Docket No. ____________

In the

Supreme Court of the United States

RPD Holdings, L.L.C., *Petitioner*.

v.

Tech Pharmacy Services, d/b/a Advanced Pharmacy Services, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

This case raises two important issues of first impression under the Bankruptcy Code: what happens to an undisclosed executory contract—frequently a valuable asset, yet deemed rejected if not timely assumed—and what exactly is an executory contract? The facts of this case show why this Court should resolve these issues, and they present the perfect matrix in which to do so, while also addressing a key intersection between bankruptcy and patent law.

RPD Holdings, LLC purchased bankruptcy assets pursuant to final bankruptcy court orders, which also provided for the assumption and assignment of executory contracts. The assets included a patent license from Tech Pharmacy Services, LLC, although neither RPD nor the bankruptcy trustees knew this at the time, because the debtors failed to schedule the license. When Tech Pharmacy sued to invalidate the license, RPD sought to enforce the bankruptcy court's final orders against this collateral attack. Reasoning that the license was an executory contract that had been rejected even though it was not scheduled, and ignoring that the bankruptcy court ordered an assumption and assignment, the courts below concluded that the license could not have been assumed and assigned to RPD. This result threatens the finality of bankruptcy sales, is inequitable, punishes the innocent, and conflicts with the Code.

Accordingly, the questions presented are:

1. Is an executory contract that is not scheduled by a debtor automatically rejected under the

Bankruptcy Code such that it cannot be assumed and assigned?

2. Where the bankruptcy court has entered a final order providing for the assumption and assignment of an executory contract, does that order control even if the bankruptcy court erred because the executory contract had actually already been rejected?

3. Alternatively to the foregoing issues, what is the proper definition of an executory contract under the Bankruptcy Code?

PARTIES TO PROCEEDING

The parties to the judgment under review are the following:

> RPD Holdings, LLC, a Texas limited liability company.
>
> Tech Pharmacy Services, LLC.

CORPORATE DISCLOSURE STATEMENT

Petitioner RPD Holdings, LLC is owned by Rick Wilson.

TABLE OF CONTENTS

Questions Presented i

Parties to Proceeding iii

Corporate Disclosure Statement iv

Table of Contents v

Table of Authorities vi

Opinions Below 1

Jurisdiction... 2

Constitutional and Statutory Provisions 3

Statement of the Case... 4

Reasons for Granting the Petition........................ 12

Conclusion 32

Appendix A: Fifth Circuit Opinion 1a

Appendix B: District Court Opinion................... 31a

Appendix C: Bankruptcy Court Findings of
Fact and Conclusions of Law......................... 39a

TABLE OF AUTHORITIES

Cases

Allentown Ambassadors Inc. v. Northeast Am. Baseball LLC, 361 B.R. 422 (Bankr. E.D. Pa. 2007) 13

C.I.R. v. Sunnen, 333 U.S. 591 (1948) 29

Celotex Corp. v. Edwards, 514 U.S. 300 (1995) 15, 23, 24

First Nat'l Bank v. Lasater, 196 U.S. 115 (1905) 19, 20, 21

Griffin v. Oceanic Contractors Inc., 458 U.S. 564 (1982) 17-18

Hallco Mfg. Co. Inc. v. Foster, 256 F.3d 1290 (Fed. Cir. 2001) 30

In re Bleaufontaine Inc., 634 F.2d 1383 (5th Cir. 1981) 12-13

In re CFLC Inc., 89 F.3d 673 (9th Cir. 1996) 27

In re Lovitt, 757 F.2d 1035 (9th Cir. 1985) 17

In re Richmond Metal Finishers Inc., 34 B.R. 521 (Bankr. E.D. Va. 1983) 27

In re Roomstore Inc., 473 B.R. 107 (Bankr. E.D. Va. 2012) 13-14, 26

In re Spoverlook LLC, 551 B.R. 481 (Bankr. D.N.M. 2016) 14, 26

In re THW Enters. Inc., 89 B.R. 351 (Bankr. S.D.N.Y. 1988) 19

In re Tompkins, 95 B.R. 722 (B.A.P. 9th Cir. 1989) 20

In re Zuniga, 287 B.R. 201 (Bankr. E.D. Mo. 2001) 19

In the Matter of Edwards, 962 F.2d 641 (7th Cir. 1992) 13, 23

In the Matter of Murexco Petroleum Inc., 15 F.3d 60 (5th Cir. 1994) 26

Kelly v. Robinson, 479 U.S. 36 (1986) 17

Kessler v. Eldred, 206 U.S. 285 (1907) 29

Marrama v. Citizens Bank, 549 U.S. 365 (2007) 20

Mentor Graphics Corp. v. EVE-USA Inc., 851 F.3d 1275 (Fed. Cir. 2017) 29

Nano-Proprietary Inc. v. Canon Inc., 537 F.3d 394 (5th Cir. 2008) 31

NLRB v. Bildisco, 465 U.S. 513 (1984) 26

Noble Energy, Inc. v. ConocoPhillips Co., 139 S. Ct. 65 (2018) 10

Noble Energy Inc. v. ConocoPhillips Co.,
532 S.W.3d 771 (Tex. 2017) 10

Reed v. City of Arlington, 650 F.3d 571
(5th Cir. 2011) 20

Schwarz v. Folloder, 767 F.2d 125
(5th Cir. 1985) 29

Slater v. U.S. Steel Corp., 820 F.3d 1193
(11th Cir. 2016) 21

Stein v. United Artists Corp., 691 F.2d 885
(9th Cir. 1982) 21

Stoll v. Gottlieb, 305 U.S. 165 (1938) 25

Texas Western Fin. Corp. v. McCraw Candies Inc., 347 F. Supp. 445
(N.D. Tex. 1972) 19

Travelers Indem. Co. v. Bailey, 557 U.S. 137
(2009) 15, 24, 25

United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs. Ltd., 484 U.S. 365 (1988) 17, 18

United Student Aid Funds Inc. v. Espinosa,
559 U.S. 260 (2010) 15, 24

Young v. United States, 535 U.S. 43 (2002) 20

Constitutional Provisions, Statutes, and Rules

11 U.S.C. § 363(m) 13

11 U.S.C. § 365(d)(1) 3, 18

11 U.S.C. §§ 554(c), (d) 21

28 U.S.C. § 157(b)(2) 2

28 U.S.C. § 158(a)(1) 2

28 U.S.C. § 158(d)(1) 2

28 U.S.C. § 1254 2

28 U.S.C. § 1334 2

U.S. Sup. Ct. R. 10(c) 16

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to Executory Contracts, 96 Tex. L.
Rev. 1437 (2018) 14

OPINIONS BELOW

This Petition involves an affirmance by the United States Court of Appeals for the Fifth Circuit, affirming the opinion of the United States District Court for the Northern District of Texas, which itself affirmed a final judgment of the United States Bankruptcy Court for the Northern District of Texas.

With respect to the judgment under review, the Fifth Circuit's opinion is published at *RPD Holdings, L.L.C. v. Tech Pharm. Servs. (In the Matter of Provider Meds, L.L.C.)*, 907 F.3d 845 (5th Cir. 2018). The District Court's opinion affirming the Bankruptcy Court is not published but is available at: https://www.govinfo.gov/content/pkg/ USCOURTS - txnd-3_17-cv-00441/pdf/USCOURTS-txnd-3_17-cv00 441-0.pdf. The Bankruptcy Court's findings of fact and conclusions of law are not published but are available at: https://www.txnb.uscourts.gov/ sites/txn b/files/opinions/15-3101%20F F%26CL.pdf.

All the foregoing opinions have been reproduced in the appendix to this petition.

JURISDICTION

The United States Bankruptcy Court for the Northern District of Texas had bankruptcy jurisdiction to enter a final judgment, as conferred on the District Court and referred to the Bankruptcy Court, under 28 U.S.C. §§ 157(b)(2) and 1334.

The U.S. District Court for the Northern District of Texas had jurisdiction over the appeal of the Bankruptcy Court's judgment under 28 U.S.C. § 158(a)(1).

The U.S. Court of Appeals for the Fifth Circuit had jurisdiction to decide the appeal below under 28 U.S.C. § 158(d)(1).

This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Fifth Circuit under 28 U.S.C. § 1254.

> In a case under chapter 7 of this title [11 USCS §§ 101 *et seq*.], if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

11 U.S.C. § 365(d)(1).

STATEMENT OF THE CASE

The facts regarding the issues for which RPD seeks the Court's review are not contested or in dispute.

I. The Remote Pharmaceutical Machines.

Various affiliated entities, operating under the name "OnSite," were pioneers in the field of remote pharmaceutical dispensing—an emerging industry. Instead of expensive onsite pharmacists and a large stock of pharmaceuticals, appropriate locations (such as nursing homes and prisons) can hire a third-party pharmacy to remotely dispense pharmaceuticals through machines located on site, offering substantial cost savings, security, and consistency. The machines are tightly but remotely controlled from a physical pharmacy, dispensing only the quantity of medication necessary, to a degree of accuracy that is substantially higher than human dispensing. This technology depends on the physical machines in order to actually dispense the pharmaceuticals. Respondent Tech Pharmacy holds a patent on the system, or method, of certain (but not all) remote pharmaceutical dispensing.

II. The Debtors and the License Agreement.

The machines themselves are useless without software to control them. This is where the OnSite entities entered the picture, because it was these entities that pioneered and developed the software used to control the machines. After raising extensive funds, lobbying various governmental and regulatory agencies to permit remote pharmaceutical dispensing, and spending years developing and perfecting the software to a high degree of security and accuracy, the OnSite entities finally hit the market with their software and with their remote pharmacies.

Almost immediately, however, they became embroiled in patent litigation with Tech Pharmacy, which sued the OnSite entities for alleged patent infringement. The OnSite entities asserted patent invalidity in response. After extensive federal judicial proceedings, Tech Pharmacy and the OnSite entities entered into a comprehensive settlement: (i) they entered into that certain *Compromise, Settlement, Release and License Agreement* (the "Settlement Agreement"); and (ii) they dismissed the lawsuit with prejudice. Under the Settlement Agreement, each of the OnSite entities (numbering more than ten) received a perpetual license to practice the Tech Pharmacy patent, in exchange for future royalties.

III. The Bankruptcy Sales.

Despite early success and continuing growth, the OnSite entities had spent so much of their capital developing their product and the complicated intellectual property it required that they ran out of cash and could no longer attract new investors. Beginning in late 2012, the OnSite entities filed Chapter 11 reorganization bankruptcy cases, which cases were promptly converted to Chapter 7 liquidations (numbering ten cases in total). A series of Chapter 7 trustees were appointed to administer the bankruptcy estates and their remaining assets.

The Bankruptcy Code and the Bankruptcy Rules require a debtor to file extensive schedules of assets and liabilities and statements of financial affairs with the bankruptcy court. These are filed under oath and penalty of perjury, for the express purpose that the bankruptcy court, the trustee, and all creditors and parties-in-interest be entitled to rely on them as accurate representations of the debtor's assets, liabilities, and financial affairs. These schedules expressly require the debtor to disclose and list "executory contracts"—a special kind of contract subject to special provisions and entitled to special protections under the Bankruptcy Code. None of the OnSite debtors listed the Settlement Agreement as an executory contract on their schedules.

Interested in the underlying technology, petitioner RPD purchased secured debt and liens against the OnSite debtors and their assets. These assets (and therefore RPD's collateral) consisted mainly of various and valuable intellectual property rights, source code, and licenses, which enabled the OnSite system to function. RPD quickly became embroiled in extensive litigation with various trustees and a competing secured creditor concerning the validity of the debt and liens RPD purchased. Ultimately, RPD, the trustees, and the competing secured creditor resolved all disputes: RPD and the competing secured creditor would pay money into the estates and would each own the underlying intellectual property, free to compete with each other in the marketplace and to develop that intellectual property separately. Prior to this final settlement, and rather than spend additional funds litigating its debt and liens, RPD purchased substantially all of the assets—including its collateral—from three of the ten OnSite bankruptcy estates, each administered by a different trustee. In this manner, RPD obtained what it wanted, in the form of its collateral; the trustees obtained what they wanted, in the form of consideration for other creditors; and litigation was avoided.

In each of these three instances, the selling trustee entered into an asset purchase agreement with RPD and filed a motion with the bankruptcy court for the approval of the sale. In each instance, the bankruptcy court held a hearing, accepted evidence, and approved the sale. In each instance, the bankruptcy court entered an order approving the sale, finding that RPD was a good faith purchaser, affording RPD all of the protections accorded a purchaser under the Bankruptcy Code. None of the sale orders was appealed, and each order became final and non-appealable.

Importantly, each sale order contained substantially identical language:

> to the extent that any of the Subject Property is such an executory contract, the same is hereby ASSUMED by the Estate and immediately ASSIGNED to RPD under the applicable provisions of section 365 of the Bankruptcy Code.

(Capitalization in Original).

To reiterate, the Settlement Agreement was not scheduled by any of the Debtors. None of the selling trustees knew of the existence of the Settlement Agreement at the time of the sales. RPD did not know of the existence of the Settlement Agreement at the time of the sales. The bankruptcy court obviously did not know of the existence of the Settlement Agreement. The selling trustees and RPD learned of the existence of the Settlement Agreement only much later, and well after RPD paid millions of dollars in combined cash and credit consideration for the assets it purchased, from counsel for the competing secured creditor during negotiations leading to a final and comprehensive settlement with that creditor and the remaining trustees.

That RPD did not know of the existence of the Settlement Agreement did not matter. RPD purchased its collateral, which unquestionably included the Settlement Agreement, and it purchased all physical and intangible property necessary to engage in the business of remote pharmaceutical dispensing. The selling trustees intended to sell to RPD all of its collateral and all property necessary to take over the debtors' businesses, reserving for themselves only cash, receivables, causes of action, and other non-dispensing assets. That the ultimate, global resolution with the competing secured creditor included a mechanism whereby each of the competing creditors would obtain title to all assets necessary to engage in this business, and would then engage in this business and compete with each other, further demonstrates the expectation of RPD, the selling trustees, all creditors, and the bankruptcy court. Nor does the fact that RPD and the selling trustees were not aware of the Settlement Agreement change the resulting legal analysis because, as quoted above, the bankruptcy court ordered that, to the extent any of the sold property was an executory contract, it was assumed and assigned. RPD mentions the foregoing only because one may inquire as to why RPD cares about an asset that it did not know existed: RPD cares about this asset because the asset is part of what RPD intended to buy, which was the whole system used by the debtors to remotely dispense pharmaceuticals. If RPD is denied an asset on which this system depends, whether it be a tangible asset, an intangible asset, or a legal right, then the whole of what it purchased is threatened.

IV. Litigation Ensues.

More than a year after the first of these sales, Tech Pharmacy sued various of the OnSite entities and various affiliates of RPD in Texas state court, alleging that the OnSite entities had transferred the Settlement Agreement to these affiliates in violation of the Settlement Agreement's anti-assignment clause, and seeking the termination of the Settlement Agreement as a result. RPD immediately intervened. RPD noted that, among other things, it had lawfully been assigned the Settlement Agreement through the bankruptcy sales discussed above and pursuant to final and non-appealable orders of the bankruptcy court, with the Tech Pharmacy suit therefore amounting to an impermissible collateral attack on final federal court orders. RPD removed the suit to the bankruptcy court, where the suit proceeded as an adversary proceeding.

The bankruptcy court conducted the trial in January, 2017. Through lengthy findings of fact and conclusions of law, the bankruptcy court found against RPD on almost every issue, including the threshold issue of whether RPD even purchased the Settlement Agreement. On that issue, the bankruptcy court concluded that, as neither the selling trustees nor RPD knew of the Settlement Agreement, it could not have been sold or purchased as a matter of Texas contract law. The bankruptcy court also held that the Settlement Agreement was an executory contract that had been deemed rejected and that, therefore, there was nothing left that could have been sold.

On appeal to the district court, the district court did not address the threshold issue of whether RPD purchased the Settlement Agreement, perhaps because a recent opinion from the Supreme Court of Texas had confirmed that a seller can sell, and a buyer can buy, property that neither knows exists and that the selling debtor had not disclosed on its bankruptcy forms—an opinion directly on point since it was decided under Texas contract law as applied to a bankruptcy sale, the same as the bankruptcy court had decided the issue.[1] Rather, the district court simply held that the Settlement Agreement was a rejected executory contract even though it was not scheduled and that, as such, it ceased being property of the estate and could not be sold *as a matter of federal bankruptcy law*.

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[1] *Noble Energy Inc. v. ConocoPhillips Co.*, 532 S.W.3d 771, 773-74 (Tex. 2017), cert. denied, *Noble Energy, Inc. v. ConocoPhillips Co.*, 139 S. Ct. 65 (2018).

RPD appealed to the Fifth Circuit, arguing that the district court collaterally attacked the bankruptcy court's sale orders. Namely, whether the district court was right or wrong on the issue of rejection, those sale orders clearly provide that, to the extent any of the purchased assets were executory contracts, they were assumed and assigned to RPD. As those sale orders had never been appealed and were not being reviewed by the district court on direct appeal, and as Tech Pharmacy never sought relief from those orders under Rule 60(b) or otherwise, the sale orders had to be enforced. The Fifth Circuit rejected this argument, instead affirming the district court's conclusion that the Settlement Agreement was a rejected executory contract under which no rights could have been assigned to RPD as a matter of federal bankruptcy law.

V. The Result.

The district court and the Fifth Circuit each refused to enforce the plain language of the final sale orders. Instead, each court permitted Tech Pharmacy to collaterally attack those orders and to obtain *de facto* appellate review outside the boundaries—including far beyond the deadlines—applicable to both reconsideration under Rule 60(b) and a direct appeal. In the process, they interpreted the Bankruptcy Code in a way that seriously undermines future bankruptcy sales, subverts the will of Congress, and threatens the very sales on which Chapter 7 of the Bankruptcy Code depends.

The result is that RPD, having provided millions of dollars in consideration, and expressly found to be a good-faith bankruptcy buyer, to be accorded all of concomitant protections as such under the Bankruptcy Code, is left holding three final and non-appealable bankruptcy court orders that do not mean what they say and that do not have the protections and powers that they and federal law provide. RPD's cash has been distributed to creditors, and there is no adequate remedy left for RPD, even though RPD (and the selling trustees) were innocent with respect to the debtors' failure to schedule the Settlement Agreement. Tech Pharmacy, meanwhile, obtains a windfall because it retains the benefits of the Settlement Agreement—*i.e.* a dismissal of the patent invalidity suit with prejudice—while being freed of the burdens of that agreement. The result is not equitable and frustrates the purposes of the Bankruptcy Code. And the result is one that RPD and all other buyers of bankruptcy assets will remember and will take into account as they consider bidding on bankruptcy assets, deciding either not to bid or to bid substantially less as insurance against such a result.

REASONS FOR GRANTING THE PETITION

I. The Issues of First Impression, the Failure to Follow this Court's Precedent, and the Importance of the Issues Merit this Court's Review.

There is no question that Chapter 7 depends on buyers who are willing to buy bankruptcy assets—that is the whole purpose of Chapter 7. *See, e.g., In re Bleaufontaine Inc.*, 634 F.2d 1383, 1389 n. 10 (5th Cir. 1981) (noting the importance of bankruptcy sales to creditors and that the "public has a keen interest in protecting such creditors" or, otherwise, "financing might become a thing of the past"). In turn, there is no question that buyers buy such assets only if they believe that the purchase will be final and will be protected by the bankruptcy process—protections which are enshrined in the Bankruptcy Code. *See* 11 U.S.C. § 363(m) (providing that a sale cannot be reversed on appeal absent a stay pending appeal and absent fraud). After all, who wants to buy assets that are embroiled in litigation and competing claims? "If purchasers at judicially approved sales of property of a bankrupt estate, and their lenders, cannot rely on the deed that they receive at the sale, it will be difficult to liquidate bankrupt estates at positive prices." *In the Matter of Edwards*, 962 F.2d 641, 643 (7th Cir. 1992). Protecting the good faith buyer becomes paramount because only then will potential buyers pay top dollar and will trustees be able to monetize estates' assets for the benefit of creditors. *See id.*

There is likewise no question that executory contracts are frequently some of the most valuable assets in a bankruptcy estate—sometimes the only assets—made all the more valuable because they can be assigned to a buyer notwithstanding an anti-assignment clause. *See, e.g., Allentown Ambassadors Inc. v. Northeast Am. Baseball LLC*, 361 B.R. 422, 450 n. 65 (Bankr. E.D. Pa. 2007) (noting that "an executory contract is potentially the most valuable asset of the estate"). At the same time, there has been, and remains, significant uncertainty as to what an executory contract even is. *See, e.g., In re Roomstore Inc.*, 473 B.R. 107, 110 (Bankr. E.D. Va.

2012) (noting that "the law of executory contracts is 'hopelessly convoluted' and a bramble filled thicket"). *See also In re Spoverlook LLC*, 551 B.R. 481, 484 (Bankr. D.N.M. 2016) (noting that "the myriad differences in particular contracts have made [the definition of executory contract] difficult to apply"). And this is after forty years of the lower courts supplying their various definitions:

> Court after court, right up to the circuit level, has continued to struggle. And debtors, too, flounder over just what they can do in a world of uncertain executoriness. 'Executoriness,' . . . has now become the hook of one of bankruptcy law's most intractable (and pointless) sources of jurisprudential confusion—What is an "executory" contract in bankruptcy that the debtor can subject to § 365?

Pottow, John A.E., A New Approach to Executory Contracts, 96 Tex. L. Rev. 1437, 1446-47 (2018).

It is against this backdrop that the gravity of the Fifth Circuit's opinion emerges. In holding that an unscheduled executory contract is automatically rejected, the Fifth Circuit penalizes innocent trustees, creditors, and buyers for the intentional or unintentional mistake of a debtor or, more often, the debtor's lawyer. Indeed, given the uncertainty of whether a contract is even an executory contract in the first place, and the consequences of mis-scheduling the contract, even the best lawyer may make a judgment call as to whether to schedule the contract as an executory contract, which, years later, could prove wrong or improvident. Either way, the result is that valuable assets are lost, for good. This is inequitable: whether unintentional error or intentional mischief, it is innocent creditors who are penalized by a scheduling omission or error when the express intention of Congress was that these creditors obtain the benefits of the estate's executory contracts. This also conflicts with section 544 of the Bankruptcy Code, which provides that unscheduled assets remain property of the estate in perpetuity.

Equally as important, this frustrates the expectations of good-faith buyers, like RPD. RPD paid millions of dollars in consideration to obtain final sale orders from the bankruptcy court. It relied on those orders, and on the protections that the Bankruptcy Code promises. Those orders provided that, to the extent that any purchased asset was an executory contract, it was assumed and assigned to RPD. Even if those orders are erroneous because a rejected executory contract cannot be assumed and assigned—which could not have been known at the time since the existence of the Settlement Agreement was not known—they are final orders that are to be enforced and not collaterally attacked, as this Court has made clear through its precedent. *See United Student Aid Funds Inc. v. Espinosa*, 559 U.S. 260, 272-74 (2010); *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 152-53 (2009). The Fifth Circuit is no more free to ignore those orders than it was to ignore an injunction of a bankruptcy court in *Celotex Corp. v. Edwards*, when this Court not only reversed the Fifth Circuit but construed what it had done as "seriously undercutting the orderly process of the law." 514 U.S. 300, 313 (1995).

Here, RPD was innocent, as were the selling trustees. Here, RPD paid good money, which the trustees distributed to creditors. Here, there is no way to unscramble the eggs. Yet here, it is RPD, the one party whose funds solved everyone else's problems, that suffers the loss and that suffers the prejudice. This is a lesson that not only RPD has learned the hard way, but that any reasonable buyer of bankruptcy assets in the Fifth Circuit will remember in light of the Circuit's published opinion. They will remember it as they consider whether to bid for bankruptcy assets, and as they decide how much they should bid in light of the potential that, years later, they could discover that they own nothing.

Accordingly, the Fifth Circuit "has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." U.S. Sup. Ct. R. 10(c).

II. The Fifth Circuit Incorrectly Decided the Issue of First Impression Regarding the Rejection of an Unscheduled Executory Contract.

The text of the Bankruptcy Code provides that an executory contract not assumed by the applicable deadline is deemed rejected. It does not, however, address what the result is if the executory contract is not scheduled. This Court has never spoken on the issue. The Fifth Circuit appears to be the first circuit court to have considered the issue.[2] The Fifth Circuit mechanically reviewed the text of the statute, in isolation and without reference to the remainder of the Bankruptcy Code, and simply concluded that the plain meaning of the statute compels the conclusion that an executory contract is deemed rejected whether or not it is scheduled or disclosed.

The Fifth Circuit erred: *first*, because the plain language of the statute imposes a scheduling or disclosure requirement; *second*, because it interpreted section 365 of the Bankruptcy Code in isolation, without reference to the balance of the Bankruptcy Code; and *third*, because the circuit's interpretation directly conflicts with a separate provision of the Bankruptcy Code. And this is aside from the equities involved and the absurd result achieved.

As this Court has counseled, the Bankruptcy Code is an integrated law that is to be read and interpreted holistically, in such a manner to avoid making any provision superfluous or insignificant, and in light of its fundamentally equitable objectives and design. *See United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 371 (1988); *Kelly v. Robinson*, 479 U.S. 36, 43 (1986). Absurd results are to be avoided where possible. *See*

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[2] The Ninth Circuit considered the issue in *In re Lovitt*, 757 F.2d 1035 (9th Cir. 1985). However, that case was decided under the Bankruptcy Act. Under the Act, unlike the Code, an executory contract did not become property of the estate unless and until first assumed, whereas under the Code the contract becomes property of the estate whether or not scheduled or assumed, and remains property of the estate in perpetuity unless abandoned. Thus, *In re Lovitt* is inapplicable.

Griffin v. Oceanic Contractors Inc., 458 U.S. 564, 575 (1982). No provision should be read in isolation. *See United Sav. Ass'n of Tex.*, 484 U.S. at 371.

First, the plain language of the statute imposes a scheduling or disclosure requirement. The statute provides that, "if the trustee does not assume or reject an executory contract . . . within 60 days of the order for relief . . . then such contract or lease is deemed rejected." 11 U.S.C. § 365(d)(1). The statute expressly contemplates that the trustee will make a timely decision regarding assumption or rejection—"if the trustee does not assume or reject …" The statute does not say that an executory contract that is not assumed is deemed rejected. Rather, the trigger is the trustee's refusal to assume the contract. But the trustee cannot refuse to assume something of which he or she has no knowledge. This Court considered a similar issue under the Bankruptcy Act, under which a trustee decided whether to accept a debtor's property or not (the equivalent of making the property the property of the estate or not):

> But that doctrine can have no application when the trustee is ignorant of the existence of the property and has had no opportunity to make an election. It cannot be that a bankrupt, by omitting to schedule and withholding from his trustee all knowledge of certain property, can, after his estate in bankruptcy has been finally closed up, immediately thereafter assert title to the property on the ground that the trustee had never taken any action in respect to it. If the claim was of value . . . it was something to

> which the creditors were entitled, and this bankrupt could not, by withholding knowledge of its existence, obtain a release from his debts and still assert title to the property.

First Nat'l Bank v. Lasater, 196 U.S. 115, 119 (1905).

The same principle applies to section 365 of the Bankruptcy Code: the trustee cannot elect to assume or reject an executory contract, or to effectuate a deemed rejection by refusing to assume, "when the trustee is ignorant of the existence of the property and has had no opportunity to make an election." Lower courts confirm this result: "[a]n executory contract is not subject to § 365, however, when the debtor fails to disclose the existence of the contract on her bankruptcy schedules. A trustee cannot be deemed to have rejected a contract of which he was not aware." *In re Zuniga*, 287 B.R. 201, 206 (Bankr. E.D. Mo. 2001). *See also Texas Western Fin. Corp. v. McCraw Candies Inc.*, 347 F. Supp. 445, 449 (N.D. Tex. 1972) (holding that trustee "cannot be deemed to have rejected the [undisclosed] contract"); *In re THW Enters. Inc.*, 89 B.R. 351, 354 (Bankr. S.D.N.Y. 1988) (rejecting lessor's "draconian interpretation" of the statute for the proposition that an unscheduled executory contract is always deemed rejected without resort to equitable principles). Even those courts which have concluded otherwise noted that the trustee had actual knowledge of the executory contract even though the contract was not scheduled, something which is not the case here, where none of the selling trustees had any actual or constructive knowledge of the contract. *See In re Tompkins*, 95 B.R. 722, 724 (B.A.P. 9th Cir. 1989).

Second, the balance of the Bankruptcy Code and its purposes must be considered. The Bankruptcy Code seeks to balance competing interests and to arrive at equitable results. *See Young v. United States*, 535 U.S. 43, 50 (2002). As such, cases are replete where this Court imposed fundamental requirements of equity to interpret or augment a statute which, under the wrong circumstances, could otherwise be used to achieve an inequitable result. *See, e.g., Marrama v. Citizens Bank*, 549 U.S. 365, 375 (2007). It is clear that property of the debtor becomes property of the estate regardless of whether the debtor schedules the property. *See Lasater*, 196 U.S. at 119. Indeed, it is axiomatic that the debtor's scheduling or failure to schedule assets, or how they are scheduled, does not bind the bankruptcy court or the bankruptcy proceedings and does not control the outcome. *See Reed v. City of Arlington*, 650 F.3d 571, 575 (5th Cir. 2011) (*en banc*) (holding that trustee's "duty was not affected by [the debtor's] failure to disclose the asset"). Indeed, as the Fifth Circuit held *en banc* in refusing to remove an unscheduled asset from the trustee's ability to monetize the asset for the benefit of creditors, "[e]stopping the Trustee from pursuing the judgment . . . would thwart one of the core goals of the bankruptcy system—obtaining a maximum and equitable distribution for creditors—by unnecessarily 'vaporizing' the assets effectively belonging to innocent creditors." *Id*. at 576. Yet here, the Fifth Circuit "vaporized" a valuable asset precisely on the basis of the debtor's scheduling omission.

Third, the Fifth Circuit's interpretation conflicts with section 554 of the Bankruptcy Code, governing the abandonment of property of the estate. That section provides that "any property scheduled . . . not otherwise administered at the time of the closing of a case is abandoned to the debtor . . . property of the estate that is not abandoned under this section . . . remains property of the estate." 11 U.S.C. § 554(c), (d). Therefore, property that is not scheduled cannot be abandoned and, consequently, remains property of the estate in perpetuity (as is necessary to protect against a dishonest debtor trying to hide assets by not scheduling them). *See, e.g., Slater v. U.S. Steel Corp.*, 820 F.3d 1193, 1226 (11th Cir. 2016). Indeed, abandonment always required affirmative action by the trustee, which cannot happen if the trustee does not know of the asset, even before the Bankruptcy Code changed the requirement to the entry of a court order authorizing abandonment. *See, e.g., Stein v. United Artists Corp.*, 691 F.2d 885, 891 (9th Cir. 1982). *See also Lasater*, 196 U.S. at 119. According to the Fifth Circuit, however, an unscheduled executory contract is deemed rejected, thereby ceasing to be property of the estate. This directly conflicts with section 554 and this Court's precedent regarding abandonment by essentially *mandating* (not even *permitting*) abandonment of an unscheduled asset that would otherwise remain property of the estate in perpetuity. Not only is there a direct conflict, but it is section 554, as the more applicable section, that should control.

Finally, if there is ambiguity as to the correct statutory interpretation, the role of equity cannot be ignored given the fundamentally equitable nature of the Bankruptcy Code and the bankruptcy system as a whole. In many cases, executory contracts may be the only valuable assets of the estate. That is why many Chapter 11 cases are filed, in order to preserve that value and enable that value to be monetized by assigning contracts and leases to buyers, because such an assignment can be accomplished through bankruptcy notwithstanding a contractual anti-assignment clause. A debtor can be dishonest or simply forgetful and thereby fail to schedule the executory contract. Counsel, whose job it is to assist with preparing the schedules, may err or may make an intentional, albeit informed, decision not to schedule a contract as an executory contract, given the uncertainty over what an executory contract is and given legal consequences that may result from mis-scheduling a simple contract as an executory contract. Either way, if the contract is not scheduled and a trustee does not know of its existence, to hold that the contract is forever lost to the estate by way of rejection punishes innocent trustees and creditors by removing value from the estate. There is no corresponding prejudice (or benefit) to the contract counterparty, since the fate of its contract should not be decided by whether a debtor and counsel correctly scheduled the contract as an executory contract.

III. The Fifth Circuit Violated this Court's Precedent by not Enforcing the Sale Orders.

Bankruptcy courts sometimes err. Yet the finality of bankruptcy court orders, given the collective bankruptcy process and the reliance that many people place on bankruptcy court orders, will frequently override any interest in correcting the error, subject to Rule 60(b). If a bankruptcy court order is not appealed (thereby becoming final), it controls even if erroneously decided. This is all the more important when it comes to bankruptcy sale orders, where an innocent third party is enticed to transfer its funds, which are then distributed to creditors, precisely on the promise of finality. *See, e.g., Edwards*, 962 F.2d at 643. Indeed, in *Celotex*, the Fifth Circuit went so far as to ignore an injunction issued by a bankruptcy court on the basis that the injunction was wrong and exceeded the authority of the bankruptcy court. *Celotex Corp.*, 514 U.S. 300. In reversing the Fifth Circuit's decision, this Court held as follows:

> We have made clear that it is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected. If respondents believed the Section 105 Injunction was improper, they should have challenged it in the Bankruptcy Court, like other similarly situated bonded judgment creditors have done. If dissatisfied with the Bankruptcy Court's ultimate decision, respondents can appeal to the district court for the judicial district in which the bankruptcy judge is serving, and then to the Court of Appeals for the Eleventh Circuit. Respondents chose not to pursue this course of action, but instead to collaterally attack the Bankruptcy Court's Section 105 Injunction in the federal courts in Texas. This

> they cannot be permitted to do without seriously undercutting the orderly process of the law.

514 U.S. at 313 (internal citations and quotations omitted).

In *Espinosa*, 559 U.S. at 263-64, this Court considered a bankruptcy court order which confirmed a Chapter 13 plan granting the debtor a student loan "hardship" discharge—something that the bankruptcy court could not have done without an adversary proceeding and a judgment. The order in question was a final order, which the creditor failed to appeal. *See id*. at 269. As such, the order was to be enforced even if entered in error: "the order remains enforceable and binding on United because United had notice of the error and failed to object or timely appeal." *Id*. at 275. In *Travelers*, 557 U.S. at 140-46, the appellate court concluded that the bankruptcy court could not enjoin various actions, which it had enjoined decades earlier through final and non-appealable orders. This Court reversed, concluding that the orders were final and could not be collaterally attacked even if the injunctions were improper: "[i]f this were a direct review of the 1986 Orders, the Court of Appeals would indeed have been duty-bound to consider whether the Bankruptcy Court had acted beyond its subject-matter jurisdiction. But the 1986 Orders became final on direct review over two decades ago." *Id*. at 148 (internal citations omitted). As explained by this Court, "[t]he willingness . . . to entertain this sort of collateral attack cannot be squared with *res judicata* and the practical necessity served by that rule. It is just as important that there should be a place to end as that there should be a place to begin litigation." *Id.* at 154 (quoting *Stoll v. Gottlieb*, 305 U.S. 165, 172, (1938)).

To get around this prohibition against collateral attack, the Fifth Circuit construed what it and the lower courts were doing as *interpreting* the prior sale orders. With due respect to the circuit, this is nothing less than judicial alchemy. Those sale orders provide that "to the extent that any of the Subject Property is such an executory contract, the same is hereby ASSUMED by the Estate and immediately ASSIGNED to RPD under the applicable provisions of section 365 of the Bankruptcy Code." There is nothing to interpret, as this language could not be clearer: if the Settlement Agreement was an executory contract, as the courts below held that it was, then it was assumed and assigned. Period. Whether this was correct or whether it was in error, because a rejected executory contract cannot be assumed and assigned, it became irrelevant when these orders became final, and the Fifth Circuit erred by refusing to simply enforce these orders as written.

This is all the more important given that the orders in question were sale orders—orders upon which RPD relied to provide millions of dollars in consideration, and upon which the trustees and multiple creditors also relied as the trustees distributed RPD's purchase price to those creditors. It is simply not possible to unscramble these eggs. The alternative is to permit the existence of three final federal court orders that have not been set aside under Rule 60(b) or otherwise, and to conclude that they apparently do not mean what they say. Tech Pharmacy had a remedy, which was to appeal the sale orders in the first instance or to seek relief from those orders under Rule 60(b), but it chose to collaterally attack those orders instead. Permitting such a collateral attack to succeed seriously undercuts the orderly process of the law.

IV. Proper Definition of Executory Contract.

The Bankruptcy Code does not define "executory contract." This Court has not defined the term either, except to note certain legislative history to the effect that an executory contract is a contact "on which performance remains due to some extent on *both* sides." *NLRB v. Bildisco*, 465 U.S. 513, 521 n.6 (1984) (emphasis added). The majority of lower courts, but not all of them, have adopted the "Countryman" definition, under which a contract is an executory contract if at the time of the bankruptcy filing, the failure of either party to complete performance would constitute a material breach of the contract, thereby excusing the performance of the other party. *See In the Matter of Murexco Petroleum Inc.*, 15 F.3d 60, 62-63 (5th Cir. 1994). While a workable definition, the problem is that this Court has yet to place any limitations on this definition, resulting in fact-specific anarchy: "the myriad differences in particular contracts have made [the Countryman definition] difficult to apply." *Spoverlook*, 551 B.R. at 484. Or, as stated by one bankruptcy court, the result of the boundless Countryman definition is a body of case law that is "hopelessly convoluted" and a "bramble filled thicket." *Roomstore*, 473 B.R. at 110.

The facts of this case present the *reductio ad absurdum*: the failure to act, even though judicially prohibited from acting, has been held to be an executory obligation on the part of Tech Pharmacy such that the Settlement Agreement was an executory contract. RPD does not suggest that a standard patent license is not an executory contract—it almost always is, although there are exceptions. This is so not because of a categorical rule, but because, in a standard patent license, there are future obligations on the part of *both* parties: the licensee must pay royalties, provide reports, etc., and the licensor must defend the patent, warrant the validity of the patent, perhaps support the patent, and so on. *See, e.g., In re Richmond Metal Finishers Inc.*, 34 B.R. 521, 525 (Bankr. E.D. Va. 1983). RPD is not challenging the application of the Countryman definition to such contracts, or the result.

Some courts have also held, however, that the licensor also has an ongoing obligation not to sue for patent infringement as long as the license is in effect. *See In re CFLC Inc.*, 89 F.3d 673, 677 (9th Cir. 1996). These courts have construed this obligation—to refrain from suing—as future performance such as to make the patent license executory on the part of the licensor. *See id*. That is the sole reason why the courts below concluded that the Settlement Agreement was an executory contract with respect to Tech Pharmacy's obligations—that Tech Pharmacy was to refrain from suing for patent infringement. Unlike virtually every other patent license, the Settlement Agreement imposed no other, future, or executory obligations on Tech Pharmacy. If refraining from suing for patent infringement is not an appropriate executory obligation, then the Settlement Agreement cannot be an executory contract because there are no other future obligations on the part of Tech Pharmacy irrespective of future performance owed by the debtors (or RPD as assignee).

Immediately, there are three problems with this broad, limitless, and categorical ruling. First, refraining from acting is not "performance." It is the opposite of performance. Second, if refraining from acting is performance, then every contract or legal instrument is an executory contract. The creditor cannot sue under a promissory note that is current or that has been paid, yet does that legal obligation not to sue convert the executed contract into an executory one? Does a land transferor's legal obligation to refrain from suing for trespass after the land has been transferred somehow render the conveyance deed an executory contract that can later be rejected? What about the legal duties imposed by law not to file baseless or harassing lawsuits? If refraining from filing such suits is executory "performance," then there is no limitation to the phrase.

Third, the courts below failed to construe the Settlement Agreement as one integrated contract, instead separately interpreting the license granted in that agreement as though it were a standalone contract. In fact, the Settlement Agreement's purpose was to permanently resolve all disputes and to dismiss the patent proceeding, thereby buying peace for all time, as opposed to creating new and executory obligations. Other than the payment of limited future royalties (and the payment of money is not itself an executory obligation), the whole of the Settlement

Agreement was fully performed upon execution. Or, if the Settlement Agreement is an executory contract, meaning that it was rejected, does it then follow that the exchange of consideration is also undone such that the federal lawsuit should be revived and the dismissal with prejudice set aside? Such is the potential chaos resulting from the Fifth Circuit's limitless construction.

Finally, and determinatively, Tech Pharmacy dismissed its patent infringement claim with prejudice. "The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment." *C.I.R. v. Sunnen*, 333 U.S. 591, 597 (1948). A dismissal with prejudice is a complete and final substantive determination, and is the equivalent of a final federal judgment. *See Schwarz v. Folloder*, 767 F.2d 125, 129 (5th Cir. 1985). Thus, once the dismissal with prejudice was ordered, Tech Pharmacy could never again sue the debtors for patent infringement. *See, e.g., Kessler v. Eldred*, 206 U.S. 285 (1907). The fact that this was a method patent controls the balance of the inquiry because, either the OnSite method was infringing the patented method, or it was not.[3] When a pending patent infringement / invalidity suit is dismissed for a method patent, the same method may not again be chal-

[3] The analysis may be different for other types of patents, where each time a product is placed into the stream of commerce represents a new and separate action, such that a dismissal with prejudice does not prejudice a claim for future infringement. *See Mentor Graphics Corp. v. EVE-USA Inc.*, 851 F.3d 1275, 1299 (Fed. Cir. 2017).

lenged in the future, as confirmed in an opinion with very similar facts, in which there was a settlement agreement regarding a method patent, the settlement provided for a license, and the suit was dismissed with prejudice:

> when a final judgment is rendered on the merits, another action may not be maintained between the parties on the same 'claim,' and defenses that were raised or could have been raised in that action are extinguished . . . under basic claim preclusion rules, Foster is precluded from bringing another suit for infringement regarding the Hallco I. As a corollary principle, Hallco now is similarly precluded from challenging validity in a suit for infringement of any device that is the same as the Hallco I, because invalidity was a defense that was or could have been raised in the prior litigation.

Hallco Mfg. Co. Inc. v. Foster, 256 F.3d 1290, 1294 & 1297 (Fed. Cir. 2001).

The dismissal with prejudice meant that Tech Pharmacy could never again sue the debtors for their *method*—not only was Tech Pharmacy's performance complete at that moment, but Tech Pharmacy could no more sue the debtors for patent infringement than it could for causing the Black Death, for staging the moon landing, or any other absurd claim clearly prohibited by Rule 11 and similar law. To refrain from acting in a way that one has no legal right to act, and is legally prohibited from acting, is not performance. To conclude otherwise would render any contract or indeed any obligation an executory contract.

Moreover, the Fifth Circuit ignored the fact that the license granted in the Settlement Agreement was perpetual. The perpetual grant of the license means that Tech Pharmacy is not excused from whatever performance it has, even if the debtors defaulted under the Settlement Agreement—the grant was an immediate transfer and vesting of a perpetual right. It is true that, in many instances, even perpetual licenses can be qualified or subject to termination by future conditions, if the contract so provides. Here, the Settlement Agreement conditioned the perpetual nature of the license only as follows: "perpetual license . . . so long as the Patent or Patents are valid and enforceable." Tech Pharmacy thus knew how to condition or defeat the perpetual grant and, having been provided one such mechanism, intended to exclude other potential mechanisms, such as the failure to pay royalties. Therefore, because the license was perpetual, it would have remained in effect even if the debtors breached their obligations. *See Nano-Proprietary Inc. v. Canon Inc.*, 537 F.3d 394, 400 (5th Cir. 2008). As such, the failure by the debtors to perform would not have excused Tech Pharmacy's own performance, in the form of not suing for patent infringement, meaning that the Settlement Agreement was not executory. Tech Pharmacy would still have a remedy, of course, which was to sue for money damages—an entirely separate issue (and the payment of money is not itself an executory obligation for purposes of section 365).

Therefore, it is the facts of this case that present an appropriate and informative matrix through which this Court can consider the proper definition and limitation of what an executory contract is—and there must be a limitation, lest all contracts become executory contracts. If the Court adopts the Countryman definition, the facts of this case will nevertheless enable the Court to place proper brackets around that definition to ensure consistency and to ensure that not all contracts become executory contracts. Thus, it is the facts of this case, just as much as the judicial uncertainty regarding the meaning of executory contract, that merit this Court's analysis, for this case will either represent the outside boundary of what an executory contract is, or it will present a prototypical example of what it is not.

CONCLUSION

The novelty of the issues, the importance of the issues, and the potential consequences to many future bankruptcy cases and proceedings resulting from the holdings below, call out for this Court to review those proceedings and holdings and, after forty years of uncertainty in the lower courts, to provide definitive guidance to the lower courts, bankruptcy trustees, bankruptcy professionals, and a myriad of parties-in-interest in bankruptcy cases.

Dated this 25th day of January, 2019.

Respectfully submitted,

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