

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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MISSION PRODUCT HOLDINGS, INC.,)
Petitioner,)
v.) No. 17-1657
TEMPNOLOGY, LLC, NKA OLD COLD LLC,)
Respondent.)
- - - - -

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3 MISSION PRODUCT HOLDINGS, INC.,)
4 Petitioner,)
5 v.) No. 17-1657
6 TEMPNOLOGY, LLC, NKA OLD COLD LLC,)
7 Respondent.)
8 - - - - -

9
10 Washington, D.C.
11 Wednesday, February 20, 2019

12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:10 a.m.

16
17 APPEARANCES:

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23 in support of the Petitioner.
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25 on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:10 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument this morning in Case 17-1657, Mission
5 Product Holdings versus Tempnology, LLC.

6 Ms. Spinelli.

7 ORAL ARGUMENT OF DANIELLE SPINELLI

8 ON BEHALF OF THE PETITIONER

9 MS. SPINELLI: Mr. Chief Justice, and
10 may it please the Court:

11 Section 365 of the Bankruptcy Code
12 lets the trustee decide whether the estate will
13 become a party to an executory contract of the
14 debtor. If so, the trustee assumes the
15 contract and the estate steps in to the
16 debtor's shoes. If not, the trustee rejects
17 the contract.

18 The statute's plain text tells us what
19 that means. Rejection constitutes a breach of
20 such contract immediately before the date of
21 the filing of the petition. The debtor will
22 not fulfill any remaining unperformed
23 obligations under the contract, and the
24 counterparty will have a prepetition claim
25 against the debtor for any resulting damages.

1 But that's all rejection is, the
2 estate's decision not to take on the debtor's
3 future performance obligations, which are
4 therefore breached.

5 The overwhelming consensus of courts
6 and scholars is that rejection can't give the
7 estate any greater rights with respect to the
8 rejected contract than the debtor would have
9 outside bankruptcy.

10 And as Respondent doesn't contest,
11 outside bankruptcy, a licensor could not use
12 its own breach of contract as a basis to
13 terminate the licensee's rights under the
14 agreement.

15 JUSTICE ALITO: But you just said, and
16 I think it's correct, that the debtor would be
17 -- rejection means that the debtor has no
18 obligation to perform future duties under the
19 contract.

20 But, if the debtor in this case, as
21 the owner of the trademark in question, did not
22 continue to perform quality control activities
23 in relationship to the mark, would that not
24 imperil the future of -- the -- the -- the
25 validity of the mark? So how can -- how can

1 the debtor not continue to perform duties under
2 the contract?

3 MS. SPINELLI: So the -- the quality
4 control obligation is an obligation that's
5 imposed by trademark law, not solely by the
6 contract and, in many cases, not at all by the
7 contract.

8 It is quite true that if --

9 JUSTICE SOTOMAYOR: How is that
10 relevant? Meaning, yes, I -- I assume that
11 there's both a contractual obligation and a
12 legal obligation under trademark law, but to
13 the extent that there's a rejection of the
14 contract, the property owner is electing to
15 say, as he -- as it is entitled to say under
16 the law, I reject that obligation vis-a-vis
17 you. Hence, you can't continue to use my mark
18 because I can't assure -- I'm not capable --
19 that's why you reject a contract, because it's
20 not beneficial to the company -- I reject that
21 obligation. Hence, I reject your being able to
22 use it.

23 MS. SPINELLI: No. With respect,
24 Justice Sotomayor, that is not how it works.

25 JUSTICE SOTOMAYOR: Why?

1 MS. SPINELLI: When --

2 JUSTICE SOTOMAYOR: Why? Why isn't
3 that exactly how it works? Meaning, once I
4 lend you something and say it's conditioned on
5 my approval of what you're doing, and I
6 withdraw that approval, haven't I withdrawn --

7 MS. SPINELLI: No. So the -- the
8 license -- so let's imagine that the agreement
9 itself imposed an obligation on the licensor to
10 monitor the quality of the licensee's goods.

11 If that is so, the licensor is free --
12 the -- the estate can choose not to assume that
13 going-forward obligation, but rejection only
14 relates to contractual obligations. It does --

15 JUSTICE SOTOMAYOR: One of the
16 trademark amici briefs said, if you're the
17 licensee, you don't have the right to produce
18 an item. If this license was one in which I
19 gave you the license to sell my goods, that
20 they -- and I refuse to sell you the goods,
21 they can't go out and make the goods, they
22 can't go out and put the trademark on something
23 else because they don't have the right to do
24 that.

25 MS. SPINELLI: Different license

1 agreements work in different ways. And it's --

2 JUSTICE SOTOMAYOR: I don't disagree,
3 but the point is that you've been -- that by
4 rejecting the contract, I've basically said you
5 can't use my goods. You're -- you're entitled
6 to sue me. You can't use my mark. You're
7 entitled to sue me.

8 MS. SPINELLI: Justice Sotomayor, let
9 me explain why I think that's not correct.

10 First of all, outside bankruptcy, as
11 Respondent has conceded, the licensor's breach
12 would not let it take away the licensee's right
13 to use the mark. The licensor could say I'm
14 breaching all day long, but the licensee could
15 continue to use the mark.

16 JUSTICE KAGAN: When -- when you say
17 that, Ms. Spinelli, what law do you look to to
18 find that, to find that principle?

19 MS. SPINELLI: That --

20 JUSTICE KAGAN: I mean, you say you
21 look to outside bankruptcy law.

22 MS. SPINELLI: Correct. Correct.

23 JUSTICE KAGAN: Are you looking to
24 state law? Is it a kind of common law?

25 MS. SPINELLI: Trademarks are governed

1 by state law, by federal -- and by federal
2 statute, the Lanham Act, and the case law
3 that's developed under the Lanham Act.

4 So -- but this is actually a much
5 simpler principle. It's simply that there --
6 there is nothing that the licensor could do
7 outside bankruptcy by breaching to stop the
8 licensee from using the mark. The only thing
9 that it could do is bring a suit to enjoin the
10 licensee from using the mark, and in that case,
11 the license would be a complete defense.

12 So, outside bankruptcy, it can't be
13 done. The other point --

14 JUSTICE SOTOMAYOR: I do have a
15 question about --

16 MS. SPINELLI: Of course.

17 JUSTICE SOTOMAYOR: -- 365(n).

18 MS. SPINELLI: Of course.

19 JUSTICE SOTOMAYOR: Which is 365(n) is
20 not the default rule with respect to
21 intellectual property. It gives more and less
22 rights to the lessors and lessees than the
23 common law would permit.

24 MS. SPINELLI: That's correct.

25 JUSTICE SOTOMAYOR: Seems

1 counterintuitive to me or counterlogical, given
2 the explanation that the Congress gave, that it
3 understood that trademark owners would get more
4 rights than (n) provides to other licensors in
5 the intellectual property field.

6 It mentioned the reason why the courts
7 up to that time who had recognized rejection as
8 termination, that trademark owners were
9 different because they had quality control
10 problems. So I read that and I think to
11 myself: Why would you think of giving
12 trademark owners more rights or less rights
13 than -- than people under (n)?

14 MS. SPINELLI: Let me -- let me
15 explain, Justice Sotomayor. It is certainly
16 true that Congress made an advertent decision
17 to leave trademarks out of 365(n), but the
18 legislative history makes it very clear that,
19 in enacting 365(n), Congress did so because it
20 thought the rule of Lubrizol, which is that
21 rejection deprives the counterparty of rights
22 already conveyed under the agreement, was
23 wrong. And that principle can't logically be
24 confined --

25 JUSTICE SOTOMAYOR: But it didn't --

1 it didn't think it was wrong completely.

2 MS. SPINELLI: I --

3 JUSTICE SOTOMAYOR: Because -- because
4 it -- it did a sort of hybrid, giving more and
5 less at the same time.

6 MS. SPINELLI: But it did completely
7 repudiate the Lubrizol rule.

8 JUSTICE SOTOMAYOR: Not really.

9 MS. SPINELLI: It said --

10 JUSTICE SOTOMAYOR: It -- it -- it
11 kept some of it and it rejected others because
12 of the situational difference.

13 MS. SPINELLI: No, with respect,
14 Justice Sotomayor, what it -- what it did is it
15 said that the licensee can retain its rights
16 under the contract. And that's precisely at
17 issue in Lubrizol.

18 It did -- it did, in addition, go on
19 to set out a specific federal regime governing
20 subsidiary issues that arise with respect to
21 the relationship between the licensee and the
22 licensor following rejection. And you're
23 correct that that regime differs in some
24 respects from the state law that would
25 otherwise apply.

1 But there is no question whatsoever
2 that Congress repudiated the basic rule of
3 Lubrizonol, saying that it was never intended,
4 that, in addition to relieving itself of the
5 debtor's affirmative performance obligations,
6 Congress never thought that rejection would
7 enable the estate to take back rights already
8 conveyed to the licensee.

9 JUSTICE GINSBURG: Could one say it
10 didn't take any position on Lubrizonol one way or
11 another in the trademark context? It did quite
12 specifically in the patent context, but it
13 didn't either approve or disapprove.

14 MS. SPINELLI: One could say that,
15 Justice Ginsburg. I -- I believe the reason
16 that Congress didn't include trademarks in
17 365(n) is because it -- first of all, it was
18 dealing with an emergency with respect to
19 patent licenses. The situation was described
20 as urgent. That was what Lubrizonol was about.

21 Congress recognized that trademarks do
22 have some differences from patents, and it
23 thought that further study was required in
24 order to shape the federal rules that would
25 govern the parties' relationship.

1 JUSTICE KAGAN: But -- but the
2 difference -- it said specifically, didn't it,
3 what the difference it thought there was,
4 right?

5 MS. SPINELLI: Yes, it did.

6 JUSTICE KAGAN: Which was this quality
7 control --

8 MS. SPINELLI: Correct.

9 JUSTICE KAGAN: -- obligation that
10 Justice Alito started us off with. And I guess
11 just to take us back there, why is it that that
12 obligation does not make trademarks different
13 under -- you -- you say we look to state law.

14 I mean, is it -- are you saying that
15 there's uniform state law that says that the
16 quality control obligation sort of makes no
17 difference with respect to this issue, that the
18 entire contract is not unwound?

19 MS. SPINELLI: There's -- I don't
20 believe anyone would say that the entire
21 contract can be unwound by the unilateral act
22 of the licensor. That's just basic contract
23 law.

24 JUSTICE KAGAN: Right. I mean, the
25 question is whether the quality control

1 obligation makes trademarks different --

2 MS. SPINELLI: Not --

3 JUSTICE KAGAN: -- from normal
4 contract law.

5 MS. SPINELLI: No.

6 JUSTICE KAGAN: That's the question.

7 MS. SPINELLI: And the answer is no.
8 There is no support for that at all. What
9 happens -- what happens when the licensor
10 abdicates its quality control obligations,
11 which, again, stem from trademark law, not from
12 the contract, is that the licensor risks
13 abandonment of the mark.

14 So the licensor may use the -- may
15 lose its rights in the mark. If that happens,
16 then the mark is up for grabs. The licensee
17 can continue to use it. So can third parties.
18 Whoever can establish rights in it through use
19 will be the new owner.

20 But it absolutely does not change
21 basic contract law principles, including that
22 the breaching party cannot terminate the
23 contract because it breaches. The opposite is
24 true.

25 JUSTICE ALITO: What would that -- I'm

1 sorry.

2 MS. SPINELLI: I'm sorry, Justice
3 Alito.

4 JUSTICE ALITO: What would happen in
5 this situation? So the debtor is the lessor of
6 residential property. It rejects the lease,
7 and you would say that the -- the -- however,
8 the -- the lessee could continue to live --

9 MS. SPINELLI: Correct.

10 JUSTICE ALITO: -- in the residential
11 property, and the lessor would be relieved of
12 any further obligations under the contract?

13 MS. SPINELLI: Correct.

14 JUSTICE ALITO: But not statutory
15 obligations?

16 MS. SPINELLI: Correct -- it --
17 correct. So if --

18 JUSTICE ALITO: So if there was a
19 statute that said that the -- any lessor of
20 residential property has to provide heat, they
21 would continue -- it would have to continue to
22 do that?

23 MS. SPINELLI: Precisely. And the
24 reason that's so is that the estate is the
25 owner of the underlying property. So, if it's

1 an apartment building, the estate now owns the
2 apartment building.

3 The estate is not given any kind of
4 exemption from generally applicable law
5 relating to property ownership simply because
6 it's in bankruptcy or because a contract
7 relating to that asset has been rejected.

8 This is the kind of thing the trustee
9 deals with every day. The trustee is obligated
10 with respect to all of the estate's assets to
11 comply with generally applicable law, and it's
12 also required to decide whether a particular
13 asset is valuable enough to be worth investing
14 estate funds in.

15 So, with regard to the quality control
16 obligation, the trustee will have to make a
17 decision: Is this mark valuable to the estate?
18 And, if so, is it valuable enough to warrant
19 making the really pretty minimal investment
20 that's necessary to continue monitoring
21 quality?

22 JUSTICE KAGAN: I mean, just thinking
23 --

24 MS. SPINELLI: That --

25 JUSTICE KAGAN: I'm sorry.

1 MS. SPINELLI: No, please, Justice
2 Kagan.

3 JUSTICE KAGAN: You know, just
4 thinking about that example you gave, the
5 analogy of the --- the lessor of real property,
6 there is in many cities background law that
7 says once the landlord stops maintaining the
8 property, the city insists that the tenant
9 leave because the property isn't safe anymore.

10 And I guess one question is whether
11 there might be or is a similar background rule
12 with respect to what happens to a trademark
13 where the obligation for quality control is not
14 being maintained? Is that a silly analogy?

15 MS. SPINELLI: It's not a silly
16 analogy at all, but there is not analogous law.
17 It -- you know, the -- again, the licensor's
18 breach doesn't entitle it to terminate the
19 licensee's rights.

20 JUSTICE SOTOMAYOR: Before you --

21 CHIEF JUSTICE ROBERTS: Does -- does
22 the licensee have any rights with respect to
23 quality control if the licensor is not
24 fulfilling its duty?

25 MS. SPINELLI: So the licensee

1 frequently takes upon itself the great burden
2 of quality control. I mean, quality control is
3 obviously in the licensee's interest as much as
4 the licensor's, because the licensee wants to
5 maintain the validity of the mark just as much
6 as the licensor. And the licensee is selling
7 goods, and it doesn't want them to get a
8 reputation for poor quality.

9 JUSTICE GORSUCH: Can I ask you to
10 address the mootness question in this case?

11 MS. SPINELLI: Of course.

12 JUSTICE GORSUCH: So as I understand
13 it -- let's put the exclusive distribution
14 rights off the table. The -- the court below
15 said they're forfeited. Assume for the moment
16 that I'm going to -- I'm not going to
17 un-forfeit them. So we just have the license
18 arrangement.

19 And as I understand it, your client
20 wasn't under any orders not to use the license,
21 the trademark, and so what -- on what theory
22 are you injured and -- and what damages might
23 you have?

24 MS. SPINELLI: Mission was injured
25 because it was wrongly prevented from using the

1 trademark on its goods post-rejection. The
2 bankruptcy court --

3 JUSTICE SOTOMAYOR: But, wait a
4 minute, it had stopped -- it had said two years
5 before, leading up to the agreement, that it
6 wasn't going to order any goods.

7 MS. SPINELLI: Well, what happened,
8 Justice Sotomayor, is that, prior to
9 bankruptcy, Tempnology attempted to terminate
10 the contract. Mission placed a purchase order.
11 Tempnology said, we're not going to fill that
12 order.

13 So it's true that immediately before
14 the bankruptcy, Mission hadn't been placing
15 purchase orders because Tempnology was refusing
16 to fill them. And then, once the rejection
17 order was put in place --

18 JUSTICE SOTOMAYOR: Were you producing
19 your own goods using their trademark, or were
20 you just --

21 MS. SPINELLI: No.

22 JUSTICE SOTOMAYOR: -- buying from
23 them?

24 MS. SPINELLI: Oh, I'm sorry -- no.
25 At that point, we were purchasing the goods

1 from Tempnology, which was a requirement under
2 the contract.

3 JUSTICE SOTOMAYOR: So they no longer
4 had to supply you with goods. So why are we
5 here? Meaning --

6 MS. SPINELLI: They did have an
7 obligation --

8 JUSTICE SOTOMAYOR: -- that's a
9 brief -- they have -- they have -- they have an
10 obligation and you're open to damages, but
11 without an -- without you producing the goods,
12 I thought that brief from the amici said that
13 you're relieved from supplying goods, the
14 lessor is relieved from supplying goods.

15 MS. SPINELLI: But, Justice Sotomayor,
16 we had a right under the agreement, if
17 Tempnology failed to provide us with goods, to
18 source those goods elsewhere.

19 May I reserve the remainder of my
20 time?

21 CHIEF JUSTICE ROBERTS: Yes.

22 MS. SPINELLI: Thank you.

23 CHIEF JUSTICE ROBERTS: Mr. Tripp.

24

25

1 ORAL ARGUMENT OF ZACHARY D. TRIPP
2 FOR THE UNITED STATES, AS AMICUS
3 CURIAE, IN SUPPORT OF THE PETITIONER

4 MR. TRIPP: Excuse me. Mr. Chief
5 Justice, and may it please the Court:

6 If I could just pick up on a couple of
7 the questions about whether trademarks are
8 different and then say a few words about our
9 rule, why Respondents are wrong, and what the
10 United States' interest is here.

11 So I -- I think an important point
12 about trademarks with the quality control --

13 JUSTICE GORSUCH: I'm not going to
14 interrupt you again --

15 MR. TRIPP: Yeah.

16 JUSTICE GORSUCH: -- but if you could
17 add to that excellent list of things to do
18 discussing mootness.

19 MR. TRIPP: Yeah --

20 JUSTICE GORSUCH: Thank you.

21 MR. TRIPP: -- I'll -- I'll start with
22 the mootness. The case is not moot. This is,
23 at bottom, a claim for money damages, and it's
24 still up in the air whether Petitioner is going
25 to get a judgment in its favor.

1 Respondent has raised a number of
2 arguments why, on remand, Petitioner would lose
3 even if you rule in their favor here, but
4 Petitioner disputes all of that, and no court
5 has resolved those remaining disputes. But --

6 JUSTICE GORSUCH: Well, if we put
7 aside the exclusive distribution agreement, and
8 I -- I really don't want to belabor this --

9 MR. TRIPP: Yeah.

10 JUSTICE GORSUCH: -- but I'd like you
11 to focus specifically on -- on the trademark
12 license.

13 If there was no order prohibiting
14 Petitioner from using the trademark at any
15 point, then where are the damages?

16 MR. TRIPP: But this part of
17 Respondent's argument I'm -- I'm not sure I
18 understand because it seems to prove way too
19 much, because if it's right that you can't get
20 damages even when there's a bankruptcy court
21 order, basically a declaratory judgment saying
22 that it would be unlawful for you to use the
23 mark, then you wouldn't be able to get damages
24 even under their theory of the case that you
25 can take away the license in bankruptcy by

1 rejecting it and terminating it; you -- you
2 would leave the counterparty with nothing,
3 unless they went back into court and asked for
4 an injunction against the thing the court just
5 told it was already illegal.

6 It's a very strange argument, so I'm
7 not sure I follow that.

8 JUSTICE GORSUCH: The bankruptcy
9 argument -- well, I'm not sure I follow you.
10 So one of us is just confused --

11 MR. TRIPP: Yeah.

12 JUSTICE GORSUCH: -- and it may well
13 be me, but if -- if the bankruptcy court is
14 simply saying you've rejected it and if
15 rejection only means that you don't have to
16 perform and that you breached, does that
17 prohibit --

18 MR. TRIPP: No, that -- that wouldn't
19 have prohibited it. But the bankruptcy court
20 here went further and said, the effect of
21 rejection is to terminate your license, is to
22 take it away from you. They -- they -- it --
23 it adopted Respondent's rule, which we're
24 respectfully submitting is wrong.

25 JUSTICE GORSUCH: I see. Okay.

1 MR. TRIPP: And Petitioner --

2 JUSTICE GORSUCH: I under -- I track
3 you now. Thank you.

4 MR. TRIPP: And so Petitioner is
5 saying there's -- there's money on the table.

6 JUSTICE SOTOMAYOR: So go back to the
7 argument you were making. So the court tells
8 them you can't, you don't have an exclusive
9 license. That's been waived or forfeited.

10 So what remains of this case?

11 MR. TRIPP: Well, they also --

12 JUSTICE SOTOMAYOR: Because you're
13 saying under their theory they can't move
14 forward, they have a non-exclusive license, but
15 if they're not getting goods, what's their --
16 why isn't this case moot?

17 MR. TRIPP: Well, at least as I
18 understand Petitioner's theory, and, of course,
19 we wouldn't have a position on -- on what's
20 going to happen on remand. They are saying
21 there is still money on the table they could
22 have gotten, they could have sourced the goods
23 from somewhere else. And -- and no court has
24 resolved these remaining claims.

25 And so this is still a very much alive

1 case. And we're really urging the Court just
2 to answer the trademark question here and to
3 send it back down. The First Circuit has a
4 damaging precedent on the books that we think
5 really just undermines the -- the stability and
6 value of trademark licenses across the board.

7 I mean, you imagine a situation where
8 you're a franchisee who's invested millions of
9 dollars in reliance on the ability, you know,
10 to -- to -- to put up the name McDonald's and
11 the -- and the golden arches and all of that.

12 What -- under Respondent's rule, what
13 they are saying is as soon as the -- the
14 trademark owner goes into bankruptcy for any
15 reason, they can pull the rug out from under
16 every single one of its franchisees and
17 basically put them to an extortionate choice
18 between paying a higher royalty payment or
19 shutting down their business and firing all
20 their workers.

21 And -- and so we're really urging the
22 Court just to adopt the Sunbeam rule and to
23 reverse.

24 And to get back to --

25 JUSTICE BREYER: Do you want -- do you

1 want -- are you -- I mean, the main question
2 that I have, I think, is the same that Justice
3 Alito and Justice Kagan had --

4 MR. TRIPP: Yeah. That's where I was
5 just --

6 JUSTICE BREYER: -- where I think --
7 well, let me show you. Where I think this
8 comes from an article by Professor Andrews, and
9 he says, look, I'm the debtor, you're the
10 licensee, but say you leased a house. There
11 are two assets here; one is the house, which
12 you've leased, and the other is a promise by me
13 to replace the windows. All right?

14 So, if you can analogize it to that,
15 you win. Well, the more I think about it, I'm
16 not sure. Why?

17 A, there are a lot of special
18 provisions in the trademark law and in
19 bankruptcy law about houses and leases. B,
20 it's really a special kind of house. It's like
21 a house that would collapse unless you keep it
22 up; maybe like an igloo that you promised to
23 air condition. You know, you break your
24 promise to air condition, no more igloo.

25 Now, if you seem to think of it like

1 that, you think, no, there aren't two rights.

2 MR. TRIPP: Yeah.

3 JUSTICE BREYER: This upkeep business
4 is an essential part of one right, which is
5 going to give you the house to live in. So I
6 -- I -- I -- so I had -- I would like you or
7 Ms. Spinelli or, you know --

8 MR. TRIPP: Yeah. So --

9 JUSTICE BREYER: -- at some point to
10 tell me which is the strong -- why is it
11 stronger when --

12 MR. TRIPP: Yeah. It's not really
13 like that. And I think a key portion of this,
14 key -- key piece of it is if the trademark
15 owner stops performing the quality control --

16 JUSTICE BREYER: Yeah.

17 MR. TRIPP: -- and maintaining the
18 distinctiveness of the mark to consumers, that
19 does not instantly destroy the mark, right?
20 That is a process, gradual, it's over time.

21 And then another thing that makes it
22 different from your igloo example is that, at
23 the end of the day, the licensee can still use
24 the mark because the only thing that happens if
25 you stop performing the quality control is

1 eventually, at the end of the day, after some
2 period of time, it'll be abandoned and returned
3 to the public domain.

4 And I -- I really think it's --
5 actually, it's a lot more like the situation in
6 our brief, which we talk about, of leasing
7 somebody a photocopier where you agree to
8 maintain it over time.

9 It may well be that if you stop the
10 maintenance on the photocopier, that eventually
11 the photocopier is going to -- going to
12 eventually break down. But that doesn't mean
13 that you can repossess the copier by breaching
14 your obligation to perform the maintenance,
15 right? That's, I think, really the heart of
16 this case.

17 Just to say a couple words about why
18 Respondents are wrong, they're pressing an
19 argument in their -- in their briefs that you
20 should draw a negative inference from (n), that
21 the exact opposite rule should apply for
22 trademarks.

23 And I just want to emphasize how
24 bizarre it would be to read (n) that way. The
25 whole point of (n) was to overrule Lubrizol's

1 specific result as to patents. And nobody
2 implicitly ratifies or endorses a court's mode
3 of reasoning.

4 JUSTICE SOTOMAYOR: Except the report
5 said exactly the opposite, that they weren't
6 taking a position.

7 MR. TRIPP: Yeah, so I -- I --

8 JUSTICE SOTOMAYOR: So it can't be
9 that their entire -- their entire purpose was
10 to overrule. As I mentioned, they overruled it
11 in part and didn't in part.

12 MR. TRIPP: Yeah. So --

13 JUSTICE SOTOMAYOR: Because there are
14 certain contracts they gave the lessees more
15 rights or the lessors more rights. They
16 exempted some things from royalty payments or
17 royalty setoffs. They did a bunch of different
18 things.

19 MR. TRIPP: So I think that's -- I
20 think really they overwhelmingly overruled
21 Lubrizol. That's really the bottom line. And
22 the differences are really far down in the
23 details. This is a reticulated scheme that
24 Congress established for patents that is, I
25 admit, somewhat different than what would apply

1 under the general background rule, like under
2 (n)(3) and (n)(4), this is pretty far down in
3 the weeds, but -- and this is reproduced in our
4 brief in 14-A and 15-A.

5 It imposes basically an obligation on
6 the licensor to actually continue performing
7 some of the obligations under the contract,
8 notwithstanding the rejection. In (n)(4), it
9 imposes a duty to continue performing, even
10 during the period where the trustee's still
11 trying to figure out whether to assume or
12 reject it.

13 And so I think really the right lesson
14 to take away from (n) is the one Justice
15 Ginsburg was saying, which is that it doesn't
16 put a thumb on the scale one way or the other.
17 They just didn't answer the trademark question.
18 Sometimes an omission is just an omission, as
19 Judge Easterbrook put it.

20 But -- so then what you have to do is
21 just resolve this by looking at the background
22 rule under (a) and (g). And on that, I think
23 we have just by -- by far the better of the
24 reading because (g) tells you what happens when
25 you reject a contract, and the answer is that

1 the rejection constitutes a breach.

2 And I guess just one last point about
3 (g) which I think is very helpful to our
4 position, and this is reproduced in -- in the
5 text at 8-A.

6 I mean, really, Respondents are
7 effectively reading (n) to be an exception to
8 the general rule in (g). They are saying that
9 the general rule in (g) is that you can claw
10 back somebody's rights, take back past
11 performance. But, if you look at the text of
12 (g), it just doesn't say that.

13 It doesn't mention (n). It doesn't
14 say that it's an exception. And it identifies
15 these two other provisions, (h)(2) and (i)(2),
16 as exceptions to the general rule, and they
17 have nothing to do with what we're talking
18 about here. Those are about situations where
19 you get an offset rather than a prepetition
20 claim.

21 JUSTICE SOTOMAYOR: I'm sorry, I don't
22 really understand that argument. It seems as
23 all of these are exceptions by their nature,
24 and that goes contrary to the general rule that
25 if it's an exception, the rule is different

1 than the exception.

2 MR. TRIPP: No, I think what they
3 really are are codifications of the background
4 rule to clarify difficult situations that have
5 arisen --

6 JUSTICE SOTOMAYOR: That's what you
7 think, but, you know, the greatest problem here
8 is that rejection is not a contract term. We
9 don't -- when we talk about contracts, we talk
10 about repudiating them, terminating them,
11 avoiding them, a bunch of different language.

12 But bankruptcy is using a very
13 specialized term, rejection. And your
14 adversary's right that it's not generally that
15 we reject a piece of a contract. We generally
16 reject the entire contract. And so it's not
17 the rejection of one claim under a contract.

18 So it -- there is some force to their
19 argument that reading it the way you do is
20 contrary to its language.

21 MR. TRIPP: If I could answer the
22 question?

23 CHIEF JUSTICE ROBERTS: Yes.

24 MR. TRIPP: So just, I mean, (g) says
25 that it constitutes a breach. I've already

1 walked through a couple other things, the
2 avoidance powers cut back on this, but just one
3 last one is the history of this language which
4 we discuss in our brief, that it's grounded in
5 the common law of trusts and receiverships, the
6 idea that the trustee is not technically a
7 party to the contract, and it has a choice of
8 whether to assume or reject it.

9 And the rule back then under the
10 common law was the same one we're advocating
11 now, the Learned Hand decision we cite in our
12 brief drives this home, that the trust -- that
13 the bankrupt landlord, the trustee, can stop
14 paying for your heat and hot water, but he
15 cannot evict you. You keep your rights.

16 And so we're asking the Court to
17 reverse.

18 CHIEF JUSTICE ROBERTS: Thank you, Mr.
19 Tripp.

20 Mr. Hallward-Driemeier.

21 ORAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER

22 ON BEHALF OF THE RESPONDENTS

23 MR. HALLWARD-DRIEMEIER: Mr. Chief
24 Justice, and may it please the Court:

25 I'd like to start with the issue of

1 mootness. And if we take the exclusive
2 distribution rights off the table, which was
3 the source of the \$4 million of claims that
4 Petitioner referred to in their reply at the
5 petition stage that kept the case from being
6 moot, we're left only with a non-exclusive
7 trademark license that has already expired.

8 And any dispute about the rights under
9 that is moot. As I said, it's already expired,
10 so we don't have a forward-looking issue. It
11 would only be a past issue. And as the
12 questions have indicated, there were -- was no
13 use of the trademark during the post-rejection
14 period.

15 JUSTICE SOTOMAYOR: The -- the
16 bankruptcy court did not stop that
17 non-exclusive use, correct?

18 MR. HALLWARD-DRIEMEIER: That --
19 that's right. All that the bankruptcy court
20 did was, at our request, declare the parties'
21 rights, what was the meaning of rejection.

22 And the -- the only argument that
23 Petitioner has that would -- that they have
24 some basis of claim against my client for the
25 post-rejection period is that we sought that

1 ruling from the court. But --

2 JUSTICE GORSUCH: Why isn't that
3 enough to have -- at least have an acorn of
4 injury for Article III purposes, the
5 uncertainty created by a declaratory judgment
6 that effectively you can't use it? It may not
7 prohibit you from using it, but it sure may
8 cause you to think twice about doing so. And
9 there might be damages available.

10 MR. HALLWARD-DRIEMEIER: Your Honor, I
11 -- I think that would be directly contrary to
12 the First Amendment and the Noerr-Pennington
13 doctrine. We have a right to go to court to
14 ask it to declare the parties' rights, and that
15 can't be the tortious act that creates damages
16 on the part of the other side. They have no
17 claim against us because we took no action
18 against them to stop them from using the -- the
19 trademark.

20 Their own words in the First Circuit
21 reflect this because, by their own words -- and
22 this is at JA 572 -- they say, "But for the
23 bankruptcy court decision, Mission would have
24 continued using Coolcore's trademarks." So it
25 was only that decision, and our only act is

1 asking the court to make a ruling. And I don't
2 believe that this Court's precedent would allow
3 a claim to be based on that.

4 That's our mootness argument. And
5 with that, I'm happy to proceed to the merits
6 on the assumption that the Court might reach
7 them.

8 JUSTICE SOTOMAYOR: Could you answer
9 the solicitor general's concern that a ruling
10 in your favor would affect any number of other
11 contracts, the copier example, the -- the car
12 example, any of the other, or the McDonald's
13 franchise?

14 MR. HALLWARD-DRIEMEIER: I'd -- I'd be
15 happy to, Your Honor, because I think the
16 photocopier example is actually paradigmatic.
17 And there is -- we -- we mentioned that there's
18 another section of the code, Section 542(a),
19 that -- that provides for a party who's in
20 possession of property of the estate to return
21 that property to the estate upon the filing of
22 the petition.

23 And if the copier is held under a
24 lease, then the copier is property of the
25 estate. And that provision would require the

1 -- the party to return the copier to the -- to
2 the -- to the bankruptcy estate, unless they
3 assume the contract, which they're going to do
4 because that's a source of income.

5 So, as a practical matter, they always
6 assume that. The copier in position under the
7 contract is worth more than getting back a used
8 copier, which is not worth very much.

9 But that's what the rule provides.
10 If, on the other hand, the copier has already
11 been sold, then it's no longer property of the
12 estate, and the other party does not have to
13 return it.

14 And that's exactly what -- the rule
15 that we advocate for. So under Section 365 --

16 JUSTICE SOTOMAYOR: And the McDonald's
17 franchise?

18 MR. HALLWARD-DRIEMEIER: The
19 McDonald's franchise is an interesting
20 exception because they highlight the million
21 dollars perhaps or more that's been invested by
22 the franchisee. That does not distinguish the
23 franchisee from any of the other creditors of
24 the bankruptcy estate.

25 A person might have invested millions

1 of dollars as a bondholder in the estate. It
2 might have been a -- a trade creditor with
3 millions of dollars of claims.

4 All of those claims are reduced to
5 often pennies on the dollars because they're
6 prepetition claims. And that's the same that
7 Congress provided for counterparties. All the
8 creditors of the bankruptcy estate have to
9 bring these claims as prepetition claims.

10 And that's the critical language of
11 365(g)(1). It says that it constitutes a
12 breach, but doesn't stop there. It says that
13 it constitutes a breach as of the day before
14 the petition. It's a prepetition claim for
15 breach.

16 And it's the temporal element that's
17 critical. And that temporal element continues
18 through the other provisions. 502(g)(1) says
19 that you must bring your claims on the basis of
20 rejection and that that claim is as if the
21 breach had happened before the petition.

22 And when you get to 1114, which is the
23 discharge provision, it says that those claims
24 that arose before the plan is confirmed are
25 discharged, and then it specifically

1 cross-references 502.

2 JUSTICE ALITO: And what do you say
3 about the -- the example of the lessor and the
4 lessee?

5 MR. HALLWARD-DRIEMEIER: Well, Your
6 Honor, ever since the 1934 Act, Congress has
7 included exceptions that specifically deal with
8 real estate. And so I would say we'd have to
9 go to the terms of the specific -- specific
10 exception in 365(h)(1).

11 Now what's notable is that that
12 exception -- two things. One, it provides less
13 rights, not more, but less rights than under
14 Petitioner's general rule. So instead of being
15 an exception that -- that protects a -- a
16 favored class, which is what Congress thought
17 it was doing, it's instead a statement that --
18 that puts them in a worse position.

19 The other thing that's interesting
20 about it is that 365(h)(1) only applies to
21 lessees where the lease has commenced. So, in
22 other words, the party whose lease has
23 commenced, which is the party that would have a
24 particular claim on Congress's interest, has
25 lesser rights than a lessee whose lease has not

1 yet commenced. If you've not --

2 JUSTICE GINSBURG: Can we go back and
3 see -- is there any disagreement between you
4 and the other side about what would happen
5 outside bankruptcy? And as we're told, outside
6 bankruptcy, one party's rejection doesn't
7 terminate the rights of the opposing party.

8 MR. HALLWARD-DRIEMEIER: That --
9 that's right, Your Honor. The -- the out --
10 the non-bankruptcy rule is that the
11 counterparty has the choice. They can either
12 treat the contract as having been a total
13 breach, once -- an anticipatory rejection,
14 counterparty may treat it as a total breach, or
15 it may seek to enforce the contract.

16 What Congress did in 365 is --

17 JUSTICE KAGAN: And -- and you don't
18 think that there's, outside bankruptcy, any
19 special rule for trademarks? You agree --

20 MR. HALLWARD-DRIEMEIER: I -- I -- no,
21 no, I do think that there are special -- I
22 think that trademarks is a special rule. But
23 what I'm trying to explain is that -- that the
24 statute does not operate as they presuppose it
25 does, that the general rule --

1 JUSTICE KAGAN: Well, I just want -- I
2 want -- I want you to tell me -- and I think
3 this is consistent with Justice Ginsburg's
4 question -- outside bankruptcy, what would be
5 the rule in this context, in the trademark
6 context?

7 MR. HALLWARD-DRIEMEIER: Well, Your
8 Honor, I -- I think -- our view is that you
9 would have a breach of contract claim, but you
10 would not have an ongoing use of -- of the
11 trademark because -- precisely because of the
12 nature of the trademark. The nature of the
13 trademark is that it is the trademark owner's
14 reputation.

15 JUSTICE BREYER: All right. It's a
16 day before bankruptcy. Nobody knows
17 bankruptcy's going to take place. I am the
18 holder of a trademark. I have leased it to
19 you, and you can use it for 10 years, and I
20 assume certain obligations.

21 And I write you a letter. You say,
22 ha, ha, ha, I'm not going to do it. Which is a
23 material breach of the contract. Now you bring
24 a lawsuit, the day before, and you say: Judge,
25 you know, I want to keep the leased good, which

1 could be anything, jewels for a costume
2 company, you know -- I don't know about igloos,
3 but -- but -- but nonetheless, you say it could
4 be anything.

5 Okay. What's the law? Can I keep it
6 or not keep it?

7 MR. HALLWARD-DRIEMEIER: Well, in --
8 in our view, you -- you can't because --

9 JUSTICE BREYER: Now, when you say "in
10 -- in -- in your view," I already stop you
11 because it's amazing to me that there is no
12 authority that's more on point than this real
13 estate stuff, which, as you say, is absolutely
14 filled with writings in the statute.

15 All right, but -- so -- so you say "in
16 your view," that means you're not certain?

17 MR. HALLWARD-DRIEMEIER: Well, I -- I
18 don't think that there's -- there's case law
19 that's clear on this --

20 JUSTICE BREYER: No?

21 MR. HALLWARD-DRIEMEIER: -- but -- but
22 the notion of the trademark as property, and
23 McCarthy is very clear --

24 JUSTICE BREYER: No, I'm not talking
25 about trademarks. Let's -- necessarily, but --

1 but, gee, I mean, they've had property law for
2 500 years and people have breached for 500
3 years. And --

4 MR. HALLWARD-DRIEMEIER: But not
5 trademarks, Your Honor, because --

6 JUSTICE BREYER: Well, no, okay,
7 but there --

8 MR. HALLWARD-DRIEMEIER: Because you
9 couldn't -- at common law, you couldn't even
10 license a --

11 JUSTICE BREYER: Okay.

12 MR. HALLWARD-DRIEMEIER: -- a
13 trademark because it was the person, the
14 owner's reputation.

15 JUSTICE BREYER: You can't think of
16 any analogy or anything that would tell us when
17 you walk in the day before, say nobody knows
18 about bankruptcy, and you say Breyer has
19 breached the contract --

20 MR. HALLWARD-DRIEMEIER: I -- I --

21 JUSTICE BREYER: -- but I want to keep
22 the property.

23 MR. HALLWARD-DRIEMEIER: I think --

24 JUSTICE BREYER: There's just no good
25 case that would help me?

1 MR. HALLWARD-DRIEMEIER: Well, if
2 we're talking about something other than --
3 other than trademark --

4 JUSTICE BREYER: Anything that you
5 think is analogous.

6 MR. HALLWARD-DRIEMEIER: -- other than
7 trademark, then you're right, that the -- the
8 -- the non-bankruptcy law is that the
9 counterparty gets to choose whether to treat
10 that anticipatory breach as --

11 JUSTICE BREYER: Okay. If that's --

12 JUSTICE KAGAN: Right. But the
13 question is whether you have any authority for
14 the proposition that trademark is different,
15 whether there's any authority that says if
16 you're outside bankruptcy and the licensor
17 breaches, is there any authority for the idea
18 that the licensee then has to stop using the
19 mark?

20 MR. HALLWARD-DRIEMEIER: I don't have
21 a case to --

22 JUSTICE BREYER: No. And then --

23 MR. HALLWARD-DRIEMEIER: -- to that
24 effect, Your Honor.

25 JUSTICE BREYER: -- you see then --

1 then the argument really turns down to, which
2 is where I sort of felt after reading the
3 briefs, well, is this continuous obligation to
4 keep the trademark going, which is on me, the
5 breacher, is that enough?

6 And at that point, I become uncertain.
7 And one of the things cutting against you is
8 that the licensee can keep up the trademark
9 himself. I don't know if that's enough. So
10 have you found anything that would really help
11 me?

12 MR. HALLWARD-DRIEMEIER: No, but the
13 licensee cannot keep up the trademark. That's
14 the problem.

15 JUSTICE BREYER: Right.

16 MR. HALLWARD-DRIEMEIER: The licensee,
17 under the Lanham Act, the licensee may license
18 the trademark as a "related party" and it's not
19 meaning, you know, subsidiary. It means that
20 it is acting under the control of the trademark
21 owner.

22 Without that control, the trademark no
23 longer serves as the source of identifying for
24 the consumers that it is a genuine article.
25 That's why trademarks are recognized as

1 property. Of course, historically --

2 CHIEF JUSTICE ROBERTS: So the -- the
3 license -- the licensee can't take any steps
4 when a third-party is infringing the trademark
5 regardless of what the licensor thinks?

6 MR. HALLWARD-DRIEMEIER: No. It's --
7 it's --

8 CHIEF JUSTICE ROBERTS: Because the
9 licensee is certainly injured by those infringe
10 -- infringing activities.

11 MR. HALLWARD-DRIEMEIER: It's -- it's
12 the licensor who enforces the trademark because
13 it is the licensor's reputation, and the -- and
14 the law imposes on the licensor that
15 responsibility.

16 CHIEF JUSTICE ROBERTS: Well, it may
17 be the licensor's reputation, but it's the
18 licensee's income, right? If the -- if the
19 trademark no longer has value, that certainly
20 undermines the value that the licensee saw in
21 the original contract.

22 MR. HALLWARD-DRIEMEIER: Well, it --
23 it may be, Your Honor, but, again, this is why
24 McCarthy specifically warns against analogies
25 of trademark to other forms of property, even

1 those that look very similar, like patents,
2 because trademarks require a unity of
3 ownership. All goodwill must accrue to the
4 trademark owner because --

5 JUSTICE BREYER: All right. That may
6 be, but there are thousands of McDonald's, I
7 guess, firms that have leased the word
8 "McDonald." And if one of -- if somehow super
9 McDonald went bankrupt, couldn't those trustees
10 say the people in this neighborhood trust me to
11 have real McDonald's, and what I'll do is I
12 will look at every hamburger and I will make
13 certain that -- that these hamburgers are
14 exactly the same as they were when McDonald was
15 still alive or whatever.

16 Now he doesn't have a right to do
17 that? Because I got the impression in the
18 other briefs he does.

19 MR. HALLWARD-DRIEMEIER: Your -- Your
20 -- Your -- Your Honor, once -- once the
21 trademark owner ceases to control the mark and
22 enforce the -- the -- the quality --

23 JUSTICE BREYER: Yeah. What happens?

24 MR. HALLWARD-DRIEMEIER: -- then it
25 becomes an abandoned trademark and it loses its

1 value.

2 JUSTICE BREYER: But what happens to
3 an abandoned trademark? Can you use an
4 abandoned trademark?

5 MR. HALLWARD-DRIEMEIER: Well, it's no
6 longer a trademark. It's no longer --

7 JUSTICE BREYER: No. Can a person --

8 MR. HALLWARD-DRIEMEIER: Yes.

9 JUSTICE BREYER: Can --

10 MR. HALLWARD-DRIEMEIER: Yes.

11 JUSTICE BREYER: He can, okay.

12 MR. HALLWARD-DRIEMEIER: Yes.

13 JUSTICE BREYER: If he can, and here
14 we're dealing with non-exclusive licenses, why
15 isn't that his problem?

16 MR. HALLWARD-DRIEMEIER: Well, Your
17 Honor, again, the -- the -- the rule, the
18 general rule under the 365(g) is that all
19 claims for breach of the contract have to be
20 brought prepetition. And that's because a
21 prepetition claim is pennies on the dollar. A
22 postpetition claim is dollars for dollar.

23 If you allow the counterparty to
24 choose, do I want prepetition pennies or do I
25 want postpetition dollars, they're always going

1 to choose dollars. And that would frustrate
2 Congress's purpose of ensuring that all claims
3 are brought, resolved, and discharged as part
4 of the bankruptcy.

5 And that's why Congress knew that it
6 had to provide all of the exceptions to the
7 rule under --

8 JUSTICE KAGAN: Okay. But that's your
9 -- that's your bigger argument, which is not a
10 trademark argument. Your -- that's an argument
11 about everything, right, which is that we
12 should not read (g) to say that, you know, what
13 (g) says, honestly, (g) says constitutes a
14 breach. That suggests that you just look to
15 the effects of a breach under non-bankruptcy
16 law. Why -- why doesn't (g) say that?

17 MR. HALLWARD-DRIEMEIER: What (g) says
18 is that it constitutes a breach pre-bankruptcy.
19 So the question is, what are the claims that
20 have to be brought? Are they all claims? Is
21 it a total breach and you have to bring the
22 full value of claims, or there are some rights
23 that -- that continue?

24 If Congress thought that some rights
25 would continue --

1 JUSTICE KAGAN: But what -- but what
2 you're saying, Mr. Hallward-Driemeier, is that
3 -- is that what (g) tells you is that you can
4 unwind the entire deal. And that's not the
5 effect of a breach outside of bankruptcy in --
6 in -- certainly in the usual context.

7 MR. HALLWARD-DRIEMEIER: It -- it can
8 be. But -- but the --

9 JUSTICE KAGAN: Well --

10 MR. HALLWARD-DRIEMEIER: --
11 non-bankruptcy rule gives that choice to the
12 counterparty. And Congress flipped that in
13 365. It's only in the exceptions that the
14 counterparty has the choice.

15 JUSTICE KAGAN: Well, what language
16 are you pointing to in 36 -- 365(g) that says
17 anything other than we look to see what happens
18 when you breach?

19 MR. HALLWARD-DRIEMEIER: It -- the
20 principal language is that it's a prepetition
21 breach. And then you have to trace it through
22 -- and I realize the Bankruptcy Code is very
23 convoluted, but you have to trace it through
24 502(g)(1).

25 JUSTICE KAGAN: Well, I think we can

1 understand it.

2 (Laughter.)

3 MR. HALLWARD-DRIEMEIER: I'm sure you
4 can, but just to explain why it's going to take
5 me some steps. 502(g)(1) says that a claim
6 that arises from the rejection must be brought,
7 administered, and is discharged under the
8 general rule as if it had arisen
9 pre-bankruptcy.

10 And then the discharge statute, 1114,
11 also refers to 502(g). It says that all claims
12 that arose pre-confirmation are discharged.

13 And then it specifically references
14 the claims specified in 502(g). Why? Because
15 what 502(g) does is make clear that all claims
16 based on the breach that is the rejection are
17 deemed prepetition breach.

18 If Congress thought that some of those
19 claims would be brought for pennies but other
20 claims could be brought for full dollars,
21 Congress would have told us where that line
22 was, and it didn't.

23 What instead Congress did is it
24 provided the general rule that the -- the --
25 instead of the counterparty getting the choice

1 to treat it as a total breach, if terminated,
2 or sue to enforce, the debtor, the trustee gets
3 that choice. I'm going to treat it as a total
4 breach, terminate it.

5 And then what the exceptions do in
6 each of them is it gives the counterparty a
7 choice. So now it's the exception. Now, as in
8 non-bankruptcy law, the counterparty gets the
9 choice to treat it as terminated; that's the
10 general rule when Congress enacted (n), they
11 said that's the general rule, what would apply,
12 apart from the exception, or accept these
13 rights. But the rights that are accepted are a
14 subset of rights that would exist under
15 non-bankruptcy law.

16 And -- and I'll point you to (n) in
17 particular, because (n) makes clear that the
18 following rights that the patentee -- that the
19 licensee would not -- would have under
20 non-bankruptcy law are not available to it,
21 okay?

22 The right to specific performance.
23 The right to updates in the -- in the software
24 or the patent. The right to setoff that would
25 be available under non-bankruptcy law. The

1 right to an administrative claim.

2 All of those rights that a party would
3 have under non-bankruptcy law the counterparty
4 does not have if they elect the rights that
5 Congress has provided them under (n).

6 So the idea that Congress adopted this
7 very detailed exception that goes on for pages
8 to provide for patentees' licenses, rather,
9 patent licensees, because they were a favored
10 party, and that in the end those are fewer and
11 lesser than the rights of trademark owners or
12 that patent licensees would have had --

13 JUSTICE GINSBURG: How do you --

14 MR. HALLWARD-DRIEMEIER: -- had there
15 been no exception at all.

16 JUSTICE GINSBURG: -- how do you
17 explain that the scholars in this field, the
18 bankruptcy field, disagree with your
19 interpretation and they say Lubrizol was wrong
20 and Sunbeam was right?

21 MR. HALLWARD-DRIEMEIER: Well, Your
22 Honor, it's not a uniform view. We've pointed
23 to articles that agree with us. The Peter
24 Menell article agrees that upon the rejection
25 of a trademark license, the licensee's right to

1 use is terminated, and instead they have a
2 claim for pre-bankruptcy pennies on the dollar.

3 And, of course, the Wilton article
4 says the same. Mr. Wilton is my co-counsel, so
5 I understand you may discount that, but the --

6 (Laughter.)

7 MR. HALLWARD-DRIEMEIER: But -- but it
8 is absolutely not true that the views are
9 unanimous in one -- in one respect.

10 Among the amici that the other side
11 have are the INTA and other organizations that
12 have gone to Congress many times to ask
13 Congress to adopt an exception similar to (n)
14 for trademark licensees, and Congress has
15 refused to do so.

16 So now they're asking this Court to do
17 what they have failed to obtain from Congress.
18 But note when they went to Congress to ask them
19 to adopt an exception, they understood that it
20 had to be nuanced. It had to balance the
21 parties' respective rights.

22 It had to, for example, provide that
23 you had to continue to conform to trademark
24 standards, and, for example, that you have to
25 continue to pay your share of advertising fees.

1 All of these are things that are
2 different because of trademark, because of the
3 duty of control, because of the need to
4 maintain consistency. And Congress could do
5 that in a statute, that's what was proposed,
6 Congress has declined to do so. And it's --

7 JUSTICE BREYER: Let me -- let me be
8 sure I'm not missing something. Forget
9 bankruptcy. Think of contract law over the
10 course of the centuries, all right?

11 Now, as I started out, A breaches a
12 provision. The ordinary rule is B can keep the
13 property that he's got if he wants. Isn't that
14 the ordinary rule?

15 But then there are lots -- there
16 should be lots of not ordinary cases. There
17 should be lots of cases where, maybe not like
18 igloos, but the property is severely injured,
19 disappears, dah-dah-dah, unless the breacher
20 keeps it up.

21 And in those non-bankruptcy cases,
22 what happens? Does he -- does he -- does --
23 does he -- what happens?

24 MR. HALLWARD-DRIEMEIER: Well, Your
25 Honor, previously I said that I was not aware

1 of a case that specifically held that breach by
2 a licensor ends the licensee's right to use the
3 mark. My colleagues have --

4 JUSTICE BREYER: Yeah.

5 MR. HALLWARD-DRIEMEIER: -- have
6 reminded me of the Seventh Circuit's decision
7 in Gorenstein Enterprises v. Quality Care-USA,
8 874 F.2d 431, which holds that it does end the
9 licensee's right to use the mark.

10 Again, I think that's because of the
11 nature of trademark, that it represents the --
12 the owner's reputation, the unitary theory of
13 ownership, which is unique to trademark, and
14 the fact that without that control there is no
15 related party to -- to use the -- the -- the
16 mark and, therefore, it ceases to be effective.

17 JUSTICE ALITO: So this is --

18 MR. HALLWARD-DRIEMEIER: But --

19 JUSTICE ALITO: -- a special rule --
20 we're outside of bankruptcy -- this is a
21 special rule for trademarks? It's different
22 from the rule that would apply outside
23 bankruptcy for, let's say, leased property?
24 And it's -- the reason why there's a different
25 rule is because of the duty of the -- the

1 licensor to maintain the quality control?

2 MR. HALLWARD-DRIEMEIER: Right, right.

3 There's --

4 JUSTICE KAGAN: I thought you were

5 saying exactly the opposite,

6 Mr. Hallward-Driemeier. I mean, you said this

7 is consistent with the rule for photocopiers.

8 MR. HALLWARD-DRIEMEIER: In -- in --

9 JUSTICE ALITO: And your entire brief

10 --

11 MR. HALLWARD-DRIEMEIER: -- in

12 bankruptcy, in bankruptcy, that's right. I

13 thought Justice Alito's question --

14 JUSTICE ALITO: Yeah. No, this is --

15 MR. HALLWARD-DRIEMEIER: -- had to do

16 with non-bankruptcy.

17 JUSTICE ALITO: -- outside bankruptcy.

18 So I -- I don't -- I don't understand why there

19 would be a special rule for trademark, outside

20 bankruptcy, that would be -- it would be

21 predicated on the licensor's failure to

22 exercise the quality control.

23 And so, because -- because the

24 licensor doesn't want to do that, the licensor

25 in -- in breach of the contract gets a more

1 favorable result. It doesn't seem to make any
2 sense.

3 MR. HALLWARD-DRIEMEIER: Well, Your --
4 Your Honor, it -- again, I think it's because
5 of the unique nature of the trademark as being
6 only -- you can only have a valid license of
7 the trademark if there is that control. That's
8 specified by the Lanham Act. It's -- and --
9 and so, if you don't have that control, then
10 you no longer have a valid lease --

11 JUSTICE SOTOMAYOR: I'm sorry --

12 MR. HALLWARD-DRIEMEIER: -- and so --

13 JUSTICE SOTOMAYOR: -- but I don't
14 know why that doesn't control non-bankruptcy
15 rights.

16 MR. HALLWARD-DRIEMEIER: We -- if --
17 if --

18 JUSTICE SOTOMAYOR: Your point would
19 seem to control both, but it doesn't seem to.
20 You're saying bankruptcy gives you more rights.

21 MR. HALLWARD-DRIEMEIER: Well, what --
22 what we're saying is that there -- we think
23 that with trademarks especially, you can't
24 continue to exercise the trademark license
25 after rejection and that -- because of the

1 unique character of trademarks.

2 But, under our view, it's true
3 generally as well, because if you have a lease
4 of a photocopier, it -- it -- the -- the
5 general rule of 365(g) is that if you -- if you
6 reject a -- a lease of a photocopier, that
7 lease now is -- is effectively terminated.
8 It's been reduced to a claim for prepetition
9 damages.

10 And 542(a) would tell us that the
11 possessor of the -- of the photocopier has to
12 return it to the estate, unless the -- the
13 lease is assumed, which it normally is, because
14 it's more beneficial.

15 So the general rule is that these
16 types of ongoing relationships are terminated,
17 they're reduced to a claim for pre-bankruptcy
18 damages, breach of contract damages that are
19 paid pennies on the dollar, and that it's not
20 up to the counterparty to decide they don't
21 want pennies on the dollar, they would rather
22 have dollars for dollar, because if that were
23 the case, then no counterparty would bring a
24 claim for pre-bankruptcy breach. They would
25 all wait and try to enforce, seek specific

1 performance --

2 JUSTICE SOTOMAYOR: Do you have any
3 argument that would limit a ruling in your
4 favor just to trademark law? Because it seems
5 to me that you're asking us to do exactly what
6 the other side wants us to do, to announce a
7 general interpretation of this provision that
8 basically says these types of contracts
9 actually do survive --

10 MR. HALLWARD-DRIEMEIER: Well --

11 JUSTICE SOTOMAYOR: -- lessees have
12 the right to terminate, in part, and keep other
13 rights alive.

14 MR. HALLWARD-DRIEMEIER: Well, Your --
15 Your Honor --

16 JUSTICE SOTOMAYOR: You -- I thought
17 when I read your briefs that you had an
18 argument as to why we should limit our ruling
19 to trademark law. But there's no way to do
20 that even under your interpretation.

21 MR. HALLWARD-DRIEMEIER: No -- no,
22 Your Honor. I -- I think that -- that there
23 is.

24 First of all, all we're asking the
25 Court to do is adhere to its ruling in

1 Bildisco, which said that the effect of
2 rejection is that the contract is no longer an
3 enforceable contract. That's -- that's our
4 rule.

5 This Court decided it in Bildisco.
6 They -- it was in the NLRA context, but the
7 first part of the opinion is all about how --
8 why, you know, collective bargaining agreements
9 are subject to 365(a) and (g), just like any
10 other contract.

11 And so, when the Court said --

12 JUSTICE SOTOMAYOR: That's somewhat
13 different because that requires actual
14 affirmative obligations by the employers.

15 MR. HALLWARD-DRIEMEIER: Well, Your
16 Honor --

17 JUSTICE SOTOMAYOR: And you're not
18 arguing the employer has to -- the trademark
19 owner has to continue his rights.

20 MR. HALLWARD-DRIEMEIER: One -- one of
21 the rights that was -- was deemed one that had
22 to be brought as a prepetition claim in
23 Bildisco was a -- a -- a claim based upon the
24 loss of seniority rights. Seniority rights is
25 a form of property right that would be

1 protected certainly by the Due Process Clause.

2 And yet, that claim for the value of
3 the seniority rights had to be brought as a
4 prepetition claim. It couldn't just be
5 enforced against the employer anymore. It had
6 -- it was reduced to a claim for prepetition
7 damages.

8 And that's the rule that we're
9 articulating. But even if 365 didn't work the
10 way we say, even if the general rule of 365(g)
11 is that non-bankruptcy law provides such that
12 the exceptions become superfluous and -- and
13 actually give the favored parties fewer rights
14 than the general rule would provide, which is,
15 of course, contrary to everything this Court
16 has ever said about exceptions, which they're
17 called, "exceptions" in 365(g), we would still
18 have an argument --

19 JUSTICE KAGAN: But -- so could I --

20 MR. HALLWARD-DRIEMEIER: -- that
21 trademark is different.

22 JUSTICE KAGAN: -- understand the sort
23 of nature of the argument? I mean, you have
24 your general argument, and the way that goes is
25 Ms. Spinelli says the effect of rejection is

1 breach, and you say the effect of rejection is
2 rescission. And that's the basic argument,
3 where, you know, honestly, Ms. Spinelli has
4 this language that says it constitutes a
5 breach. So -- but --

6 MR. HALLWARD-DRIEMEIER: Prepetition
7 breach.

8 JUSTICE KAGAN: So -- but then you
9 say, even if Ms. Spinelli is right on that and
10 we just look to what it means to breach outside
11 non -- outside bankruptcy law, then you say we
12 have a special rule for trademarks because
13 trademarks are different outside bankruptcy
14 law, and you point us to a single Seventh
15 Circuit case, is that correct?

16 MR. HALLWARD-DRIEMEIER: And -- and --
17 and the nature of -- of the trademark. And
18 McCarthy explains the -- the rule of unitary
19 ownership, that it's a different type of
20 property, that the property is really just the
21 property interest in the owner's reputation,
22 and the fact that the whole notion of -- of
23 licensing, which was a new advent in trademark,
24 was because the licensee is treated as a
25 related party because it is operating under the

1 control.

2 So it is in the nature of the -- it is
3 in the nature of trademark that it is subject
4 to that control. And without that control, it
5 ceases to exist.

6 But I want to point the Court to the
7 specific language of this trademark license
8 which I think really brings home the point.
9 This trademark license -- and this is at JA
10 237 -- says that it grants to Mission a
11 non-exclusive, non-transferable, limited
12 license for the duration of the term to use its
13 mark for the limited purposes of performing its
14 obligations, exercising its rights under the
15 agreement, subject to written trademark
16 guidelines of the -- of Coolcore and the right
17 of Coolcore to review and approve.

18 In other words, all it was was a
19 contract right. It's not a property right in
20 the license. There can't be because of the
21 rule of unitary ownership. All it was was a
22 contract right to use the trademark subject to
23 Coolcore's control.

24 And if that control goes away because
25 you can't enforce that, that's one of the --

1 one of the, you know, prospective performance
2 obligations of Coolcore in a rejected contract,
3 you can't enforce that, then that control goes
4 away, and with the control goes the license.

5 Thank you very much.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Three minutes, Ms. Spinelli.

9 REBUTTAL ARGUMENT OF DANIELLE SPINELLI
10 ON BEHALF OF THE PETITIONER

11 MS. SPINELLI: Thank you. I have
12 three points that I'll try to make quickly.

13 First, the Gorenstein case that
14 counsel referred to does not hold that a
15 trademark licensor can unilaterally terminate a
16 license by ceasing to exercise quality control.
17 That was a case in which the licensee defaulted
18 on the agreement for other reasons and then
19 tried to continue using the trademark
20 afterwards. Obviously, that can't be done.

21 So there's no authority for the
22 proposition that general contract principles
23 don't apply to trademark licenses.

24 Second, this is not about whether the
25 debtor can abandon the trademark and get rid of

1 its monitoring obligations. It's about whether
2 the estate can take back the rights in the
3 license and resell them to somebody else and
4 distribute the proceeds among creditors, and it
5 can't.

6 Rejection is not avoidance. There are
7 separate avoidance procedures in the code.
8 Rejection doesn't let the estate claw back
9 interests in the debtor's assets that the
10 debtor conveyed before bankruptcy.

11 JUSTICE SOTOMAYOR: Could you --

12 MS. SPINELLI: So, just --

13 JUSTICE SOTOMAYOR: -- answer just one
14 question for me? If you continue using the
15 mark, do the damages that you incur after the
16 filing of the bankruptcy -- are they
17 prepetition debt or postpetition debt? Are you
18 going to get a priority for the damages that
19 accrue after you declare bankruptcy -- after
20 bankruptcy had been declared?

21 MS. SPINELLI: In this case, Mission
22 has an administrative claim stemming from the
23 wrongful deprivation of its right to use the
24 trademark post-rejection. The estate -- it's a
25 claim against the estate that arose

1 postpetition, which is an administrative --

2 JUSTICE SOTOMAYOR: So --

3 MS. SPINELLI: -- claim.

4 JUSTICE SOTOMAYOR: -- you're going to
5 get more rights than (n) gives other
6 intellectual --

7 MS. SPINELLI: Yes.

8 JUSTICE SOTOMAYOR: -- property.

9 MS. SPINELLI: And let me explain why
10 that's exactly what should happen. Prior to
11 bankruptcy -- and this is just like a lease,
12 Justice Breyer -- prior to bankruptcy, the
13 debtor conveyed the licensee an interest in its
14 intellectual property. We don't have to call
15 that a property right. It doesn't matter what
16 we call it. But it's a stick in the bundle of
17 sticks, just the same way that a lease grants
18 the tenant a leasehold interest in the
19 landlord's real property. And McCarthy makes
20 this exact analogy.

21 Once the license has been granted, the
22 licensor no longer has that stick. And it's
23 uncontested that the licensor can transfer only
24 what it has. Respondent doesn't dispute that,
25 outside bankruptcy, if the licensor sold the

1 intellectual property, the buyer would take
2 subject to the license.

3 And we do have authority for this.
4 It's in the blue brief. And because of that,
5 the licensor's creditors also cannot access the
6 value of the license for their claims against
7 the debtor.

8 JUSTICE BREYER: One quick question
9 and then there's your third. But -- but --
10 and, look, outside of bankruptcy or in general,
11 you lease, the lessor leases a trademark to the
12 lessee. Lessor doesn't keep it up, doesn't
13 quality control.

14 Does that stick, which is now in the
15 hands of the lessee, dissolve, disappear --

16 MS. SPINELLI: No.

17 JUSTICE BREYER: -- gone?

18 MS. SPINELLI: No, it does not. May
19 I --

20 CHIEF JUSTICE ROBERTS: Sure.

21 MS. SPINELLI: -- respond, Justice
22 Roberts?

23 No, it doesn't. It -- it continues to
24 exist. The -- ceasing quality control does not
25 immediately dissolve the license. And because,

1 outside bankruptcy, the debtor doesn't have the
2 right to transfer the license to a buyer or to
3 its creditors, that is also true in bankruptcy.

4 One of the most fundamental principles
5 of bankruptcy is that the estate can't have any
6 greater rights to property than the debtor
7 itself had at the time of filing. The -- the
8 debtor's IP comes into the bankruptcy estate
9 subject to the license, so the value of the
10 license is not available to creditors. It
11 belongs to the licensee. And nothing about
12 rejection enables the estate to take that
13 license back.

14 Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel. The case is submitted.

17 (Whereupon, at 11:13 a.m., the case
18 was submitted.)

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