptcy is inconsistent with law and thus unenforceable

The Bankruptcy Code states that any entity who may be a debtor has the ability to file a petition for voluntary bankruptcy. 11 U.S.C. § 301 (2005). As defined in the Code, “entity” includes a person, § 101(a)(15), and “person” includes a corporation. § 101(a)(41). Because
Singsong has a place of business in the United States, it can be a debtor. § 109(a). As such, Singsong has the ability to file a petition for voluntary bankruptcy.

The Code does not, however, provide the requirements for a corporation to properly file a voluntary petition. Rather, “[t]he authority to file a bankruptcy petition must be found in the corporation’s instruments and in applicable state law.” Price v. Gurney, 324 U.S. 100, 106 (1945). Singsong’s by-laws, in relevant part, state, “[n]otwithstanding any other provision to the contrary, the Corporation is not authorized to file a petition in bankruptcy, reorganization, or insolvency proceedings against it. Further, the Board of Directors of the Corporation does not have authority to consider or approve a resolution to file a voluntary petition in bankruptcy and no Officer has any authority to sign any such petition or to cause it to be filed.” Plum, Inc. v. Singsong Electronics, Inc. (In re Singsong Electronics, Inc.), Case no. 12-628, *5 (13th Cir. 2012). State corporate law of Moot provides that, “[t]he bylaws of a corporation may contain any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with law or the articles of incorporation.” Moot Bus. Corp. Act §§ 2.06(b), 3.02(3).

a. **Attempts to waive the right to file a voluntary bankruptcy petition are inconsistent with the Bankruptcy Code**

Contractual waivers of bankruptcy, in the form of ipso facto clauses, are void as against public policy. See 11 U.S.C. § 365(e)(1); Hayhoe v. Cole, (In re Cole), 226 B.R. 647, 652 (B.A.P. 9th Cir. 1998) (citing cases). This has long been the rule, dating back to In re Weitzen, where the court stated that an agreement to waive the benefit of bankruptcy was unenforceable because such an agreement would frustrate the object of the Bankruptcy Act. 3 F. Supp. 698, 698 (S.D.N.Y. 1933). In fact, “[t]he Bankruptcy Code pre-empts the private right to contract around its essential provisions, such [as] those found in 11 USC § 362.” In re Pease, 195 B.R. 431, 435 (Bankr. D. Neb. 1996).
Efforts to waive bankruptcy benefits are unenforceable in situations beyond those in which the debtor attempts to contract away rights. See, e.g., In re S & S Liquor Mart, Inc., 52 B.R. 226, 227 (Bankr. D. R.I. 1985). In S & S, Mr. Serra was the owner of all stock in the corporation, the sole member of the board, and the sole officer. Serra had the authority to file for bankruptcy despite the pendency of a state receivership. The court found that it is fundamental that a state receivership proceeding not operate to deny a corporate debtor access to the federal bankruptcy court. Id., citing Cash Currency Exch., Inc. v. Shine (In re Cash Currency Exch., Inc.), 762 F.2d 542 (7th Cir. 1985); Jordan v. Indep. Energy Corp., 446 F. Supp. 516 (N.D. Tex. 1978); and In re Yaryan Naval Stores Co., 214 F. 563 (6th Cir. 1914).

An order by a state court receiver specifically restraining a corporation from filing a petition for federal reorganization is an unconstitutional deprivation of the right to bankruptcy relief. Merritt v. Mt. Forest Fur Farms of Am. (In re Mt. Forest Fur Farms of Am., Inc.), 103 F.2d 69, 71 (6th Cir. 1939), cert. denied, 308 U.S. 583 (1939). Because these pre-petition attempts frustrate the object of the Bankruptcy Code, they are inconsistent with the Code.

b. Singsong’s amendment of its by-laws frustrates the purpose of the Bankruptcy Code. Therefore, the by-law amendment is inconsistent with the Code.

Without the ability to file a petition for bankruptcy, Singsong is left to the system of state law. These laws focus on the rights of individual creditors and debtors. In re Pease, 195 B.R. 431, 434 (Bankr. D. Neb. 1996). State law promotes liquidation of financially troubled businesses because priority among creditors is determined by the notion of first in time is first in right. Id. Under state law, the more belligerent the creditor, the greater his reward. Id. The efforts necessary to obtain judgment and foreclose on property involve many lawsuits and high transactional costs. Id.
Bankruptcy, on the other hand, substantially alters rights and remedies of creditors and debtors alike. *Id.* Through such mechanisms as the automatic stay, the disallowance of unmatured interest, and the ability to avoid various pre-bankruptcy transactions, a debtor in possession can effectively reorganize by limiting and altering the rights of creditors. *Id.*

Just as allowance of contractual waivers of substantial bankruptcy rights would encourage institutional lenders to adopt standardized waiver terms in form loan agreements, *id.*, so too would allowance of by-law provisions such as Singsong’s encourage institutional lenders to demand such provisions in all corporate by-laws before making a loan. If the market forced corporations to have such by-law provisions, corporations would be left with the only option of the creditor race under state law. Reorganizations of viable business entities would become a thing of the past as belligerent creditors would rip the businesses apart, asset by asset.

**c. Singsong’s by-law provision purporting to extinguish Singsong’s right to file bankruptcy is unenforceable, therefore the bankruptcy filing was valid.**

If a by-law is inconsistent with law, it is unenforceable. *See, e.g., Time Warner Entertainment Co. v. Briggs*, 1993 WL 23710 (D. Mass. Jan. 14, 1993) (preempting several by-law provisions as inconsistent with federal statute). Singsong’s by-law provision is inconsistent with the Bankruptcy Code because it frustrates the purpose of the Code by waiving bankruptcy benefits pre-petition. Without the inconsistent by-law provision, Singsong may file for bankruptcy so long as it complies with the requirements in its articles of incorporation, and barring any relevant provision there, it must comply with the requirements of the corporate law of the state of Moot. *Price v. Gurney*, 324 U.S. 100, 106 (1945). Corporate law of the state of Moot requires the affirmative vote of a majority of directors when a quorum is present for the board to act. *Moot Bus. Corp. Act § 8.24(c).* The Board of Directors of Singsong unanimously
approved a resolution to file for bankruptcy. This resolution was signed by the Chief Executive Officer. Therefore, the filing of bankruptcy by Singsong was authorized and valid.

C. *In re DB Capital Holdings LLC does not support a finding to enforce Singsong’s by-law provision purporting to strip Singsong of its right to file bankruptcy.*

Plum, and the dissent in the Thirteenth Circuit’s opinion, cite *In re DB Capital Holdings, LLC* as support for their assertion that by-laws stripping a corporation of its right to file bankruptcy are enforceable. Their reliance is misplaced, however, as *DB Capital* is clearly distinguishable from the present case. In *DB Capital Holdings, LLC v. Aspen HH Ventures, LLC*, Aspen HH Ventures, LLC (“Aspen”), one of two members holding an ownership interest in DB Capital Holdings, LLC (“DB Capital”), filed a motion to dismiss a bankruptcy proceeding after the manager of DB Capital filed a voluntary petition. 463 B.R. 142, Nos. CO-10-046, 10-23242, 2010 WL 4925811 at *2 (10th Cir. B.A.P. 2010) (unpublished decision). The manager of DB Capital was Dancing Bear Management, LLC (“Manager”). *Id.* The sole owner of Manager was Tom DiVenere. *Id.* In its motion to dismiss, Aspen asserted that the operating agreement governed the limited liability company pursuant to Colorado’s Limited Liability Company Act. *Id.* This assertion was undisputed by DB Capital. *Id.*

The parties disagreed, however, over whether the court should enforce the “May Amendment.” *Id.* The May Amendment in relevant part read, “[t]he Company (v) to extent permitted under applicable Law, will not institute proceedings to be adjudicated bankrupt or insolvent; or consent to the institution of bankruptcy or insolvency proceedings against it; or file a petition seeking, or consent to, reorganization or relief under any applicable federal or state law relating to bankruptcy. . . .” *Id.* Manager refuted the validity of the May Amendment because it was adopted at the demand of and for the sole benefit of Debtor’s main secured creditor,
WestLB. *Id.* at *3. The court refused to consider the issue of the May Amendment’s validity because Manager failed to provide any evidence in support of its assertion. *Id.*

Although the *DB Capital* court acknowledged that the May Amendment did preclude Debtor from filing a bankruptcy petition, the court took pains to demonstrate in the alternative that Manager lacked authority to file for bankruptcy on behalf of Debtor, regardless of the enforceability of the May Amendment bankruptcy provision. *Id.* The court relied on another provision of Debtor’s operating agreement, which stated in part that the manager must “conduct and operate its business as presently conducted.” *Id.* The court concluded that entering into bankruptcy and operating as a debtor in possession was not business “as presently conducted.” *Id.* For this reason, Manager did not possess the authority to file for bankruptcy on behalf of debtor. *Id.*

a. *In re DB Capital Holdings, LLC* differs significantly from the present case because it involved an intracompany dispute, thus raising legitimate questions about the voluntariness of the decision.

In *DB Capital*, Tom DiVenere, the sole owner of Manager of Debtor filed bankruptcy on behalf of the Debtor. *Id.* at *2. Aspen, a member of Debtor, filed a motion to dismiss. In the present case, Singsong’s board of directors reached the resolution to file for bankruptcy unanimously, and the Chief Executive Officer signed the resolution. *Plum, Inc. v. Singsong Electronics, Inc.* (In re Singsong Electronics, Inc.), Case no. 12-628, *5 (13th Cir. 2012). The action of the board was challenged not by an officer or owner of Singsong, but rather by Plum, a judgment creditor. This distinction is meaningful because a unanimous decision by the board is more akin to a voluntary action of an entity, than a disagreement between an entity’s owners and its manager. Even though the organizing documents of both DB Capital and Singsong purported to prevent each entity from filing bankruptcy, the unanimous actions of the board of Singsong
support the notion that the by-law provision was not in Singsong’s best interest. Alternatively, the intracompany dispute between member and manager of DB Capital suggest that the manager agent of the company was acting in some capacity other than in the best interest of the company.

b. Unlike In re DB Capital, Singsong’s by-law provision purporting to strip Singsong of its right to file bankruptcy is a waiver.

The Tenth Circuit refused decide the issue of whether the provision in DB Capital’s May Amendment of its operating agreement constituted a waiver because allegations made by Manager that the amendments were made at the insistence of DB Capital’s main secured creditor were not supported by evidence at the hearing. In re DB Capital Holdings, at *3. It is undisputed in the present case, however, that Plum insisted on the amendment of Singsong’s by-laws to include the prohibition on bankruptcy. Singsong, at *5, 9. Although the Thirteenth Circuit chose not to address this issue, it is an important distinction that warrants the Court’s attention. Because Plum coerced Singsong into amending its by-laws, the amendment more closely resembles an ipso facto clause, unlike the provision in In Re DB Capital. As such, the rules guarding against such clauses should be applicable to this case, and Singsong’s by-law amendment is therefore unenforceable as against public policy. See, e.g., In re Cole, 226 B.R. 647, 652.

c. The court’s reluctance in In re DB Capital to rely solely on the May Amendment suggests that this Court should not enforce Singsong’s by-law purporting to strip itself of its right to bankruptcy.

The Tenth Circuit, in addressing the May Amendment, which purported to strip Debtor of its ability to file bankruptcy, stated simply that, “[d]ebtor has not cited any cases standing for the proposition that members of an LLC cannot agree among themselves not to file bankruptcy, and that if they do, such agreement is void as against public policy, nor has the court located any.” In re DB Capital, at *2. At no point in the decision did the Tenth Circuit state unequivocally that
the May Amendment, on its own, precluded Debtor from filing for bankruptcy. Instead, the court turned to several other provisions in the operating agreement which discussed Manager’s power to make business decisions “as presently conducted” and “in the course of ordinary business.” *Id.* at *3–5*. Based on these provisions, rather than the May Amendment language barring bankruptcy, the court found that the manager did not have the authority to file for bankruptcy on his own, but did not directly address the question of whether any attempt by manager and members to file for bankruptcy would be barred. *Id.* at *5*.

Unlike *DB Capital*, Singsong’s incorporating documents contain no other provisions limiting or even dictating the necessary procedure for filing a bankruptcy petition other than the by-law in question. *Singsong*, at *9*. The Tenth Circuit was able to decide the issue of whether provisions in an entity’s operating documents purporting to prohibit an entity from filing bankruptcy are enforceable without actually ruling that such provisions are enforceable under state law. *In re DB Capital* at *3–5*. Here, by contrast, the Court faces squarely the issue of whether such by-laws are enforceable. The finding in *In re DB Capital* was that there may be ways for the entity to declare bankruptcy, just that this particular way was invalid. *Id.* A ruling here enforcing the by-law provision will create precedent that by-laws that do not simply limit or restrict an entity’s ability to file, but bar it completely, are enforceable. Due to this stark distinction between the facts of *In re DB Capital* and this case, the Court should give no weight to the holding in that case.

**D. Special purpose entities and classic “bad boy” guaranties are not instructive in determining the outcome of this case because the factual situations in which they arise are too dissimilar to the facts of this case.**

In his dissent in the Thirteenth Circuit opinion, Judge Khezri opined on line drawing and how the majority’s decision would affect where those lines fall in regards to other limitations on
the bankruptcy right. *Singsong*, at *17. Judge Khezri considered whether provisions within the controlling documents of special purpose entities constitute a prohibited waiver. If the Court adopts the majority’s view and denies Plum’s motion to dismiss, the effect will not extend so far as to prevent this type of transaction structure. The reason is because the same policy concerns that exist for preventing pre-petition waivers in most cases do not typically apply in special purpose entity cases. *See* Forrest Pearce, Comment, *Bankruptcy-Remote Special Purpose Entities and a Business’s Right to Waive its Ability to File for Bankruptcy*, 28 Emory Bankr. Dev. J. 507, 533 (2012).

A special purpose entity typically is created to manage a single project, often a single piece of real estate. *Id.* at 524–25. The special purpose entities typically receive a loan from a single lender, who in turn takes a mortgage interest in the sole asset owned by the entity. *Id.* at 524. The Bankruptcy Code has recognized that such entities, in which there is only one lender and one piece of collateral, are not in need of the various bankruptcy protections. 11 U.S.C. § 362(d)(3) (requiring the automatic stay be lifted in single asset real estate, or SARE, cases). Because such transaction structures do not face the typical difficulties of an ailing business, such as multiple creditors and many assets, the allowance of special purpose entities to contract away bankruptcy rights has little bearing on the present case.

Similarly, “bad boy” guaranties are not instructive in deciding the present case. As explained by the dissent of the Thirteenth Circuit opinion, such a guaranty contains a provision in which the owner of the company becomes personally liable for the company’s debts only if that company enters into bankruptcy proceedings. *Singsong*, at *17–18. Although the dissent is correct in asserting that this type of provision serves as a disincentive to file bankruptcy, the provision does not actually strip the owner of his right to file for bankruptcy. *FDIC v. Prince
George Corp., 58 F.3d 1041, 1046 (4th Cir. 1995). If, at some point, the owner of a company bound by a “bad boy” guaranty provision decides to file for bankruptcy, the bankruptcy filing will be valid.

This is entirely different than the present scenario—here, Singsong’s board of directors unanimously reached a resolution to file for bankruptcy. This was a voluntary decision to file. However, the by-law, if enforceable, acts as a complete bar, depriving Singsong of its right to file for bankruptcy. Unlike the owner with the “bad boy” provision, Singsong no longer possesses the option to file bankruptcy.

Although the dissent responds to this concern by stating that Singsong can still make a voluntary decision to amend the by-laws, such a rationalization for allowing by-laws that prevent a corporation from filing for bankruptcy becomes unworkable if followed to its logical conclusion. If this Court follows the logic of the dissent, by-laws such as that created by Singsong will become commonplace in corporate documents. After a few corporations quickly amend their by-laws and then file for bankruptcy, creditors will require that the procedure for amending by-laws be made much more difficult to prevent future unexpected bankruptcies. Eventually, by-laws will become so difficult and time-consuming to amend that viable business entities for which chapter 11 reorganization would be successful, will slip past the point of no return. Liabilities will spiral out of control, and assets will disappear.

The dissent is correct in pointing out that certain limitations on the right to file bankruptcy exist and are valid. However, the limitations allowed for special purpose entities and classic “bad boy” guaranties are unworkable for the present case. A by-law provision purporting to strip a corporation of its right to file bankruptcy is too final and to definite to be valid. Unlike special purpose entities, Singsong has many creditors and many assets. Unlike classic “bad boy”
guaranties, Singsong can no longer choose to file bankruptcy. For these reasons, such examples of limitations of bankruptcy rights are not instructive in deciding this case.

E. Adoption of the dissenting opinion of the Thirteenth Circuit by this Court will inevitably lead to an inferior contractually driven system for insolvent businesses.

As the Thirteenth Circuit majority speculates, allowing Singsong’s by-law provision to bar Singsong from bankruptcy will lead to the inclusion of similar by-laws of many businesses before even approaching a lender. *Singsong*, at *9. If such by-laws become standard, the predictable system established by the Bankruptcy Code will fade from use and ultimately become irrelevant. Inadequate state law dissolution will be the default, and lenders will soon include contractual provisions to govern their debtors’ insolvencies to avoid state dissolution laws.

a. A contractual theory of bankruptcy is unworkable and a poor alternative to the bankruptcy code in its current form.

Various theories exist as to how a private, contract-driven system of dealing with insolvent businesses would be superior to the Bankruptcy Code. *See* Elizabeth Warren & Jay Lawrence Westbrook, *Contracting Out of Bankruptcy: An Empirical Intervention*, 118 Harv. L. Rev. 1197, 1199 n.4 (2005) (citing articles from pro-contractualist authors Barry E. Adler, Lucian Arye Bebchuk, Robert K. Rasmussen, and Alan Schwartz). Basic assumptions of greater efficiency is a common theme among contractualists. The idea is that “multiple methods of dealing with debtor collapse would permit parties to tailor a default system to their specific needs.” *Id.* at 1201.

The assertions of contractualists begin to crumble against empirical data of several business bankruptcies, namely for three reasons: (1) the theory would be redistributitional if costs were shifted from the debtor and the contracting party to creditors who could not fully adjust to
the risks for them by the new system; (2) if the number of these types of creditors is large in
business bankruptcies, the inefficient redistribution would outweigh any efficiencies gained from
the bankruptcy bargain; and (3) if there are a large number of creditors, the costs of information
gathering and negotiation will be prohibitively expensive. *Id.*

The benefit of the current bankruptcy system is that it is universal and predictable. As
such, lawyers are able to predict fairly well the potential outcomes and scenarios in an
insolvency proceeding. This allows the lawyer’s clients to price their risks accordingly. As the
system remains in place longer, creditors and business owners are able to predict outcomes with
increasing accuracy. *Id.* at 1254. Although the current bankruptcy system is not perfect,
allowing corporations to essentially waive their right to benefit from bankruptcy will quickly
undo the positives that bankruptcy provides in its current form.

**F. Finally, the Court should not enforce Singsong’s by-law provision stripping it of its
right to file bankruptcy because Singsong is a viable business that would succeed in
a Chapter 11 reorganization.**

Singsong is in the business of both manufacturing electronics for brand name companies
and producing its own electronics. Despite Singsong’s recent financial woes, the corporation has
a strong business with large demand from both consumers and electronics designers. If Singsong
is allowed to restructure, it will overcome its current financial difficulties with a release of its
Galactica phone with non-infringing software. If, however, the Court overturns the Thirteenth
Circuit and grants Plum’s motion to dismiss, Singsong will not have access to the protections of
the bankruptcy code and thus be unable to obtain sufficient capital during the restructuring
process. As a simple economic cost-benefit analysis, the loss of value that will accompany the
liquidation of Singsong as opposed to a successful reorganization makes clear the need to affirm
the Thirteenth Circuit and allow Singsong to reorganize.
II. THE COURT SHOULD AFFIRM THE JUDGMENT OF THE COURT OF APPEALS THAT THE AUTOMATIC STAY APPLIES TO ACTIONS SEEKING TO ENJOIN ALLEGED POST-PETITION PATENT INFRINGEMENT

A. 11 U.S.C. § 362(a)(1) and (3) apply to Plum’s motion seeking to enjoin Singsong’s continued sale of Galactica phones.

a. Plum could have moved to enjoin Singsong from selling the Galactica before Singsong’s petition for bankruptcy. Therefore, Plum’s motion for an injunction is stayed by 11 U.S.C. § 362(a)(1).

The automatic stay applies to Plum’s motion to enjoin Singsong’s alleged post-petition patent infringement. The automatic stay “has been described as ‘one of the most fundamental protections provided by the bankruptcy laws.’” Midlantic Nat’l Bank v. New Jersey Dept. of Envt’l Protection, 474 U.S. 494, 503 (1986) (citing S. Rep. No. 950989, at 54 (1978); H.R. Rep. No. 950595, at 340 (1977)). The automatic stay provides a debtor with “breathing space and also protects creditors as a class from the possibility that one creditor will obtain payment on its claims to the detriment of all others.” Id. (citing Treasurer of Snohomish Cty., Wash. v. Seattle First Nat’l Bank, 971 F.2d 391, 394–95 (9th Cir. 1992)).

11 U.S.C. § 362(a)(1) stays “the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action proceeding against the debtor that was or could have been commenced before the commencement of the [bankruptcy case], or to recover a claim against the debtor that arose before the commencement of the case . . . .” 11 U.S.C. § 362(a)(1). Courts apply § 362(a)(1) broadly, and have held that the automatic stay applies to all actions, including motions for injunctions, based on any facts arising before the commencement of the bankruptcy case. In re Joe DeLisi Fruit Co., 11 B.R. 694, 695 (Bankr. D. Minn. 1981). Thus, if an action was or could have been brought against the debtor before the debtor filed its bankruptcy petition, the action is stayed. 11 U.S.C. § 362(a)(1). Unless the action falls within the exceptions to the automatic stay enumerated in § 362(b), or cause exists to
lift the stay for one of the reasons outlined in § 362(d), no action may proceed against the debtor. 11. U.S.C. § 362(b), (d).

Courts have held that activity which began pre-petition, but which continues post-petition, logically cannot be divided into separate actions, and therefore is stayed under § 362(a)(1). This includes actions to enjoin a bankrupt debtor’s patent infringement activity. See, e.g., In Re Mahurkar Double Lumen Hemodialysis Catheter Patent Litig., 140 B.R. 969, 976 (N.D. Ill. 1992) (holding that “the continuation during bankruptcy of conduct . . . begun beforehand is most certainly one in which an action was or could have been commenced before the commencement of the [bankruptcy case]” for the purpose of § 362(a)(1)) (internal quotations omitted); Nike, Inc. v. National Shoes, Inc. 18 B.R. 507, 509 (Bankr. D. Me. 1982) (“[b]ifurcating [a patent infringement] claim does not change the fact that [the claim] is one which arose before the commencement of the [debtor’s] Chapter 11 case and that this proceeding could have been commenced before the commencement of the [debtor’s] Chapter 11 case within the meaning and intent of Section 362(a)(1”)’). This interpretation is consistent with the plain language of § 362(a)(1), which states unequivocally that any action “against the debtor that was or could have been commenced” before the bankruptcy petition is stayed. 11 U.S.C. § 362(a)(1). Therefore, if the debtor began its activity before its petition for bankruptcy, and continues that activity during reorganization, the automatic stay prevents actions seeking to enjoin that activity. Id.

A few courts have held that pre-petition patent infringement may be treated separately from post-petition infringement. These courts consider each act of infringement as a separate tort, allowing the patent holder to pursue its claims involving post-petition infringement without regard to the automatic stay. See, e.g., E.I. du Pont de Nemours & Co. v. McDonald, 525 F.3d
R34


The Court should reject this approach, as it is contrary to the plain language of the bankruptcy code—§ 362(a)(1) stays any action “against the debtor that was or could have been commenced before the commencement” of the bankruptcy case. And even if patent law treats each act of infringement as a separate tort, bankruptcy courts are not obligated to adapt this framework in determining whether the automatic stay applies in cases of post-petition patent infringement. Indeed, it makes sense not to, as this would expose a fragile bankrupt debtor to a multiplicity of suits seeking to recover for post-petition patent infringement. Thus, the split between courts permitting bifurcation of claims and those not permitting bifurcation should be resolved against permitting bifurcation.

Plum’s motion is stayed by § 362(a)(1) because Plum could have filed its motion for an injunction before Singsong filed for bankruptcy. In fact, the United States Court for the District of Washington, where the patent litigation took place, invited Plum to file a motion enjoining sales of the Galactica. Plum could have filed its motion for an injunction at any time after summary judgment was entered in the patent infringement case and before Singsong filed for bankruptcy, but Plum failed to do so. Plum, Inc. v. Singsong Electronics, Inc. (In re Singsong Electronics, Inc.), Case no. 12-628, *4 (13th Cir. 2012). It is nonsensical to bifurcate the alleged infringement into pre- and post-petition periods, so any alleged post-petition patent infringement is therefore only a continuation of pre-petition conduct, which falls within the scope of § 362(a)(1). Thus, as much as Plum does not want to, it must now abide by the orderly claim resolution process provided by the bankruptcy code.
Further supporting Singsong’s right to stay protection is the fact that Plum is a judgment creditor of Singsong. The dissent in the Thirteenth Circuit opinion relies on Dominic’s Restaurant v. Mantia for the suggestion that § 362(a)(1) does not stay actions meant to enjoin tortious post-petition conduct. Id. at *18 (Khezri, J., dissenting) (citing Dominic’s Restaurant v. Mantia, 683 F.3d 757, 760–61 (6th Cir. 2012)). The dissent’s reliance on Dominic’s is misplaced, however, because in Dominic’s, the movant was neither a creditor nor a claimant to the debtor’s property. Dominic’s, 683 F.3d 757, 760. Here, by contrast, Plum is a judgment creditor of Singsong. Singsong, at *3. This fact, absent in Dominic’s, supports finding that 362(a)(1) applies, because 362(a)(1)’s primary purpose is to provide a debtor with “breathing space” from rapacious creditors. Hillis Motors, Inc. v. Hawaii Auto Dealers’ Ass’n, 997 F.2d 581, 585 (9th Cir. 1993) (citing Treasurer of Snohomish Cty., v. Seattle First Nat’l Bank, 971 F.2d 391, 394–95 (9th Cir. 1992)). Therefore, because Singsong’s patent infringement began pre-petition, and cannot logically be bifurcated into pre- and post-petition periods, Plum’s motion is stayed under the plain language of 362(a)(1).

b. Plum’s motion seeks to exercise control over Singsong’s assets. Accordingly, Plum’s motion for an injunction is stayed by § 362(a)(3).

11 U.S.C. § 362(a)(3) provides additional support for Singsong’s assertion that the automatic stay applies to actions seeking to enjoin alleged post-petition patent infringement. § 362(a)(3) stays “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.” 11 U.S.C. § 362(a)(3). The Bankruptcy Code defines property of the estate broadly, as “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1). This includes interests in intellectual property, such as patents, or patented products. Taxel v. Electronic Sports Research (In re Cinematronics, Inc.), 111 B.R. 892, 897 (Bankr. S.D. Cal. 1990). § 362(a)(3) also stays
actions seeking to control a debtor’s use of property allegedly infringing another’s patent. *Id.*, at 897. For example, in *Taxel*, one of the debtor’s creditors sought to enjoin the debtor from using software that infringed the creditor’s patent. *Id.* at 892. The Court stayed the motion for the injunction, reasoning that the motion was “clearly intended to wrest the possession and management of the [software] away from the debtor . . . .” *Id.* at 897.

Some courts have held that upon a determination that the debtor is violating intellectual property rights, the debtor loses its interest in the infringing products, and that as a result, § 362(a)(3) does not stay motions to enjoin the infringement. *See, e.g., Continental Air Lines, Inc. v. Hillblom (In re Continental Air Lines, Inc.),* 61 B.R. 758 (S.D. Tex. 1986); *Amplifier Research Corp. v. Hart*, 144 B.R. 693 (E.D. Penn. 1992). However, these courts found that § 362(a)(3) did not apply only when they determined that the debtor had no property interest in the infringing product whatsoever. Thus, if the debtor retains some equitable interest notwithstanding the patent infringement, § 362(a)(3) may still apply. *Continental Air Lines, Inc.*, 61 B.R. at 779 n.41 (holding that a creditor’s motion for an injunction of infringing activity “could only be premised upon an initial judicial determination that [the debtor’s] estate possess[ed] no equitable interest in the claimed property.”).

Plum’s motion seeks to control Singsong’s use of its property by preventing Singsong from displaying, distributing, selling, or taking orders for its Galactica phone. This is precisely the kind of action 362(a)(3) is meant to stay. Plum’s motion seeks broad relief—it would severely restrict how Singsong controls its assets, even those assets not infringing Plum’s patents. For example, the motion seeks to prohibit taking orders for the Galactica. This necessarily would allow Plum to restrict Singsong’s use of its phones and ordering website.
Additionally, Plum’s motion seeks to enjoin Singsong from merely displaying its Galactica phone, a phone which soon will be loaded with new, non-infringing software. *Plum, Inc. v. Singsong Electronics, Inc.* (In re *Singsong Electronics, Inc.*), Case no. 12-628, *4 (13th Cir. 2012).* This would prove catastrophic for Singsong’s reorganization, because Singsong’s revenue stream depends heavily upon its smartphone sales. If the Galactica is taken off the market and forced out of customers’ view for several months, restarting Singsong’s smartphone business when its new, non-infringing Galactica model is ready will be impossible. With the smartphone market reinventing itself seemingly every quarter, months matter. If Singsong cannot display its smartphone to customers for three months or more, Singsong customers will lose interest in the product, and the marketing push required to restart Singsong’s smartphone business when the new version of the Galactica is available may prove too costly.

Plum protests that § 362(a)(3) is inapplicable because Plum seeks not to control the property, but to control Singsong’s use of the patented property. This is a meaningless distinction. As the Thirteenth Circuit noted, “[f]or a corporate debtor, the distinction is one without a difference because it can control its property only through the actions of its agents; so control of the agent’s actions is an exercise of control over the property.” *Id.* at *13. By seeking to prevent Singsong from taking orders for Galactica phones through its agents, Plum will exercise control over Singsong’s property.

Additionally, Plum has not established that Singsong retains no equitable interest in the Galactica phone. The Washington court determined that the Galactica software infringed Plum’s patent, but did not find that any other component of the Galactica infringed any of Plum’s patents. Thus, Singsong retains valid property interests in the other components of its Galactica
phones, such as the phone’s hardware. Plum’s motion would allow it to exercise control over property in which Singsong retains a valid interest. Accordingly, § 362(a)(3) applies.

In truth, prohibiting the display of Singsong’s Galactica is a punitive measure intended not to protect Plum’s patent, but to prevent Singsong’s reorganization. Plum’s motion goes far beyond simply trying to protect its patent—rather, the motion, if granted, would give Plum effective control over an unduly large portion of Singsong’s assets, precluding a fair and equitable reorganization.

Both § 362(a)(1) and § 362(a)(3) apply to Plum’s motion. In fact, this is exactly the kind of action Congress intended the Automatic Stay to prevent. Accordingly, the Court should hold that § 362(a)(1) and § 362(a)(3) stay Plum’s motion. If Plum wants to proceed, it must play by the bankruptcy rules and move to lift the stay. See 11 U.S.C. § 362(d) (permitting an interested party to lift the automatic stay “for cause”).

B. 28 U.S.C. § 959(a) does not allow Plum to bypass the automatic stay. And even if it does, Plum’s motion should be stayed because allowing the motion to proceed without leave of the bankruptcy court would unduly burden Singsong’s reorganization.

a. § 959(a) does not allow Plum’s motion to proceed without leave from the bankruptcy court because Singsong’s post-petition patent infringement is not an act or transaction in carrying on business connected with the bankruptcy estate.

28 U.S.C. § 959(a) reads as follows:

Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.
28 U.S.C. § 959(a). § 959(a) was enacted as a limited exception to the general rule, established over a century ago in *Barton v. Barbour*, that a litigant must obtain permission of the court appointing a trustee before the litigant may bring suit against that trustee. 104 U.S. 126 (1881); *Allard v. Wietzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1240–41 (6th Cir. 1993) (describing § 959(a) as a “limited” exception to the *Barton* rule). Trustees protected by the *Barton* rule include bankruptcy trustees, and debtors in possession. *Curry v. Castillo (In re Castillo)*, 297 F.3d 940, 945 (9th Cir. 2002). § 959(a) reflected the concern, which Justice Miller raised in his dissent in *Barton*, that an absolute rule requiring leave of court before an entity could bring an action against the trustee would “exempt[] [the trustee’s operation of the business] from the operation of the common law . . . .” *Barton*, 104 U.S. at 138 (Miller, J., dissenting). Congress, apparently agreeing with Justice Miller that a limited exception was necessary, enacted § 959(a). *In re VistaCare Group LLC*, 678 F.3d 218, 225 (3d Cir. 2012). However, notwithstanding his concerns, Justice Miller agreed with the *Barton* majority that “[w]hen a receiver [was] appointed to wind up a defunct corporation … [and] his sole duty [was] to convert the property into a fund for the payment of debts, … a very strong reason exist[ed] why the court which appointed him should alone control him in the performance of his duty.” *Id.* at 226 (quoting *Barton*, 104 U.S. 126, 138) (Miller, J., dissenting). Following Justice Miller, then, Congress intended § 959(a) to act as a very limited exception, allowing Trustees broad flexibility in the administration of their estates. *Id.*

§ 959(a) allows only those claims against a debtor which “apply to the trustee’s ‘acts or transactions in carrying on business connected with’ the bankruptcy estate.” *Muratore v. Darr*, 375 F.3d 140, 144 (1st Cir. 2004) (quoting 28 U.S.C. § 959(a)). Courts have interpreted “‘acts or transactions connected with’ the bankruptcy estate to mean acts or transactions in conducting the
debtor’s business in the ordinary sense of the words or in pursuing that business as an operating enterprise.” *Id.* (citing *Melvin v. Klein*, 49 Misc. 2d 24, 26 (N.Y. Spec. Term 1965)). For example, § 959(a) would permit a lawsuit to proceed where the debtor in possession committed a wrong while continuing the debtor’s regular business transactions. *Id.; Vass v. Conron Bros. Co.*, 59 F.2d 969, 971 (2d Cir. 1932). On the other hand, “collecting and liquidating the assets of the debtor . . . and taking steps for the care and preservation of the property, do not constitute ‘carrying on business’” for the purpose of § 959(a) because they are actions more characteristic of a trustee acting in its official capacity. *Muratore*, 375 F.3d at 144 (citing *Austrian v. Williams*, 216 F.2d 278, 285 (2d Cir. 1954), *U. & I., Inc. v. Fitzgerald*, 13 B.R. 974, 976 (Bankr. D. Idaho 1981), *In re Kalb & Berger Mfg. Co.*, 165 F. 895, 896–97 (2d Cir. 1908)).

Courts repeatedly have held that § 959(a) only “permit[s] actions redressing torts committed in furtherance of the debtor’s business, such as the common situation of a negligence claim in a slip and fall case where a bankruptcy trustee, for example, conducted a retail store.” *Muratore v. Darr*, 375 F.3d 140, 144 (1st Cir. 2004) (quoting *Lebovits v. Scheffel* (In re Lehal Realty Assocs.), 101 F.3d 272, 276 (2d Cir. 1996). Hence, actions meant to address wrongs committed by the debtor in possession in its capacity as manager of a business may proceed under § 959(a), but actions to address wrongs committed by the debtor in possession in his capacity as trustee may not. *Id.*

Suits allowed to proceed under § 959(a) have not been great in number or variety—“[t]he few examples of suits that have been allowed under § 959(a) include a wrongful death action filed against an operating railroad trustee and suits for wrongful use of another’s property.” *Beck v. Fort James Corp. (In re Crown Vantage, Inc.)*, 421 F.3d 963, 972 (9th Cir. 2005). The policy reasons for limiting the scope of § 959(a) are obvious—“[i]f debtors, creditors, defendants in
adversary proceedings, and other parties to a bankruptcy proceeding could sue the trustee in state
court for damages arising out of the conduct of the proceeding, [the nonbankruptcy] court would
have the practical power to turn bankruptcy losers into bankruptcy winners, and vice versa.” In
re Linton, 136 F.3d 544, 546 (7th Cir. 1998).

A bare handful of lower courts have erroneously held that § 959(a) permits an action
against a trustee when “the trustee has committed a tort.” See, e.g., Campbell v. Fitzgerald (In re
Campbell), 13 B.R. 974, 976 (Bankr. D. Idaho 1981) (citing Lawrence P. King, Collier on
Bankruptcy, ¶ 23.20 at 642–45 (14th ed.)). This generalized exception approach is contrary to the
plain language of § 959(a), which states, “debtors in possession[] may be sued . . . with respect to
any of their acts or transactions in carrying on business connected with such property.” 28
U.S.C. § 959(a) (emphasis added). It is also contrary to the overwhelming weight of authority
from other courts—for example, the court in Muratore expressly rejected the tort exception
approach, noting that “there are numerous cases in which the Barton doctrine was held to bar tort
actions brought without the permission of the bankruptcy court.” 375 F.3d 140, 146–47 (citing
Carter v. Rodgers, 220 F.3d 1249, 1253 (11th Cir. 2000) (refusing to allow an action to proceed
under § 959(a) for breach of duty of reasonable care and fiduciary duty); Bay Area Material
Handling, Inc. v. Broach (In re Bay Area Material Handling, Inc.), 1995 WL 747954, *1
(N.D.Cal. Dec. 6, 1995) (staying action for recovery of damages related to economic and
emotional harm)).

§ 959(a) does not operate as an exception to the Barton rule in this case. It is plain that
the transactions to which Plum objects were undertaken by Singsong in its capacity as debtor in
possession, not as manager of the company’s business. All of Singsong’s post-petition acts were
within “the authority and duty of a trustee in bankruptcy.” In re Campbell, 13 B.R. at 976. In
fact, the continued sale and marketing of the Galactica phone are essential for the effective reorganization of Singsong. Singsong does not seek to maximize its profits by selling as many Galactica phones as possible, as it would do if the debtor in possession were simply “carrying on the business” as usual. Rather, Singsong intends to liquidate only a portion of its stock of 100 million Galactica phones in order to provide a much needed short-term capital injection to continue operations during reorganization. Liquidating assets—even assets that infringe a patent—does not constitute “carrying on business” for the purpose of § 959(a). Muratore, 375 F.3d at 144. With respect to the Galactica phone, if Singsong were carrying on its business as usual, it would attempt to sell its entire inventory of phones. It is not. Therefore, Singsong’s transactions do not resemble the actions of a trustee transacting in the regular course of business—rather, Singsong is acting to effectuate a reorganization. Singsong requires a short-term injection of capital to fund operations through the reorganization, knowing full well that it may be liable in the future for money damages resulting from patent infringement. Nevertheless, with Singsong in such dire straits, this strategy is Singsong’s only viable way to stay afloat during reorganization.

Plum attempts to use § 959(a) as a key to open the locked gate of the automatic stay, but Plum’s key does not fit. Throughout the post-petition period, Singsong has acted at all relevant times only in its capacity as trustee. The Court should hold that § 959(a) does not operate as an exception to the automatic stay, and therefore Plum’s motion may only proceed with leave from the bankruptcy court.

b. **Even if § 959(a) does operate as an exception in this case, the court should exercise its equity jurisdiction and hold that Plum’s motion cannot proceed because the motion will unduly burden efforts to reorganize Singsong. If the Court declines to exercise discretion, it should remand the case to the bankruptcy court for determination of this issue.**
Even if the court finds that § 959(a) acts as an exception to the automatic stay, and that Plum’s motion may proceed without permission from the bankruptcy court, the Court should not permit the motion to proceed because the motion would disrupt efforts to reorganize Singsong. Any action allowed to proceed without leave of court under § 959(a) “shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice . . . .” 28 U.S.C. § 959(a). Thus, even if § 959(a) allows an action to proceed without leave of court, the court may stay the action if the stay is “necessary to the ends of justice.” Id. As the Thirteenth Circuit noted, § 959(a)’s “necessary to the ends of justice” standard is essentially identical to § 362(d)(1)’s standard allowing relief from the automatic stay for “cause.” Plum, Inc. v. Singsong Electronics, Inc. (In re Singsong Electronics, Inc.), Case no. 12-628 (13th Cir. 2012); Accord, In re Spansion, Inc., 418 B.R. 84, 98 (Bankr. D. Del. 2009), vacated as moot, Singsong Electronics, Co. Ltd. V. Ad Hoc Consortium of Floating Rate Noteholders, 2010 WL 2636115 (D. Del. 2010).

Bankruptcy courts have significant discretion to allow or disallow lawsuits to proceed against the debtor in possession and avoid results which would impede an effective organization. In re Television Studio School of New York, 77 B.R. 411, 412 (Bankr. S.D.N.Y. 1987). If the action would “embarrass, burden, delay, or otherwise impede the reorganization proceedings,” the court may stay the proceedings. Jaytee-Penn del Co. v. Bloor (In re Investors Funding Corp. of New York, IFC Collateral Corp.), 547 F.2d 13, 16 (2d Cir. 1976); See also Diners Club, Inc. v. Blumb, 421 F.2d 396, 400 (9th Cir. 1970) (holding that some suits “could conceivably so embarrass administration of the debtor corporation . . . as to make it proper that they be stayed.”). Courts weigh the relative benefits of allowing the suit to proceed before the reorganization is complete, and the harm to the reorganization which would result. Jaytee-
Penndel Co., 547 F.3d at 16; Hudson River Sloop Clearwater, Inc. v. Revere Copper Prod. (In re Revere Copper and Brass, Inc.), 32 B.R. 725, 728 (S.D.N.Y. 1983). For example, in In re Sonnax Indus., Inc., the court declined to lift the automatic stay when doing so would preclude an effective reorganization. Sonnax Indus. Corp. v. Tri Component Prods. Corp. (In re Sonnax Indus., Inc.), 907 F.2d 1280, 1286 (2d Cir. 1990) On the other hand, courts have lifted the stay where the movants’s action sought only to determine liability of the debtor and would not impact the reorganization, or where the debtor’s only objection to lifting the stay was that the debtor would be forced to bear the cost of defending more litigation. See, e.g., International Bus. Machs. v. Fernstrom Storage & Van Co., 938 F.2d 731 (7th Cir. 1991); Wilson v. Unioil (In re Unioil), 54 B.R. 192 (Bankr. D. Colo. 1985). Thus, the Court must decide whether and to what extent lifting the stay will impact the debtor’s reorganization.

Here, Plum’s motion would devastate Singsong’s reorganization efforts. It is undisputed that if Singsong were enjoined from selling any of its remaining stock of Galactica phones, a reorganization will be impossible. Plum, Inc. v. Singsong Electronics, Inc. (In re Singsong Electronics, Inc.), Case no. 12-628, *4 (13th Cir. 2012). With so much of Singsong’s revenue dependent upon Galactica sales, Singsong’s future as a going concern depends entirely on its ability to successfully transition to a non-infringing model of the Galactica. This may, in fact, require temporary continued infringement of Plum’s patent by Singsong. Singsong does not deny that it will be liable to Plum for each act of post-petition patent infringement—provided, of course, that the District Court’s judgment is not overturned on appeal. Singsong’s infringement does nothing more than add to the total amount Singsong owed to Plum as a judgment creditor. In fact, using Galactica sales as a temporary, short-term source of cash-flow, something essential for Singsong’s reorganization, is the only way Singsong may be rehabilitated. However, this
situation is the same as a struggling debtor agreeing to a high-interest short-term loan to survive reorganization. The cash infusion from Galactica sales will enable Singsong to survive, and if Singsong survives and becomes profitable, Singsong will pay back Plum as a judgment creditor. This would be the optimal result for all interested parties in this case, including Singsong, its owners, creditors, and for Plum as well.

Plum would not be greatly prejudiced by delaying its motion for an injunction. Plum began its patent infringement action less than two months before Singsong filed for bankruptcy, even though Singsong had been selling the Galactica since 2011. Id. Requiring Plum to wait until Singsong’s plan is confirmed would not, therefore, greatly prejudice Plum. As well, a lack of immediate injunctive relief may be more than compensated for by money damages awarded post-confirmation. See In re Television School Studio of N.Y., 77 B.R. 411, 413 (Bankr. S.D.N.Y. 1987) (“[t]o have [the movant] wait until the time [the] plan is either confirmed or denied confirmation would not greatly prejudice him . . . any small prejudice to [the movant] which may result from a delay in obtaining an injunction may be redressed by an award of damages.”).

Plum’s motion, if allowed to proceed, also would require an immediate and costly response. Singsong undoubtedly will challenge the breadth of Plum’s motion, which seeks, among other things, restrictions on even displaying the Galactica phone. Singsong, at *4. Such litigation is an expense Singsong can hardly afford at this point in its reorganization. Also, it will force Singsong to divert its attention away from reorganization efforts and back to the patent litigation, which will take place far from the bankruptcy court, in Washington. Plum will suffer only a brief delay in enforcing its patent if the court stays its motion—a delay which will prove essential if anything is to remain of Singsong. In fact, the only way Plum will recover a
meaningful amount of its damages for patent infringement is if Singsong is successfully rehabilitated, and this requires preventing immediate application of the injunction.

Apparently believing that a successful reorganization is impossible, Plum is seeking to maximize its own benefit, to the detriment of Singsong and its other creditors, by enjoining the sale of Galactica phones. This may benefit Plum, but any benefit will accrue to Plum at the expense of Singsong’s other creditors. This result is precisely the kind of situation that Chapter 11 bankruptcy is intended to avoid. Here, Plum simply does not want to play by the bankruptcy rules. Singsong and its creditors should not pay for Plum’s avarice.

CONCLUSION

Singsong’s by-law purporting to strip Singsong of its right to file bankruptcy is inconsistent with law and therefore invalid. The same public policy reasons that support disallowance of pre-petition waivers of bankruptcy rights apply in this case. The Court’s decision to deny Plum’s motion to dismiss the bankruptcy proceeding will allow the viable business entity Singsong to reorganize under Chapter 11 and will ensure that the bankruptcy system is protected from creditors’ future attempts to avoid it.

The automatic stay applies to Singsong’s alleged post-petition patent infringement, and § 959(a) does not operate as an exception to the automatic stay. If the Court finds that § 959(a) does operate as an exception, however, the Court should exercise its equity jurisdiction and hold that Plum’s motion cannot proceed. If the Court declines to decide this issue, it should remand the case to the bankruptcy court for determination consistent with the Court’s opinion.