No. 17-

IN THE SUPREME COURT OF THE UNITED STATES

MISSION PRODUCT HOLDINGS, INC.,
Applicant,

v.

TEMPNOLOGY, LLC,
Respondent.

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable Stephen Breyer, Associate Justice of the Supreme Court of the United States and Circuit Justice for the First Circuit:

Pursuant to this Court's Rule 13.5, Mission Product Holdings, Inc. ("Mission") respectfully requests a 60-day extension of time, to and including June 11, 2018, to file a petition for a writ of certiorari in this case.[1] The First Circuit entered judgment on January 12, 2018. *See* App. A. The time to file a petition for a writ of certiorari currently expires on April 12, 2018. This Court's jurisdiction would be invoked pursuant to 28 U.S.C. §1254(1).

1. Debtor Tempnology, LLC ("Tempnology") produced specialized clothing and accessories designed to remain at a low temperature when used during exercise. It marketed these products using the COOLCORE and DR. COOL trademarks. In 2012, Mission and Tempnology executed a marketing and distribution agreement ("the Agreement") which, as

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[1] Mission has no parent company and no publicly held company owns 10% or more of its stock.

relevant here, granted Mission exclusive rights to distribute several of Tempnology's products within the United States, and a non-exclusive license to use Tempnology's trademarks in those distribution efforts. On September 1, 2015, however, Tempnology filed a petition for Chapter 11 bankruptcy, and the next day, it moved to reject the Agreement under §365 of the Bankruptcy Code. *See* 11 U.S.C. §365(a). The question this case presents concerns the effect of that rejection on Mission's rights under the Agreement.

2. Section 365 of the Bankruptcy Code provides that a debtor "may … reject any executory contract," 11 U.S.C. §365(a), and that "rejection of an executory contract … constitutes a breach of such contract … immediately before the date of the filing of the petition" for bankruptcy, *id.* §365(g). In *Lubrizol Enterprises, Inc.* v. *Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985), the Fourth Circuit held that a debtor's rejection of an agreement under which it had licensed its intellectual property deprived the licensee of its right to continue using the intellectual property. *Id.* at 1048. Congress responded by enacting §365(n) of the Bankruptcy Code, which provides that when the debtor rejects a contract "under which the debtor is a licensor of a right to intellectual property, the licensee … may … retain its rights … under such contract … to such intellectual property" for the duration of the contract and any renewal as of right. 11 U.S.C. §365(n)(1); *see also* S. Rep. No. 100-505, at 2-5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3200, at 3200-3204. Congress defined "intellectual property" to include, among other things, patents, copyrights, and trade secrets, but not trademarks. *See* 11 U.S.C. §101(35A); *see also* S. Rep. No. 100-505, at 5 (noting that "the bill does not address the rejection of … trademark … licenses," although "such rejection is of concern because of the interpretation of section 365 by the Lubrizol court," "[s]ince these matters could not be addressed without more extensive study").

3. In bankruptcy court, Mission argued that Tempnology's rejection of the Agreement did not deprive Mission of its exclusive right to distribute Tempnology's products using the licensed trademarks. The bankruptcy court disagreed. It concluded that §365(n) protected only intellectual property rights as defined in §101(35A) and did not apply to executory contracts pertaining to distribution rights or trademark licenses, and that absent application of §365(n), Tempnology's rejection of the Agreement terminated Mission's exclusive distribution and trademark rights.

4. Mission appealed to the Bankruptcy Appellate Panel for the First Circuit ("BAP"). The BAP affirmed the bankruptcy court's holding that Mission could not retain its exclusive distribution rights, but it reversed as to Mission's right to use Tempnology's trademarks, following the Seventh Circuit's decision in *Sunbeam Products, Inc.* v. *Chicago American Manufacturing, LLC*, 686 F.3d 372 (7th Cir. 2012) (Easterbrook, C.J.). In *Sunbeam*, the Seventh Circuit held that rejection of a trademark license does not terminate the licensee's right to use the debtor's trademarks. *Id.* at 375-378. Although the Seventh Circuit agreed that §365(n) does not protect trademark licenses, it expressly disagreed with the Fourth Circuit's view in *Lubrizol* of the effect of rejection under §365(g), acknowledging that its decision "creates a conflict among the circuits." *Id.* The Seventh Circuit explained: "What § 365(g) does by classifying rejection as [a] breach is establish that in bankruptcy, as outside of it, the other party's rights remain in place." *Id.* at 377. The "debtor's unfulfilled obligations are converted to damages" that are treated as pre-petition claims, "[b]ut nothing about this process implies that any rights of the other contracting party have been vaporized." *Id.* Following *Sunbeam*, the BAP concluded that if Mission's right to use Tempnology's trademarks would not vanish due to

Tempnology's breach of the Agreement outside bankruptcy, that right did not vanish due to Tempnology's decision to reject, and thereby breach, the Agreement inside bankruptcy.

5. Mission appealed to the First Circuit, which disagreed with the BAP and affirmed the bankruptcy court. Although the court of appeals unanimously agreed that §365(n) did not protect Mission's exclusive distribution rights and trademark license, it split 2-1 regarding the effect of rejection on Mission's rights under the Agreement. The majority expressly disagreed with the Seventh Circuit's reasoning in *Sunbeam*, and instead sided with the Fourth Circuit in *Lubrizol*, holding that rejection terminated Mission's exclusive-distribution and trademark rights under the Agreement. *See* App. A at 3, 14-32. Judge Torruella dissented, noting that he would "follow the Seventh Circuit and the BAP in finding that Mission's rights to use [Tempnology]'s trademark[s] did not vaporize as a result of [Tempnology]'s rejection of the executory contract." App. A at 35.

6. Mission intends to file a petition for certiorari seeking review of the First Circuit's decision. In holding that rejection terminated Mission's rights under the Agreement, the First Circuit expressly disagreed with the Seventh Circuit in *Sunbeam* and thereby deepened a long-standing and acknowledged split among the circuits on the question of the effect of rejection on a license agreement. The First Circuit's decision was also wrong. The Bankruptcy Code specifies the result of a debtor's rejection of an executory contract: It is treated as a prepetition breach of contract, and the counterparty has a prepetition claim for damages arising out of that breach. 11 U.S.C. §365(g). As the Seventh Circuit recognized in *Sunbeam*, that is all rejection does; it relieves the debtor of its affirmative obligations under the contract going forward and creates a claim for breach. It does not terminate the contract or extinguish the counterparty's existing rights under the contract. Rather, to the extent that the counterparty's rights under the contract

would survive the debtor's breach outside bankruptcy, they survive the debtor's breach inside bankruptcy. *See Sunbeam*, 686 F.3d at 377; *see also, e.g.*, Douglas G. Baird, *Elements of Bankruptcy* 123 (6th ed. 2014) (noting that the reasoning of *Lubrizol* "assumes a notion of the rejection power that has no basis in history and makes little sense").

7. Mission engaged the undersigned as new Supreme Court counsel only very recently, on March 16, 2018. Counsel therefore requires additional time to become familiar with the case and to prepare a petition for certiorari that will most effectively and efficiently present the issues for this Court's consideration. That is especially so in light of counsel's other obligations during the relevant period, which include a brief filed in the Third Circuit, pursuant to an expedited briefing schedule, on March 26; a brief due in this Court on March 30; two briefs due in separate appeals in the Seventh Circuit on April 6; and replies in support of petitions for certiorari expected to be filed in this Court on May 14 and May 25.

For the foregoing reasons, Mission respectfully requests that the time for filing a petition for a writ of certiorari in this case be extended by 60 days, to and including June 11, 2018.

Respectfully submitted.

Danielle Spinelli/SM

DANIELLE SPINELLI
Counsel of Record
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 663-6000
danielle.spinelli@wilmerhale.com

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