APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

879 F.3d 389
No. 16-9016

IN RE TEMPNOLOGY, LLC, N/K/A OLD COLD LLC,
Debtor,

MISSION PRODUCT HOLDINGS, INC.,
Appellant,
v.

TEMPNOLOGY, LLC, N/K/A OLD COLD LLC,
Appellee.

January 12, 2018

Before Torruella, Lynch, and Kayatta, Circuit Judges.

OPINION

KAYATTA, Circuit Judge.

Generally speaking, when a company files for protection under Chapter 11 of the Bankruptcy Code, the trustee or the debtor-in-possession may secure court approval to "reject" any executory contract of the debtor, meaning that the other party to the contract is left with a damages claim for breach, but not the ability to compel further performance. 11 U.S.C. §§ 365(a), 1107(a); *see NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531–32, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984); *Mason v. Official Comm. of Unsecured Creditors, for FBI Distrib. Corp. & FBC Distrib. Corp.* (*In re FBI Distrib. Corp.*), 330 F.3d 36, 43–44 (1st Cir. 2003). When the rejected contract, however, is one "under which the debtor is a licensor of a right to intellectual property," the licensee may elect to "retain its rights ... to such intellectual property," thereby continuing the debtor's duty to license the intellectual property. 11 U.S.C. § 365(n)(1). In this case, Tempnology, LLC ("Debtor")—a debtor-in-possession seeking to reorganize under Chapter 11—rejected an agreement giving certain marketing and distribution rights to Mission Product Holdings, Inc. The parties agree that Mission can insist that the rejection not apply to nonexclusive patent licenses contained in the rejected agreement. They disagree as to whether the rejection applies to the agreement's grants of a trademark license and of exclusive rights to sell certain of Debtor's goods. In the case of the trademark license, resolving that disagreement poses for this circuit an issue of first impression concerning which other circuits are split. For the following reasons, we agree with the bankruptcy court that the rejection left Mission with only a pre-petition damages claim in lieu of any obligation by Debtor to further perform under either the trademark license or the grant of exclusive distribution rights.

I.

Debtor made specialized products—such as towels, socks, headbands, and other accessories—designed to remain at low temperatures even when used during exercise, which it marketed under the "Coolcore" and "Dr. Cool" brands. A significant intellectual property portfolio supported Debtor's products. This portfolio consisted of two issued patents, four pending patents, research studies, and a multitude of registered and pending trademarks.

On November 21, 2012, Mission and Debtor executed a Co-Marketing and Distribution Agreement, which serves as the focal point of this appeal. The Agreement provided Mission with three relevant categories of rights.

First, Debtor granted Mission distribution rights to certain of its manufactured products within the United States.[1] These products, called "Cooling Accessories," were defined in the Agreement as "products of the specific types listed on Exhibit A" and "manufactured by or on behalf of [Debtor]." They also included "additional products that are hereafter developed by [Debtor]." Exhibit A broke down the thirteen listed products into two categories: "Exclusive" and "Non-Exclusive" Cooling Accessories. For "Exclusive Cooling Accessories"—comprised of towels, wraps, hoodies, bandanas, multi-chills, and doo rags—Debtor agreed that "it will not license or sell" the products "to anyone other than [Mission] during the Term." Mission's rights with respect to the remaining Cooling Accessories—comprised of socks, headbands, wristbands, sleeves, skullcaps, yoga mats, and baselayers—were nonexclusive because Debtor reserved for itself the "right to sell ... to vertically integrated companies as well as customers that are not Sports Distributors or retailers in the Sporting Channel."

[1] In addition to the United States, the exclusive geographic territory also included "other countries and territories that [Mission] acquires exclusive distribution rights to pursuant to its first rights of refusal and notice."

Second, Debtor granted Mission a nonexclusive license to Debtor's intellectual property. This "non-exclusive, irrevocable, royalty-free, fully paid-up, perpetual, worldwide, fully-transferable license" granted Mission the right "to sublicense (through multiple tiers), use, reproduce, modify, and create derivative work based on and otherwise freely exploit" Debtor's products—including Cooling Accessories—and its intellectual property. This irrevocable license, however, expressly excluded any rights to Debtor's trademarks.

Trademarks were the subject of the third bucket of rights. Section 15(d) of the Agreement granted Mission a "nonexclusive, non-transferable, limited license" for the term of the Agreement "to use [Debtor's] trademark and logo (as well as any other Marks licensed hereunder) for the limited purpose of performing its obligations hereunder, exercising its rights and promoting the purposes of this Agreement." This license came with limitations. Mission was forbidden from using the trademarks in a manner that was disparaging, inaccurate, or otherwise inconsistent with the terms of the Agreement. Further, Mission was required to "comply with any written trademark guidelines" and Debtor had "the right to review and approve all uses of its Marks," except for certain pre-approved uses.

The Agreement also included a provision permitting either party to terminate the Agreement without cause. On June 30, 2014, Mission exercised this option, triggering a "Wind-Down Period" of approximately two years. Debtor, in turn, issued a notice of immediate termination for cause on July 22, 2014, claiming that Mission's hiring of Debtor's former president violated the Agreement's restrictive covenants. Pursuant to the Agreement's terms, Mission's challenge to Debtor's immediate termination for cause went before an arbitrator. The arbitrator determined that Debtor had waived any grounds for immediate termination under the restrictive covenant and that the Agreement remained in effect until the expiration of the Wind-Down Period. That ruling meant that Mission was contractually entitled to retain its distribution and trademark rights until July 1, 2016, and its nonexclusive intellectual property rights in perpetuity.

Intervening events, however, put an earlier end to the parties' contractual relationship. Although Debtor posted profits in 2012, its financial outlook dimmed. After accruing multi-million dollar net operating losses in 2013 and 2014, Debtor filed a voluntary petition for Chapter 11 bankruptcy on September 1, 2015. The following day, Debtor moved to reject seventeen of its contracts, including the Agreement, pursuant to 11 U.S.C. § 365(a).

Section 365(a) permits a debtor-in-possession,[2] with the court's approval, to "reject any executory contract" that, in the debtor's business judgment, is not beneficial to the company. *See Agarwal v. Pomona Valley Med. Grp., Inc.* (*In re Pomona Valley Med. Grp., Inc.*), 476 F.3d 665, 669–71 (9th Cir. 2007); *see also Bildisco & Bildisco*, 465 U.S. at 520, 523, 104 S.Ct. 1188. In its memoranda supporting its motion, Debtor informed the bankruptcy court that it sought to reject the Agreement because it hindered Debtor's ability to derive revenue from other marketing and distribution oppor-

---

[2] Although this provision of the statute only refers to the powers of a trustee, per 11 U.S.C. § 1107(a), a Chapter 11 "debtor in possession shall have all the rights ... and powers, and shall perform all the functions and duties, ... of a trustee serving in a case under this chapter." *See also In re FBI Distrib. Corp.*, 330 F.3d at 42 n.8 (citing this provision).

tunities. Debtor faulted Mission—and particularly the Agreement's grant of exclusive distribution rights—for its bankruptcy. It alleged that the Agreement "suffocated the Debtor's ability to market and distribute its products" after Mission failed to fulfill its obligations, "essentially starving the Debtor from any income."

Mission objected to the rejection motion, arguing that 11 U.S.C. § 365(n) allowed Mission to retain both its intellectual property license and its exclusive distribution rights. Section 365(n) provides an exception from section 365(a)'s broad rejection authority by limiting the debtor-in-possession's ability to terminate intellectual property licenses it has granted to other parties.

On September 21, 2015, the bankruptcy court granted Debtor's motion to reject certain executory contracts, except for the Agreement, for which it ordered further hearing. In a subsequent one-sentence order, the bankruptcy court granted the motion to reject the Agreement, "subject to Mission Product Holdings's election to preserve its rights under 11 U.S.C. § 365(n)." Debtor then moved for a determination of the applicability and scope of Mission's rights under section 365(n). In that motion, Debtor conceded that Mission retained its nonexclusive, perpetual license to certain of Debtor's intellectual properties—which did not include its trademarks—but argued that section 365(n) did not cover either Mission's exclusive distribution rights or the trademark license. Mission again objected, arguing that the relief Debtor requested required an adversary proceeding pursuant to Rule 7001(2) of the Federal Rules of Bankruptcy Procedure.

After holding a nontestimonial hearing, the bankruptcy court concluded that Mission's election pursuant to section 365(n) did not preserve either the exclusive distribution rights or the trademark license. The court found that section 365(n) only protected intellectual property rights, and Mission's exclusive distributorship could not fairly be characterized as such. With respect to trademarks, the court reasoned that Congress's decision to leave trademarks off the definitional list of intellectual properties in 11 U.S.C. § 101(35A) left the trademark license unprotected from rejection. Finally, the court rejected Mission's argument that the Bankruptcy Code required an adversary proceeding to determine the issue. The court viewed "the Motion in the context of rejection under § 365, which is a contested matter under Fed. R. Bankr. P. 9014."

Mission appealed to the Bankruptcy Appellate Panel for the First Circuit ("BAP"). The BAP affirmed the bankruptcy court's order with respect to Mission's exclusive distribution rights, concluding that "Mission's attempt to re-characterize its exclusive product distribution rights under the Agreement as an intellectual property license [is] unsupported by either the letter or the spirit of the Agreement." Like the bankruptcy court, the BAP read section 365(n)'s protection of "exclusivity provision[s]" as encompassing only the exclusivity attributes, such as they might be, of intellectual property rights. The BAP also affirmed the bankruptcy court's determination that the section 365(n) motion did not require Debtor to commence an adversary proceeding under Bankruptcy Rule 7001.

Regarding trademarks, however, the BAP diverged from the bankruptcy court. Although the BAP agreed that section 365(n) failed to protect Mission's rights to Debtor's trademarks, it disagreed as to the effect of that conclusion. Rather than finding that rejection extinguished the non-debtor's rights, the BAP followed the Seventh Circuit's ruling in *Sunbeam*

Products, Inc. v. Chicago American Manufacturing, LLC, 686 F.3d 372 (7th Cir. 2012). The BAP held that, because section 365(g) deems the effect of rejection to be a breach of contract, and a licensor's breach of a trademark agreement outside the bankruptcy context does not necessarily terminate the licensee's rights, rejection under section 365(g) likewise does not necessarily eliminate those rights. Thus, the BAP reversed the bankruptcy court's determination that Mission no longer had protectable rights in Debtor's trademarks and trade names.

This appeal ensued. We affirm the bankruptcy court's determinations. We conclude that section 365(n) does not apply to Mission's right to be the exclusive distributor of Debtor's products, or to its trademark license. Unlike the BAP and the Seventh Circuit, we also hold that Mission's right to use Debtor's trademarks did not otherwise survive rejection of the Agreement.

II.

On appeal from a decision by the BAP, "[w]e accord no special deference to determinations made by the [BAP]," and instead "train the lens of our inquiry directly on the bankruptcy court's decision."[3] *Wheeling & Lake Erie Ry. Co. v. Keach* (*In re Montreal, Maine & Atl. Ry., Ltd.*), 799 F.3d 1, 5 (1st Cir. 2015). In doing so,

[3] We do nevertheless pay great attention to the considered opinion of the three experienced bankruptcy judges who sit on the BAP. Among other things, our consideration of such an opinion reduces the likelihood that our court of general appellate jurisdiction is blindsided by the effect that a decision might have on matters or issues of bankruptcy law and practice that are beyond the ken of the parties in a particular proceeding.

we review the bankruptcy court's factual findings for clear error and its conclusions of law de novo. *DeGiacomo v. Traverse* (*In re Traverse*), 753 F.3d 19, 24 (1st Cir. 2014).

III.

We begin with the statutory framework that defines the scope of Debtor's ability, "subject to the court's approval," to "assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). Executory contracts, although not defined in the Bankruptcy Code, are generally considered to be contracts "on which performance is due to some extent on both sides." *In re FBI Distrib. Corp.*, 330 F.3d at 40 n.5 (quoting *Bildisco & Bildisco*, 465 U.S. at 522 n.6, 104 S.Ct. 1188); *see also Parkview Adventist Med. Ctr. v. United States ex rel. Dep't of Health & Human Servs.*, 842 F.3d 757, 763 n.12 (1st Cir. 2016). Section 365(a) permits the debtor-in-possession to assume those contracts that are beneficial and reject those that may hinder its recovery. *In re FBI Distrib. Corp.*, 330 F.3d at 42. It provides an "elixir for use in nursing a business back to good health" by allowing the trustee or debtor-in-possession to "prescribe it as an emetic to purge the bankruptcy estate of obligations that promise to hinder a reorganization." *Thinking Machs. Corp. v. Mellon Fin. Servs. Corp.* (*In re Thinking Machs. Corp.*), 67 F.3d 1021, 1024 (1st Cir. 1995). Section 365(a) thus furthers Chapter 11's "paramount objective" of rehabilitating debtors. *In re FBI Distrib. Corp.*, 330 F.3d at 41. In lieu of the rejected obligation, a debtor is left with a liability for what the Code deems to be a pre-petition breach of the contract. 11 U.S.C. § 365(g) ("[T]he rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease ... immediately before the date of the filing of the petition....”).

In 1985, the Fourth Circuit was tasked with applying this framework to an intellectual property license granted by a debtor. *See Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985). The Fourth Circuit held that the term “executory contract” in section 365(a) encompassed intellectual property licenses, *id.* at 1045, and that under section 365(g) the effect of rejection was to terminate an intellectual property license, *id.* at 1048. The court based its reasoning on what it saw as the animating principles behind section 365(g), thus distinguishing “statutory breach” from common law breach:

> Even though § 365(g) treats rejection as breach, the legislative history of § 365(g) makes clear that the purpose of the provision is to provide only a damages remedy for the non-bankrupt party.... [T]he statutory “breach” contemplated by § 365(g) controls, and provides only a money damages remedy for the non-bankrupt party. ... Allowing specific performance would obviously undercut the core purpose of rejection under § 365(a).

Id.

Three years later, Congress responded. Rather than amending either section 365(a) or section 365(g), Congress enacted a brand new section 365(n). *See* S. Rep. No. 100-505, at 8 (1988). Section 365(n)(l) gives to a licensee of intellectual property rights a choice between treating the license as terminated and asserting a claim for pre-petition damages—a remedy the licensee held already under section 365(g)—or retaining its intellectual property rights under the license. It states, in full:

> If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—
>
> > (A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or
> >
> > (B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for—
> >
> > > (i) the duration of such contract; and
> > >
> > > (ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

11 U.S.C. § 365(n)(1).

Congress also amended the definition of intellectual property, thus defining the scope of the new section 365(n)(1). Under 11 U.S.C. § 101(35A),

> The term "intellectual property" means—
>
> (A) trade secret;
>
> (B) invention, process, design, or plant protected under title 35;
>
> (C) patent application;
>
> (D) plant variety;
>
> (E) work of authorship protected under title 17; or
>
> (F) mask work protected under chapter 9 of title 17;
>
> to the extent protected by applicable nonbankruptcy law.

IV.

With the foregoing framework in mind, we turn now to Mission's arguments on appeal. We consider first its contention that its exclusive distribution rights remained unaffected by Debtor's rejection of the Agreement. We then address Mission's contention that its trademark license also remained in effect during the two-year Wind-Down Period. What is at issue for these parties, practically speaking, is whether to classify as prepetition or post-petition liability any damages caused by Debtor's failure to honor its executory obligations during the two-year Wind-Down Period.

A.

Section 365(n)(1)(B) allows Mission "to retain its rights (including a right to enforce any exclusivity provision of such contract ...) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law)." Mission would have us read the words "any exclusivity provision of such contract" in the foregoing parenthetical as meaning any "exclusivity provision" in the entire contract (or any supplementary agreement), whether or not the provision grants exclusive use of a pertinent intellectual property right.

We disagree. We start in section 365(a) with the universe of all executory contracts that a debtor may seek to reject; section 365(n)(1) then focuses on a subset of that universe ("executory contract[s] under which the debtor is a licensor of a right to intellectual property"); subsection (n)(1)(B) then says what happens to intellectual property rights granted under such contracts (the licensee may "retain its rights"); and the parenthetical merely makes clear that those rights "to such intellectual property" include any exclusivity attributes of those rights. In this manner, subsection (n)(1)(B) protects, for example, an exclusive license to use a patent, but does not protect an exclusive right to sell a product merely because that right appears in a contract that also contains a license to use intellectual property.

Our reading aligns with the legislative record. In enacting section 365(n), Congress made clear that it was responding to a "particular problem arising out of recent court decisions." S. Rep. No. 100-505, at 5. The limited "purpose of the bill is to amend Section 365 of the Bankruptcy Code to make clear that the rights of an intellectual property licensee to use the licensed property cannot be unilaterally cut off." *Id.* at 1. The amendment is "not in any way intended to address broader matters under Section 365." *Id.* at 5. Congress, it seems, was focused on a narrow issue, and only intended its amendment to address that issue. It did not intend the scope of its amendment to extend beyond the licensee's bargained-for intellectual property rights post-rejection, as Mission's position would necessarily require. Further supporting our reading of the statutory text, Congress's description of the protected exclusivity rights in both relevant congressional reports is limited to license rights, and does not mention or imply the protection of exclusive rights other than those to intellectual property. The House Report, describing the House's version of the bill,[4] states that, "[u]nder the legislation, any right in the license agreement giving the licensee an exclusive license will still be enforceable by the licensee, but other rights of the licensee cannot be specifically enforced." H.R. Rep. No. 100-1012, at 6 (1988). Similarly, the Senate Report says that "if the contract granted exclusive use to the licensee, such exclusivity would be preserved to the license." S. Rep. No. 100-505, at 9.

Mission's fallback position is to argue that, in this instance, its exclusive distribution right is, de facto, a provision that renders its right to use Debtor's intellectual property exclusive. The unstated premise is that because Mission has an exclusive right to sell certain of Debtor's products made using Debtor's intellectual property, no one else can use the intellectual property. Hence, Mission reasons, the exclusive distribution right is an "exclusivity provision" of the intellectual property right.

[4] Congress ultimately adopted the Senate version, although the language of this section of the House bill is identical to its Senate counterpart.

The most obvious defect in this argument is its premise. The Agreement and record are clear that Debtor can use its intellectual property to make and sell products other than those for which the Agreement grants Mission exclusive distribution rights. The only thing that is exclusive is the right to sell certain products, not the right to practice, for example, the patent that is used to make those products. An exclusive right to sell a product is not equivalent to an exclusive right to exploit the product's underlying intellectual property.

But, argues Mission, because of its exclusive distribution rights, no one can use the Debtor's patent to make at least some products if those products are to be sold in Mission's territory. Perhaps. But this is simply a restriction on the right to sell certain products that, like many products, happen to be made using a patent. And the exclusivity Mission seeks to maintain would apply fully even if there were no patent license at all. Given that the right to sell a product is clearly not included within the statute's definition of intellectual property, we are not going to treat it as such merely because of a coincidental practical effect it may have in limiting the scope of the manner in which a patent might be exploited, especially where the Agreement itself expressly makes clear that any patent license is nonexclusive. To hold otherwise would be to find buried in a parenthetical to a statutory subsection an implied exception to rejection that would, in practical terms, likely cover as much commercial territory as do some of the rights expressly defined as protected. *See Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) ("Congress ... does not, one might say, hide elephants in mouseholes."). The fact that Mission can cite no circuit court precedent for its effort to paint its exclusive distribution right as a de facto exclusive intellectual property right further buttresses our conclusion.[5]

Mission also argues that its nonexclusive license of intellectual property "lacks meaningful value" unless it retains an exclusive right to sell certain of Debtor's products. Why this is so is not apparent given that section 365(n) protects the nonexclusive license, hence Mission retained the right to use the intellectual property. The Agreement itself spells out myriad ways that Mission could exploit its nonexclusive intellectual property rights that were presumably unaffected by rejection of its exclusive distribution right: Mission could still "sublicense (through multiple tiers), use, reproduce, modify, and create derivative work based on" Debtor's intellectual property. And if those rights lacked meaningful value, that hardly becomes a reason for turning rights that are not intellectual property rights into intellectual property rights. Rather, it simply suggests that most of the contract's value was apparently in the exclusive distribution agreement.

Nor does the reference in section 365(n)(1)(B) to "any embodiment of such intellectual property" help Mission. Embodiment is a term of art associated with intellectual property. The Senate Report includes a letter informing the Judiciary Committee of the Department of Commerce's view of the bill, which states that "[a]lthough 'embodiment' is not defined, we assume the term arises from the copyright law." S. Rep.

---

[5] Mission cites *Encino Bus. Mgmt., Inc. v. Prize Frize, Inc.* (*In re Prize Frize, Inc.*), 32 F.3d 426 (9th Cir. 1994), but the contract in that case granted an "exclusive license to utilize the proprietary rights." *Id.* at 427. This case is clearly distinguishable, as Mission was granted no such right.

No. 100-505, at 12. Black's Law Dictionary tags the term as belonging to patent law, and offers three alternate definitions: (1) "[t]he tangible manifestation of an invention"; (2) "[t]he method for using this tangible form"; or (3) "[t]he part of a patent application or patent that describes a concrete manifestation of the invention." *Embodiment*, *Black's Law Dictionary* (10th ed. 2014). Black's Law Dictionary further notes that while intellectual property "is a mental construct" without "physical structure," an embodiment "is a specific physical form of the invention" and thus "[e]ach embodiment exists in the real world." *Id.* (quoting Morgan D. Rosenberg, *The Essentials of Patent Claim Drafting* xvii (2012)).

Where the statutory language includes a term of art, resort to sources beyond the text is particularly appropriate to make clear the intended meaning of that term. *See Molzof v. United States*, 502 U.S. 301, 307, 112 S.Ct. 711, 116 L.Ed.2d 731 (1992). Both the Senate Report and the Department of Commerce letter offer additional insight into the meaning of "embodiment" and its application to a licensee's rights. The Senate Report provides three examples of protected rights, and concludes with two traits that all protected rights must contain:

> [T]he parties might have agreed that the licensor would prepare a prototype incorporating the licensed intellectual property. If such a prototype was prepared prior to the filing of the petition for relief, but had not been delivered to the licensee at that time, then the licensee can compel the delivery of the prototype in accordance with the terms of the rejected license. Other examples of embodiments include genetic material needed to produce certain bio-

> technological products and computer program source codes. There are many other possible examples of embodiments, *but critical to any right of the licensee to obtain such embodiments under this bill is the prepetition agreement of the parties that the licensee have access to such material and the physical existence of such material on the day of the bankruptcy filing*.

S. Rep. No. 100-505, at 9-10 (emphasis added). The Department of Commerce letter states:

> Where the licensed intellectual property is not a work of authorship, we assume the term "embodiment" would be interpreted in a similar sense of enablement in a manner reasonable in the circumstances and would not necessarily include all physical manifestations of the intellectual property. For example, an embodiment of a licensed process might be interpreted to include technical data sufficient to enable the licensee to operate the process, but not a manufacturing facility using (or embodying) the process; and *an embodiment of a licensed invention might be interpreted to include a sample of the invention, but not all inventory*.

S. Rep. No. 100-505, at 12 (emphasis added).

A few common themes appear in these explanations. First, the pre-petition agreement must give the licensee access to the embodiment of intellectual property. Second, an embodiment of intellectual property is a tangible or physical object that exists pre-petition. Third, an embodiment of intellectual property is something inherently limited in number—it is a prototype or example of a product, but does not include all products produced using the intellectual property. Finally, we can infer that the purpose of this provision is to allow the licensee to exploit its right to the underlying intellectual property.

Here, we have no object to which Mission requires access in order to exploit an intellectual property right. Rather, we have a prosaic, nonexclusive right to use a patented process, and an unremarkable and entirely independent right to be the exclusive distributor of some but not all goods made with that process. There is simply no "embodiment" at issue in the relevant statutory sense.

Nor does this case, as Mission contends, bear on the enforceability of all negative covenants independent of an intellectual property license. If a party possesses an intellectual property license, perhaps the Code may protect from rejection certain negative covenants—such as confidentiality—that do not materially restrict the debtor's reorganization, are tied closely to the intellectual property license, and are necessary to implement its terms. *See Biosafe Int'l, Inc. v. Controlled Shredders, Inc.* (*In re Szombathy*), Nos. 94 B 15536, 95 A 01035, 1996 WL 417121, at *11 (Bankr. N.D. Ill. July 9, 1996) *rev'd in part sub nom. Szombathy v. Controlled Shredders, Inc.*, Nos. 94 B 15536, 95 A 01035, 1997 WL 189314 (N.D. Ill. Apr. 14, 1997). But we are not presented with that situation here.

Finally, we observe that Mission salts its brief with several undeveloped suggestions that rejection under section 365(a), even if allowed, might not extinguish a right to demand specific performance of the negative covenant implicit in the exclusive distribution rights. Mission attempts to support these suggestions by citing *In re Szombathy*, 1996 WL 417121, and by emphasizing that case's reliance on a quote from the Department of Commerce's letter to the Senate Judiciary Committee. Neither source seems to come close to carrying the meaning claimed by Mission. In any event, even as Mission tendered an analogous argument in connection with its trademark license (which we address, below), it never raised any such argument in the bankruptcy court as a basis for preserving its exclusive distribution rights. Hence, the argument is waived in this civil action. *See Argentaria v. Wiscovitch-Rentas* (*In re Net-Velázquez*), 625 F.3d 34, 40 (1st Cir. 2010) ("The proposition is well established that, 'absent the most extraordinary circumstances, legal theories not raised squarely in the lower court cannot be broached for the first time on appeal.' " (quoting *Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 59 v. Superline Transp. Co.*, 953 F.2d 17, 21 (1st Cir. 1992))).

B.

We next consider whether Mission retained its rights to use Debtor's trademarks post-rejection. In defining the intellectual property eligible for the protection of section 365(n), Congress expressly listed six kinds of intellectual property. 11 U.S.C. § 101(35A). Trademark licenses (hardly something one would forget about) are not listed, even though relatively obscure property such as "mask work protected under chapter 9 of title 17" is included. *Id.* Nor does the statute contain any catchall or residual clause from which one might infer the inclusion of properties beyond those expressly listed.

One might reasonably conclude that Congress's decision not to include trademark licenses within the protective ambit of section 365(n) must mean that such licenses are not exempt from section 365(a) rejection.

On the other hand, the conclusion that an agreement finds no haven from rejection in section 365(n) does not entirely exhaust the possible arguments for finding that a right under that agreement might otherwise survive rejection. For example, we have held that a counterparty's right to compel the return of its own property survives rejection of a contract under which the debtor has possession of that property. *See Abboud v. The Ground Round, Inc.* (*In re The Ground Round, Inc.*), 482 F.3d 15, 19 (1st Cir. 2007). This case, though, does not present us with a request by a party following rejection to recover its own property temporarily in the hands of the debtor. Rather, it presents a demand by a party to continue using the debtor's property.

Regarding trademarks specifically, the Senate Report states that Congress "postpone[d]" action on trademark licenses "to allow the development of equitable treatment of this situation by bankruptcy courts." S. Rep. No. 100-505, at 5. The only circuit to address this issue squarely has resisted the temptation to find in this ambiguous comment outside the statutory text a toehold for unfettered "equitable" dispensations from section 365(a) rejection when it would otherwise apply. *See Sunbeam*, 686 F.3d at 375 ("What the Bankruptcy Code provides, a judge cannot override by declaring that enforcement would be 'inequitable.' "). We agree. *See Law v. Siegel*, ––– U.S. ––––, 134 S.Ct. 1188, 1194-95, 188 L.Ed.2d 146 (2014) ("We have long held that 'whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of' the Bankruptcy Code." (quoting *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988))).

There is, though, an alternative argument for finding that a right to use a debtor's trademark continues post-rejection. That argument rests not on equitable dispensation from rejection, but instead on an exploration of exactly what rejection means. The argument, as accepted by the Seventh Circuit in *Sunbeam*, runs thus: Under section 365(g), section 365(a) rejection constitutes a breach of contract that "frees the estate from the obligation to perform." *Sunbeam*, 686 F.3d at 377 (quoting *Thompkins v. Lil' Joe Records, Inc.*, 476 F.3d 1294, 1306 (11th Cir. 2007)). "But nothing about this process implies that any rights of the other contracting party have been vaporized." *Id.* Therefore, reasoned the Seventh Circuit, while rejection converts a debtor's duty to perform into a liability for pre-petition damages, it leaves in place the counterparty's right to continue using a trademark licensed to it under the rejected agreement. In so reasoning, the Seventh Circuit found itself unpersuaded by the contrary approach taken by the Fourth Circuit in *Lubrizol*. *Sunbeam*, 686 F.3d at 378; *see also In re Exide Techs.*, 607 F.3d 957, 964–68 (3d Cir. 2010) (Ambro, J., concurring).

Of course, to be precise, rejection as Congress viewed it does not "vaporize" a right. Rather, rejection converts the right into a pre-petition claim for damages. Putting that point of vocabulary to one side, and leaving open the possibility that courts may find some unwritten limitations on the full effects of section 365(a) rejection, we find trademark rights to provide a poor candidate for such dispensation. Congress's principal aim in providing for rejection was to "release the debtor's estate from burdensome obligations that can impede a successful reorganization." *Bildisco & Bildisco*, 465 U.S. at 528, 104 S.Ct. 1188. *Sunbeam* therefore largely rests on the unstated premise that it is possible to free a debtor from any continuing performance obligations under a trademark license even while preserving the licensee's right to use the trademark. *See Sunbeam*, 686 F.3d at 377. Judge Ambro's concurrence in *In re Exide Technologies* shares that premise. *See* 607 F.3d at 967 (Ambro, J., concurring) (assuming that the bankruptcy court could allow the licensee to retain trademark rights even while giving the debtor "a fresh start").

Careful examination undercuts that premise because the effective licensing of a trademark requires that the trademark owner—here Debtor, followed by any purchaser of its assets—monitor and exercise control over the quality of the goods sold to the public under cover of the trademark. *See* 3 J. Thomas *McCarthy, McCarthy on Trademarks & Unfair Competition* § 18:48 (5th ed. 2017) ("Thus, not only does the trademark owner have the right to control quality, when it licenses, it has the duty to control quality."). Trademarks, unlike patents, are public-facing messages to consumers about the relationship between the goods and the trademark owner. They signal uniform quality and also protect a business from competitors who attempt to profit from its developed goodwill. *See Societe Des Produits Nestle, S.A. v. Casa Helvetia*, Inc., 982 F.2d 633, 636 (1st Cir. 1992). The licensor's monitoring and control thus serve to ensure that the public is not deceived as to the nature or quality of the goods sold. Presumably, for this reason, the Agreement expressly reserves to Debtor the ability to exercise this control: The Agreement provides that Debtor "shall have the right to review and approve all uses of its Marks," except for certain pre-approved uses. Importantly, failure to monitor and exercise this control results in a so-called "naked license," jeopardizing the continued validity of the owner's own trademark rights. McCarthy, *supra*, § 18:48; *see also Eva's Bridal Ltd. v. Halanick*

Enters., Inc., 639 F.3d 788, 790 (7th Cir. 2011) ("[A] naked license abandons a mark."); Restatement (Third) of Unfair Competition § 33 ("The owner of a trademark, trade name, collective mark, or certification mark may license another to use the designation. ... Failure of the licensor to exercise reasonable control over the use of the designation by the licensee can result in abandonment....").

The Seventh Circuit's approach, therefore, would allow Mission to retain the use of Debtor's trademarks in a manner that would force Debtor to choose between performing executory obligations arising from the continuance of the license or risking the permanent loss of its trademarks, thereby diminishing their value to Debtor, whether realized directly or through an asset sale. Such a restriction on Debtor's ability to free itself from its executory obligations, even if limited to trademark licenses alone, would depart from the manner in which section 365(a) otherwise operates. And the logic behind that approach (no rights of the counterparty should be "vaporized" in favor of a damages claim) would seem to invite further leakage. If trademark rights categorically survive rejection, then why not exclusive distribution rights as well? Or a right to receive advance notice before termination of performance? And so on.

Although claiming to follow *Sunbeam*, our dissenting colleague seems to reject its categorical approach in favor of what *Sunbeam* itself rejected—an "equitable remedy" that would consider in some unspecified manner the "terms of the Agreement, and non-bankruptcy law." *See Sunbeam*, 686 F.3d at 375-76. In so doing, our colleague gives great weight to a few lines in the Senate Report, treating them variously as "guidance," as a statement of Congress's "intent," and even as a mandate that "instruct[s]" the courts. In short, the dissent's interpretative approach seems to accord a line in the Senate Report the force of a line in the statute itself. Moreover, it does so by taking a line out of the Senate Report addressing section 365(n), which itself has no relevant ambiguity, and then uses that line to inform the dissent's interpretation of the previously enacted section 365(a). And while it is true that the Senate Report references equitable consideration, the dissent also seems to overlook the fact that when Congress otherwise intended to grant bankruptcy courts the ability to "equitably" craft exceptions to the Code's rules, it did so in the statute itself. *See, e.g.*, 11 U.S.C. § 365(d)(5) (requiring the trustee to perform the obligations of the debtor until an unexpired lease is assumed or rejected "unless the court, after notice and a hearing and based on the equities of the case, orders otherwise"); *id.* § 552(b)(1) (stating that a security agreement may extend to proceeds or profits acquired after the commencement of the case "to the extent provided by such security agreement and by applicable nonbankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise"); *see also id.* § 502(j) ("A reconsidered claim may be allowed or disallowed according to the equities of the case."); *id.* § 557(d)(2)(D) (allowing the expedited disposition of grain by, inter alia, "such other methods as is equitable in the case"); *id.* § 723(d) ("[T]he court, after notice and a hearing, shall determine an equitable distribution of the surplus so recovered...."); *id.* § 1113(c) (listing whether "the balance of the equities clearly favors rejection of such agreement" as a factor for a court to consider in determining whether to approve an application for rejection of a collective bargaining agreement); *id.* § 1114(g) (requiring a court to modify the payment of retirement benefits if the court finds that "such modification is necessary to permit the reorganization of the debtor and assures that all creditors, the debtor, and all of the affected parties are treated fairly and equitably, and is clearly favored by the balance of the equities").

Even if we did sit in the chancellor's chair in applying section 365(a), we would likely hesitate to adopt our colleague's approach. Under such a case-specific, equitable approach, one might in theory preclude rejection only where the burden of quality assurance on the debtor will be minimal. The problem, though, is that in the bankruptcy context especially, where the licensor and licensee are at odds over continuing to deal with each other, the burden will likely often be greater than normal. Here, for example, the adversarial relationship between Debtor and Mission may portend less eager compliance. More importantly, in all cases there will be some burden, and it will usually not be possible to know at the time of the bankruptcy proceeding how great the burden will prove to be, as it will depend very much on the subsequent actions of the licensee. Conversely, the burden imposed on the counterparty of having its trademark right converted to a prepetition damages claim at a time when the relationship signaled by the trademark is itself ending will in most instances be less than the burden of having patent rights so converted. The counterparty may still make and sell its products—or any products—just so long as it avoids use of the trademark precisely when the message conveyed by the trademark may no longer be accurate. We therefore find unappealing the prospect of saddling bankruptcy proceedings with the added cost and delay of attempting to draw fact-sensitive and unreliable distinctions between greater and lesser burdens of this type. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 649, 132 S.Ct. 2065, 182 L.Ed.2d 967 (2012) ("[I]t is our obligation to interpret the Code clearly and predictably using well established principles of statutory construction."). There is, too, the public's interest in not being misled as to the origin and quantity of goods that consumers buy.

In sum, the approach taken by *Sunbeam* entirely ignores the residual enforcement burden it would impose on the debtor just as the Code otherwise allows the debtor to free itself from executory burdens. The approach also rests on a logic that invites further degradation of the debtor's fresh start options. Our colleague's alternative, "equitable" approach seems similarly flawed, and has the added drawback of imposing increased uncertainty and costs on the parties in bankruptcy proceedings. For these reasons, we favor the categorical approach of leaving trademark licenses unprotected from court-approved rejection, unless and until Congress should decide otherwise. *See* James M. Wilton & Andrew G. Devore, *Trademark Licensing in the Shadow of Bankruptcy*, 68 Bus. Law. 739, 771-76 (2013).

C.

Mission's final argument is that the bankruptcy court erred by not holding an adversary proceeding under Bankruptcy Rule 7001. Mission contends that because the rule governing adversary proceedings includes within its ambit determinations of an "interest in property," the bankruptcy court was required to hold such a hearing to determine the scope of Mission's rights. The bankruptcy court instead treated the issue as a contested matter under Rule 9014. We need not address this argument directly, because we find that even if an adversary proceeding was required, any error was harmless.

Mission contends that it was prejudiced because it was not given a fair opportunity to develop an evidentiary record. But the issues at stake can be resolved—and are resolved, in our de novo review—without reliance on any disputed facts outside the four corners of the Agreement. The logical leap Mission asks us to make—that extrinsic evidence would be both appropriate and lead to a different result—is unsupported by any possible extrinsic evidence to which Mission points. Further, the bankruptcy court permitted Mission and Debtor to conduct discovery following its September 21, 2015 order. There is no evidence, however, that either party had a need for or in fact did conduct discovery, and if they did, Mission offers no explanation for how this discovery generated any factual dispute that need be resolved in a testimonial hearing. Requiring Debtor to commence an adversary proceeding would only have delayed the resolution of critical issues without changing the bankruptcy court's ultimate determination.

V.

For the foregoing reasons, the bankruptcy court's decision is *affirmed.*

TORRUELLA, Circuit Judge (Concurring in part, dissenting in part).

I agree with the majority that 11 U.S.C. § 365(n) does not protect Mission's exclusive distribution rights or its nonexclusive trademark license. The plain language of this subsection identifies "intellectual property," which, for purposes of chapter 11, does not encompass trademarks. *See* 11 U.S.C. § 101(35A). However, I disagree with the majority's bright-line rule that the omission of trademarks from the protections of section 365(n) leaves a non-rejecting party without any remaining rights to use a debtor's trademark and logo. As Judge Easterbrook wrote, "an omission is just an omission," and simply implies that section 365(n) does not determine how trademark licenses should be treated—one way or the other. *Sunbeam*, 686 F.3d at 375. I would follow the Seventh Circuit and the BAP in finding that Mission's rights to use Debtor's trademark did not vaporize as a result of Debtor's rejection of the executory contract.

The majority focuses on the Bankruptcy Code's protection of debtors' ability to reorganize and to escape "burdensome obligations." But, as the majority acknowledges, in some situations, the Bankruptcy Code also provides protections to non-debtor parties of an executory contract, allowing the courts to determine an equitable remedy pursuant to the terms of a rejected contract. *See Ohio v. Kovacs*, 469 U.S. 274, 280, 105 S.Ct. 705, 83 L.Ed.2d 649 (1985); *see also In re Nickels Midway Pier, LLC*, 255 Fed. Appx. 633, 637-38 (3d Cir. 2007); *Abboud*, 482 F.3d at 19. Thus, to determine the effect of a section 365(a) rejection on a trademark license, we look to the plain text of section 365 as a whole, which dictates the parameters of such a rejection of an executory contract.

A plain language review reveals section 365's silence as to the treatment of a trademark license post-rejection. Where a statute is silent, we look to the legislative history for assistance. *DiGiovanni v. Traylor Bros., Inc.*, 75 F.3d 748, 755 (1st Cir. 1996) (citing *Cabral v. I.N.S.*, 15 F.3d 193, 194 (1st Cir. 1994)). Resultantly, our examination leads us back to Congress's intent when it enacted section 365(n). The Senate Committee report makes clear that Congress enacted section 365(n) as a direct response to the Fourth Circuit's decision in *Lubrizol*, 756 F.2d 1043, where the court found that rejection of a contract for an intellectual property license deprived the licensee of all rights previously granted under that license. *See* S. Rep. No. 100-505, at 2-3. In so doing, Congress intended to "correct[ ] the perception of some courts that Section 365 was ever intended to be a mechanism for stripping innocent licensee [sic] of rights central to the operations of their ongoing business." *Id.*, at 4.

Specific to trademark licenses, the Senate Committee report explains that the purposeful omission of trademarks was not designed to leave trademark licensees unprotected, but rather was "designed to allow more time for study, not to approve *Lubrizol*." *Sunbeam*, 686 F.3d at 375. The relevant portion of the Senate report reads:

> [T]he bill does not address the rejection of executory trademark[s],.... While such rejection is of concern because of the interpretation of [§] 365 by the *Lubrizol* court and others, ... such contracts raise issues beyond the scope of this legislation. In particular, trademark ... relationships depend to a large extent on control of the quality of the products or services sold by the licensee. Since these matters could not be

> addressed without more extensive study, it was determined to postpone congressional action in this area and to allow the development of equitable treatment of this situation by bankruptcy courts.

S. Rep. No. 100-505, at 5. This legislative history expresses congressional concern about the application of *Lubrizol*'s holding to trademarks licenses until further studies are done, and, rather than continue to apply *Lubrizol*'s holding, encourages "equitable treatment" by the courts to resolve disputes arising in the meantime. *Id.* Why would Congress have provided this guidance if it meant for *Lubrizol*—the very case Congress rejected—to apply to trademark licenses? Congress has yet to advise the courts about the results of any further studies; as such, the majority's judicially created bright-line rule contravenes congressional intent.

The majority's view infers that the omission of trademarks from section 101(35A)'s definition of "intellectual property," and therefore the protections of section 365(n), implies that section 365 categorically affords no protections to licensees of trademarks. Yet, Congress's own interpretation of section 365(n) informs us that the bill does not "address or intend any inference to be drawn concerning the treatment of executory contracts which are unrelated to intellectual property." *Id.* "In light of these direct congressional statements of intent, it is simply more freight than negative inference will bear to read rejection of a trademark license to effect the same result as termination of that license." *In re Exide Techs.*, 607 F.3d at 967 (Ambro, J., concurring) (citation and internal quotation marks omitted).

Instead, like the BAP below, I find it appropriate to view a debtor's section 365(a) rejection through the broader lens of section 365, as the Seventh Circuit did in *Sunbeam*. Section 365(g) states that "the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease." 11 U.S.C. § 365(g). Similar to other contractual breaches outside of the bankruptcy context, a rejection pursuant to section 365(a) does not automatically terminate a non-rejecting party's rights under a contract. *Sunbeam*, 686 F.3d at 377. Admittedly, "[w]hat the Bankruptcy Code provides, a judge cannot override by declaring that enforcement would be inequitable." *Id.* at 375 (internal quotation marks omitted). Given the Bankruptcy Code's silence as to the post-rejection rights that a trademark licensee does or does not retain, and in accordance with principles governing breaches of contract, we must resolve the dispute by looking to the terms of the contract to which these sophisticated parties agreed, and other applicable non-bankruptcy law. While the majority mistakenly insists that that this approach rejects the one followed in *Sunbeam*, it is precisely what the Seventh Circuit called for in finding that rejection does not abrogate a contract. *Id.* at 377. The majority takes issue with this consideration in what it terms as "some unspecified manner," but ignores that "the development of equitable treatment" is precisely what Congress has instructed the courts to do. *See* S. Rep. No. 100-505, at 6. Instead, the majority's view that a section 365(a) rejection eliminates a licensee's rights to the bargained-for use of a debtor's trademark effectively treats a debtor's rejection as a contract cancellation, rather than a contractual breach, putting the court at odds with legislative intent. It also "makes bankruptcy more a sword than a shield, putting debtor-licensors in a catbird seat they often do not deserve." *In re Exide Techs.*, 607 F.3d at 967-68 (Ambro, J., concurring).

I respect my colleagues' concern that following the Seventh Circuit's holding that a section 365(a) rejection does not categorically eviscerate the trademark rights that a debtor-licensor bargained away may "require[ ] that the trademark owner—here Debtor—monitor and exercise control over the quality of the goods sold to the public" post-rejection. However, licensees have trademark quality assurance obligations under the terms of their individual contracts which can be enforced through further legal action and the equitable remedy of specific performance. In the current case, Mission's obligations are laid out in Section 15(d) of the Agreement, which states that, inter alia, Mission shall not use the trademarks in a disparaging or inaccurate manner, shall comply with written trademark guidelines, and shall not create a unitary composite mark. The majority speculates that the remaining burden on the debtor will be too great in the bankruptcy context, and therefore, if it "were in the chancellor's chair," it would not follow this approach. However, we need not enter such a debate as it is not the role of the courts to legislate, as the majority's approach effectively does, through the creation of bright-line rules in the face of congressional intent. Congress contemplated the majority's concern when it enacted section 365(n), recognizing "that there may be circumstances in which the future affirmative performance obligations under a license cannot be performed in a manner that benefits the estate." S. Rep. No. 100-505, at 4-5. The legislative history indicates that treatment of trademark licenses is one such circumstance.

Accordingly, the BAP was correct to follow the Seventh Circuit's lead in finding that, even though

11 U.S.C. § 365(n) does not provide Mission protection of its license to use Debtor's trademarks, Debtor's rejection of the executory contract does not rescind the Agreement and eviscerate any of Mission's remaining trademark rights. Instead, as Congress has instructed the bankruptcy courts to do, the effect of Debtor's rejection on Mission's trademark license should be guided by the terms of the Agreement, and non-bankruptcy law, to determine the appropriate equitable remedy of the functional breach of contract. I respectfully dissent.

APPENDIX B

UNITED STATES BANKRUPTCY
APPELLATE PANEL OF THE FIRST CIRCUIT

559 B.R. 809
BAP NO. NH 15–065
BANKRUPTCY CASE NO. 15–11400–JMD

IN RE TEMPNOLOGY LLC, N/K/A OLD COLD, LLC,
Debtor,

MISSION PRODUCT HOLDINGS, INC.,
Appellant,
v.

TEMPNOLOGY LLC, N/K/A OLD COLD, LLC,
Appellee.

November 18, 2016

Before Lamoutte, Hoffman, and Cary,
United States Bankruptcy Appellate Panel Judges

OPINION

Hoffman, U.S. Bankruptcy Appellate Panel Judge.

Mission Product Holdings, Inc. ("Mission") appeals from the bankruptcy court's November 12, 2015 order granting the Motion for Determination of Applicability and Scope of Mission Product Holdings, Inc.'s Election Pursuant to 11 U.S.C. § 365(n)(1)(B) (the "365(n) Motion") filed by Tempnology LLC, n/k/a Old Cold, LLC (the "Debtor").[1] At issue before the bankruptcy court was what rights Mission, as a licensee of intellectual property, retained as a result of its election under Bankruptcy Code § 365(n)[2] when the Debtor rejected the executory contract that gave rise to the license. The bankruptcy court ruled that Mission retained its nonexclusive license to use the Debtor's intellectual property as set forth in the rejected contract, but not its exclusive product distribution rights or right to use the Debtor's trademark and logo also contained in the contract. For the reasons set forth below, we **AFFIRM IN PART** and **REVERSE IN PART.**

BACKGROUND

I. EVENTS PRECEDING BANKRUPTCY

Prior to a sale of substantially all its assets in 2015, the Debtor was a Portsmouth, New Hampshire-based material innovation company that developed chemical-free cooling fabrics for use in consumer products under the brand name "Coolcore." Mission is in the business of marketing and distributing innovative sports technologies.

---

[1] In conjunction with a sale of its assets, the Debtor was required to change its name upon the sale closing. The closing occurred on December 18, 2015, and on December 21, 2015, the Debtor filed a notice with the New Hampshire Secretary of State changing its name from Tempnology LLC to Old Cold, LLC. Thereafter, the bankruptcy court granted the Debtor's motion to amend the caption of its case to reflect the name change.

[2] Unless expressly stated otherwise, all references to "Bankruptcy Code" or to specific statutory sections shall be to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. §§ 101, *et seq.* All references to "Bankruptcy Rule" shall be to the Federal Rules of Bankruptcy Procedure.

On November 21, 2012, the Debtor and Mission entered into a Co–Marketing and Distribution Agreement (the "Agreement"). In section 1 of the Agreement, entitled "Territory," the Debtor granted Mission exclusive distribution rights within the United States and "first rights of notice and of refusal in certain other countries" (collectively defined in the Agreement as the "Exclusive Territory") with respect to an array of the Debtor's products defined as "Cooling Accessories" and identified on Exhibit A of the Agreement. The Debtor also granted Mission the non-exclusive right to sell Cooling Accessories anywhere else in the world.

In section 5 of the Agreement, entitled "Product Exclusivity," the Debtor agreed that in the Exclusive Territory it would not license or sell certain specified Cooling Accessories, defined in the Agreement as "Exclusive Cooling Accessories," to anyone other than Mission during the term of the Agreement.[3]

In section 6, entitled "Distribution Exclusivity and Collaboration," the Debtor agreed that in the Exclusive Territory it would not sell *any* Cooling Accessories and certain other products directly or indirectly to any sporting goods and sport specialty retailers.

Section 7 of the Agreement, entitled "Cooperation and Further Assurances," provided:

> [T]hat (i) [the Debtor] shall take no actions to directly or indirectly frustrate its exclusivity

[3] Exhibit A of the Agreement listing the Cooling Accessories provided that certain Cooling Accessories were exclusive—towels, wraps, hoodies, bandanas, "multi-chills," and doo rags—while other Cooling Accessories were identified as non-exclusive—socks, headbands, wristbands, sleeves, skull caps, yoga mats, and baselayers.

> obligations hereunder; (ii) [the Debtor] shall fully cooperate with [Mission] to ensure that no third parties take any actions that frustrate the purposes of the exclusivity provisions herein, and (iii) [the Debtor] shall take such actions as are necessary to enforce [the Debtor]'s intellectual property rights and contractual rights against third parties.

In section 15 of the Agreement, entitled "Intellectual Property," the Debtor granted Mission the following non-exclusive license (the "IP License"):

> Excluding those elements of the CC Property consisting of Marks [and] Domain Names, [the Debtor] hereby grants [Mission] and its agents and contractors a non-exclusive, irrevocable, royalty-free, fully paid-up, perpetual, worldwide, fully-transferable license, with the right to sublicense (through multiple tiers), use, reproduce, modify, and create derivative work based on and otherwise freely exploit the CC Property in any manner for the benefit of [Mission], its licensees and other third parties.

The Agreement defined "CC Property" as:

> [A]ll products (including without limitation the Cooling Accessories), personal products, inventions, designs, discoveries, improvements, innovations, ideas, drawings, images, works of authorship, formulas, methods, techniques, concepts, configurations, compositions of matter, packaging, labeling, software applications, databases, computer programs as well as other creative content, methodologies and materials in existence prior to this Agreement (or created outside the scope of this Agreement) or de-

> veloped or provided by [the Debtor] hereunder and all *Intellectual Property Rights* with respect to any of the foregoing, excluding any materials provided by [Mission].

(emphasis added). With respect to the Debtor's trademark and logo which were excluded from the IP License, section 15(d) of the Agreement granted Mission a limited license to use the Debtor's Coolcore trademark and logo as follows:

> During the Term of the Agreement and the Wind–Down Period, [the Debtor] grants to [Mission] a non-exclusive, non-transferable, limited license, which shall expire upon the termination of this Agreement except as necessary to allow either party to exercise its rights during the Wind–Down Period, to use its Coolcore trademark and logo (as well as any other Marks licensed hereunder) for the limited purpose of performing its obligations hereunder, exercising its rights and promoting the purposes of this Agreement as contemplated herein....

The upshot of the Agreement was that during the term of the Agreement Mission enjoyed the exclusive right to sell the Cooling Accessories to sporting goods retailers in the United States and potentially certain other countries, and the exclusive right to sell Exclusive Cooling Accessories to anyone in that same territory. Additionally, Mission received a non-exclusive but perpetual license to exploit the Debtor's intellectual property and a limited license during the term of the Agreement to exploit the Coolcore brand and logo.

The Agreement had an initial term of two years and was subject to automatic renewal for additional one-year periods. Either party could terminate the Agreement with or without cause by providing written notice. Any event of termination, however, would trigger a two-year wind-down period during which Mission would retain certain rights to purchase, distribute, and sell the Cooling Accessories in accordance with the Agreement.

On June 30, 2014, Mission exercised its rights to terminate the Agreement without cause, triggering the two-year wind-down period. On July 22, 2014, the Debtor issued a notice of termination for cause, asserting that Mission had breached the Agreement. The ensuing dispute resulted in a two-phase arbitration process. On June 10, 2015, the arbitrator rendered a decision in the first phase of the arbitration, determining that the Agreement remained "in full force and effect." The second phase of the arbitration—as to whether either party had breached the Agreement—did not get very far as the Debtor's bankruptcy, and accompanying stay, brought the arbitration to a halt.

II. THE BANKRUPTCY CASE

On September 1, 2015, the Debtor filed a voluntary petition for reorganization under chapter 11 of the Bankruptcy Code. The next day, the Debtor filed a motion seeking authority to reject certain of its executory contacts, including the Agreement. The Debtor also filed a motion asking the bankruptcy court to approve the sale of substantially all of its assets free and clear of liens, claims, encumbrances, and other interests.

Mission filed an objection to the sale motion and the rejection motion, which included its notice of election pursuant to § 365(n)(1)(B). In its objection, Mission argued that notwithstanding the Debtor's rejection of the

Agreement, by making an election under § 365(n) Mission retained its exclusive product distribution rights as well as its rights under the IP License and the limited trademark license and that it could continue to exercise and exploit all those rights without interference from the Debtor or the purchaser of the Debtor's assets. Mission maintained that any sale of the Debtor's assets would be subject to, not free and clear of, Mission's rights under the Agreement.

The Debtor disagreed with Mission's view of the implications of its § 365(n) election. According to the Debtor, § 365(n) protects a non-debtor licensee's rights to intellectual property when a debtor rejects a license agreement embodying intellectual property, not other rights under the contract such as distribution rights. The Debtor contended that the exclusive product distribution provisions in the Agreement did not grant Mission a right to intellectual property but rather addressed the scope of available product distribution rights and, therefore, those distribution rights were not protected by the § 365(n) election.

After an initial hearing, the bankruptcy court entered an order authorizing the Debtor's rejection of certain executory contracts, but deferred its determination of the Debtor's proposed rejection of the Agreement. After additional briefing and another hearing, the bankruptcy court entered an order regarding rejection of the Agreement. The order provided in its entirety:

> The motion to reject the contract of Mission Product Holdings pursuant to 11 U.S.C. § 365(a) is granted and the contract is rejected as of the petition date subject to Mission Prod-

uct Holdings' election to preserve its rights under 11 U.S.C. § 365(n).

This prompted the Debtor to file the 365(n) Motion, seeking a determination that Mission's post-rejection rights were limited exclusively to the IP License and that the balance of Mission's rights under the Agreement, including any exclusive product distribution rights or the right to use the Debtor's trademark and logo, did not survive rejection. Mission objected on the ground that its § 365(n) election also protected its exclusive product distribution rights and the right to use the Debtor's trademark and logo for the remainder of the wind-down period. Mission also claimed that the 365(n) Motion was procedurally defective because a request for a determination as to the scope of Mission's property rights in the Debtor's intellectual property required the commencement of an adversary proceeding pursuant to Bankruptcy Rule 7001(2).

After a non-evidentiary hearing, the bankruptcy court entered the order being appealed (the "365(n) Order") granting the 365(n) Motion and ruling: (1) Mission's election pursuant to § 365(n) protected Mission rights as a non-exclusive licensee only as to any patents, trade secrets, and copyrights as were granted to Mission in section 15(b) of the Agreement (the section identifying the property subject to the IP License); (2) Mission's election pursuant to § 365(n) provided no protectable interest in the Debtor's trademarks or trade names; and (3) Mission's election pursuant to § 365(n) provided no protectable interest in the Debtor's "Exclusive Products" and the "Exclusive Territory" as those terms were defined in the Agreement.

In its accompanying Memorandum Opinion,[4] the bankruptcy court first determined that the protections of § 365(n) extended only to the intellectual property rights granted to Mission in the Agreement. The court examined the provisions of the Agreement granting Mission exclusive distribution rights, and concluded that, even though the products to which it applied, namely the Cooling Accessories, were patented, the exclusive distribution rights did not constitute a license of intellectual property and therefore were outside the protection afforded under § 365(n). The court determined that the exclusive distribution rights granted to Mission were unrelated to the IP License and thus although the IP License was protected under § 365(n), the distribution rights were not.

With respect to the Debtor's trademarks, the bankruptcy court concluded that, to the extent the Agreement granted Mission a non-exclusive right to use certain of the Debtor's trademarks and trade names, § 365(n) did not protect Mission's trademark license post-rejection, and, as a result, "Mission does not retain rights to the Debtor's trademarks and logos post-rejection." In so ruling, the court adopted the view articulated in cases such as *In re Old Carco LLC*, 406 B.R. 180 (Bankr. S.D.N.Y. 2009), that because the Bankruptcy Code's definition of "intellectual property" set forth in § 101(35A) does not include trademarks and trade names, those categories of intellectual property are not protected under § 365(n). The court declined to follow *In re Crumbs Bake Shop, Inc.*, 522 B.R. 766 (Bankr. D.N.J. 2014), which held that it was improper to draw a negative inference from the absence of any reference to trademarks and trade names in § 101(35A)

[4] *In re Tempnology*, LLC, 541 B.R. 1 (Bankr. D.N.H. 2015).

for purposes of applying § 365(n) and that bankruptcy courts must exercise their equitable powers on a case-by-case basis to determine whether trademark licensees may retain their rights under § 365(n).

Finally, with respect to Mission's procedural argument, the bankruptcy court determined that the parties' dispute over the scope and applicability of § 365(n) arose as a result of the Debtor's rejection of the Agreement, which gave rise to a contested matter under Bankruptcy Rule 9014 and, therefore, the Debtor was not required to commence an adversary proceeding in order to obtain an adjudication of the 365(n) Motion.

JURISDICTION

The Panel has jurisdiction to hear appeals from final judgments, orders, and decrees of the bankruptcy court. *See* 28 U.S.C. § 158(a)(1). In the bankruptcy context, an order is "final" if it completely resolves "all of the issues pertaining to a discrete dispute within the larger proceeding." *Morse v. Rudler (In re Rudler)*, 576 F.3d 37, 43 (1st Cir. 2009) (quoting *Perry v. First Citizens Fed. Credit Union (In re Perry)*, 391 F.3d 282, 285 (1st Cir. 2004)). The 365(n) Order resolved conclusively what rights were preserved by Mission's § 365(n) election in response to the Debtor's rejecting the Agreement and, therefore, it is final. Thus, the Panel has jurisdiction to hear this appeal. *See In re Spansion, Inc.*, 507 Fed. Appx. 125, 127 (3d Cir. 2012) (considering appeal of bankruptcy court order determining creditor did not retain any rights pursuant to § 365(n) because the agreement between the parties was not a license); *In re Exide Techs.*, 607 F.3d 957, 961 (3d Cir. 2010) (considering appeal of order holding agreement was executory contract and rejection of the agreement terminated creditor's rights under the agreement).

STANDARD OF REVIEW

The Panel reviews a bankruptcy court's findings of fact for clear error and its conclusions of law de novo. *Jeffrey P. White & Assocs., P.C. v. Fessenden (In re Wheaton)*, 547 B.R. 490, 496 (1st Cir. BAP 2016) (citation omitted). This appeal concerns the bankruptcy court's interpretation of the Agreement and the relevant provisions of the Bankruptcy Code—questions of law reviewed de novo. *See OfficeMax, Inc. v. Levesque*, 658 F.3d 94, 97 (1st Cir. 2011) ("Contract interpretation, when based on contractual language without resort to extrinsic evidence, is a 'question of law' that is reviewed *de novo*.") (citation omitted); *Boston & Me. Corp. v. Mass. Bay Transp. Auth.*, 587 F.3d 89, 98 (1st Cir. 2009) ("[W]e review de novo issues of statutory interpretation ...."); *United States v. Yellin (In re Weinstein)*, 272 F.3d 39, 42 (1st Cir. 2001) ("A question of the interpretation of the Bankruptcy Code, like any other question of statutory interpretation, is a question of law that we review de novo.") (citation omitted). "De novo review means that the appellate court is not bound by the bankruptcy court's view of the law." *O'Rorke v. Porcaro*, 545 B.R. 384, 394 (1st Cir. BAP 2016) (citation omitted) (internal quotations omitted).

DISCUSSION

I. APPLICABLE LAW

Section 365(a) permits a trustee or debtor-in-possession, subject to court approval, to assume or reject any executory contract of the debtor. The rejection of an executory contract constitutes a breach of the contract as of the bankruptcy petition filing date, entitling the counter-party to damages. 11 U.S.C. § 365(g). Section 365(n) allows a counter-party who is the licensee under an intellectual property license to elect to retain certain rights under the contract notwithstanding the debtor's rejection. It provides, in relevant part, as follows:

> (n)(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—
>
> > ...
> >
> > (B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for—
> >
> > > (i) the duration of such contract; and
> > >
> > > (ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.
>
> (2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract—
>
> > (A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive—

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

11 U.S.C. § 365(n)(1) & (2).

Section 365(n)(3)(B) provides:

> If the licensee elects to retain its rights ... then on the written request of the licensee the trustee shall ... not interfere with the rights of the licensee as provided in such contract ... to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

11 U.S.C. § 365(n)(3)(B).

"Thus, in the event that a bankrupt licensor rejects an intellectual property license, § 365(n) allows a licensee to retain its licensed rights—along with its duties—absent any obligations owed by the debtor-licensor." *In re Exide Techs.*, 607 F.3d at 966. Upon the licensee's election to retain its rights, the trustee or debtor-in-possession must allow the licensee to exercise those rights free from interference. 11 U.S.C. § 365(n)(2), (3).

Congress enacted § 365(n) in 1988 in response to the U.S. Court of Appeals for the Fourth Circuit's decision in *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1048 (4th Cir. 1985), in which the court held that rejection of an intellectual property license deprived the licensee of all rights previously granted under the license. *Lubrizol* was widely criticized and the legislative history of § 365(n) makes it clear that Congress intended to overrule it. *See* S. Rep. No. 100–505, 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3201–3202. Lawmakers were concerned that technologists would respond to *Lubrizol* by insisting on outright assignments of intellectual property rather than agree to a licensing arrangement that could evaporate in the event of bankruptcy. *Id.* Seeing this as a threat to the system of licensing of intellectual property that had evolved in the United States, the Senate Report states that the purpose of § 365(n) was "to make clear that the rights of an intellectual property licensee to use the licensed property cannot be unilaterally cut off as a result of the rejection of the license pursuant to [§] 365 in the event of the licensor's bankruptcy." *Id.*

II. ISSUES ON APPEAL

In the present case, it is undisputed that, due to its § 365(n) election, Mission retained its rights under the IP License granted to it in section 15 of the Agreement and could exercise those rights free from interference by the Debtor.

Mission argues, however, that the bankruptcy court committed reversible error: (1) by ruling that Mission's § 365(n) election applied only to the IP License and not to the exclusive product distribution rights granted in the Agreement; (2) by ruling that notwithstanding its § 365(n) election Mission did not retain any rights to use the Debtor's trademark and logo because those items are not included in the Bankruptcy Code's definition of "intellectual property"; and (3) by not requiring the Debtor to bring an adversary proceeding against Mission in order to obtain the relief sought in the 365(n) Motion.

A. **Whether the bankruptcy court erred in ruling that Mission's exclusive product distribution rights were not protected by its § 365(n) election.**

Mission argues that its exclusive product distribution rights were preserved as a result of its § 365(n) election because § 365(n) permits a licensee of intellectual property to retain its rights under the contract, "including a right to enforce *any* exclusivity provision of such contract" and "including any embodiment of such intellectual property." 11 U.S.C. § 365(n)(1)(B) (emphasis added). According to Mission, the Debtor's grant to Mission of exclusive rights to distribute Cooling Accessories in section 1 of the Agreement, and the Debtor's agreement in sections 5 and 6 not to license or sell Cooling Accessories to anyone else during the term of the Agreement, were "exclusivity provisions" and they related to the IP License because the Cooling Accessories were the "embodiment" of the Debtor's intellectual property. Thus, Mission contends, its § 365(n) election protected not only its non-exclusive IP License but also its exclusive product distribution rights.

As the bankruptcy court correctly observed, and the parties do not seriously dispute, an executory contract which may be subject to a § 365(n) election can contain terms and provisions unrelated to the licensing of intellectual property. Upon rejection of such a contract, the licensee's § 365(n) election applies only to its rights to intellectual property and not to any other rights that it might have received under the executory contract. To conclude otherwise would allow the narrow exception of § 365(n) to upend the very purpose of § 365. Any executory contract could be made "rejection proof" by inserting in it an intellectual property license no matter how remote or untethered the license provision was from the other terms of the agreement.

The Agreement here deals with far more than the licensing of intellectual property. As reflected in its title, "Co-Marketing and Distribution Agreement," it confers on Mission the exclusive right to distribute the Debtor's products, namely its Cooling Accessories, in the United States and elsewhere around the world. Even a cursory reading of the Agreement makes it clear that the parties had two independent goals in entering into the Agreement: first, to grant Mission the right to distribute certain of the Debtor's products on an exclusive basis in a defined territory during a limited period; and second, to grant Mission a non-exclusive license to use some of the Debtor's intellectual property in perpetuity.

Mission also argues that the Debtor actually granted Mission two separate intellectual property licenses in the Agreement—the non-exclusive IP License provided in section 15 and an implied exclusive intellectual property license to defined products in a defined territory provided in sections 1, 5, 6, and 7 of the Agreement. According to Mission, the provisions by which the Debtor agreed that it would not interfere with Mission's product distribution rights in the Exclusive Territory and would refrain from selling or licensing the same products to third parties in that territory constituted the grant of an exclusive intellectual property license to Mission.

Mission's attempt to re-characterize its exclusive product distribution rights under the Agreement as an intellectual property license are unsupported by either the letter or the spirit of the Agreement. The product distribution provisions in sections 1, 5, 6, and 7 of the Agreement never use the terms license or intellectual property. They confer on Mission the exclusive right to sell certain of the Debtor's products in a defined territory and restrict the Debtor's ability to do the same, nothing more. These rights would have been viable and valuable even if the Agreement had not gone on to grant Mission the IP License.

Nor does the fact that the product distribution rights happen to be exclusive allow Mission's § 365(n) election to extend to those rights. The parenthetical reference in § 365(n)(1)(B) to "a right to enforce any exclusivity provision of such contract" refers "to such intellectual property." Thus, exclusivity provisions unrelated to an intellectual property license such as the exclusive product distribution rights in the Agreement are not protected by a § 365(n) election.

We conclude that the bankruptcy court did not err in ruling that the exclusive product distribution rights granted to Mission in the Agreement were unprotected by its § 365(n) election.

B. **Whether the bankruptcy court erred in ruling that Mission's rights in the Debtor's Coolcore trademark and logo were not protected by its § 365(n) election and, therefore, Mission did not retain any rights to the trademark and logo post-rejection.**

While the purpose of § 365(n) is to protect licensees of intellectual property, the section does not define the term "intellectual property." Section 101(35A) does. It provides:

> The term "intellectual property" means—
>
> > (A) trade secret;
> >
> > (B) invention, process, design, or plant protected under title 35 [relating to patents];
> >
> > (C) patent application;
> >
> > (D) plant variety;
> >
> > (E) work of authorship protected under title 17 [relating to copyrights]; or
> >
> > (F) mask work protected under chapter 9 of title 17 [relating to microchips];
>
> to the extent protected by applicable nonbankruptcy law.

11 U.S.C. § 101(35A). Conspicuously absent from the Code's definition are trademarks and trade names.[5]

---

[5] Congress considered addressing the omission of trademarks from § 101(35A) when it enacted § 365(n) but ultimately chose not to do so. The Senate Report noted:

> [T]he bill does not address the rejection of executory trademark, trade name or service mark licenses by debtor-licensors. While such rejection is of concern because of the interpretation of [§] 365 by the *Lubrizol* court and others, ... such contracts raise issues beyond the scope of this legislation. In particular, trademark, trade name and service mark licensing relationships depend to a large extent on control of the quality of the products or services sold by the licensee. Since these matters could not be addressed without more extensive study, it was determined to postpone congressional action in this area and to allow the development of equitable treatment of this situation by bankruptcy courts[.]

After Congress enacted § 365(n), several courts directly addressed the issue of whether trademarks are protected under the statute. Some courts reasoned by negative inference that the omission of trademarks from § 101(35A) means that trademark licenses are not afforded any protection under § 365(n) and therefore electing licensees have no rights to use trademarks post-rejection. *See, e.g.*, *In re Old Carco LLC*, 406 B.R. at 211 (holding that "[t]rademarks are not 'intellectual property' under the Bankruptcy Code" and, therefore, § 365(n) did not entitle licensees to retain their rights with respect to trademarks or to continue using them post-rejection); *In re HQ Global Holdings, Inc.*, 290 B.R. 507, 513 (Bankr. D. Del. 2003) ("[S]ince the Bankruptcy Code does not include trademarks in its protected class of intellectual property, *Lubrizol* controls and the Franchisees' right to use the trademarks stops on rejection."); *Raima UK Ltd. v. Centura Software Corp. (In re Centura Software Corp.)*, 281 B.R. 660, 674–75 (Bankr. N.D. Cal. 2002) ("Because § 365(n) plainly excludes trademarks, the court holds that [the licensee] is not entitled to retain any rights in [the licensed trademarks] under the rejected ... [t]rademark [a]greement.").

Other courts have expressed the view that reasoning by negative inference is inappropriate in the context of the rejection of trademark licenses and the scope of the § 365(n) election. *See, e.g.*, *In re Exide Techs.*, 607 F.3d at 966 (Ambro, J., concurring) ("I believe such reasoning [by negative inference] is inapt for

---

In re Crumbs Bake Shop, Inc., 522 B.R. at 771–72 (quoting S. Rep. No. 100–505, at 5, *reprinted in* 1988 U.S.C.C.A.N. 3204) (emphasis omitted).

trademark license rejections.");[6] *In re Crumbs Bake Shop, Inc.*, 522 B.R. at 772. Courts applying this approach rely on the legislative history of § 365(n), concluding that "Congress intended the bankruptcy courts to exercise their equitable powers to decide, on a case[-]by[-]case basis, whether trademark licensees may retain the rights listed under § 365(n)." *In re Crumbs Bake Shop, Inc.*, 522 B.R. at 772 (adopting rationale set forth by Judge Ambro in *In re Exide Techs.*). After considering the equities, the court in In re *Crumbs Bake Shop, Inc.* concluded that it would be inequitable to strip the trademark licensees of their rights under § 365(n) in the event of a rejection, as those rights were bargained away by the debtors.

---

[6] In *In re Exide Technologies*, the Third Circuit held that a perpetual, exclusive, and royalty-free trademark license that was part of a larger, decade-old asset-purchase agreement pursuant to which the debtor had sold a certain business unit was not executory and, therefore, could not be rejected by the debtor. 607 F.3d at 963–64. In other words, the trademark license continued to exist because the debtor could not reject the contract. In his concurring opinion, Judge Thomas L. Ambro disagreed with the bankruptcy court's determination that rejection of the contract deprived the licensee of its right to use the trademark. *Id.* at 964–68. He considered the line of cases that concluded by negative inference that, because Congress did not include trademarks in the definition of intellectual property, it intended *Lubrizol's* holding to control when a debtor rejects a trademark license. Judge Ambro opined, however, that "it is 'simply more freight than negative inference will bear' to read rejection of a trademark license to effect the same result as termination of that license." *Id.* at 967. He contended that, even though rejection of a contract would be a breach, rejection would not terminate the licensee's rights, and the licensee might still use a trademark even after rejection. Further, Judge Ambro maintained that, "[r]ather than reasoning from negative inference to apply another Circuit's holding," the Third Circuit should have used its "equitable powers" to allow the licensee to continue using the debtor's trademark. *Id.* at 967.

> Courts may use § 365 to free a bankrupt trademark licensor from burdensome duties that hinder its reorganization. They should not ... use it to let a licensor take back trademark rights it bargained away. This makes bankruptcy more a sword than a shield, putting debtor-licensors in a catbird seat they often do not deserve.

Id. (quoting *In re Exide Techs.*, 607 F.3d at 967–68).

In *Sunbeam Products, Inc. v. Chicago American Manufacturing, LLC*, 686 F.3d 372 (7th Cir. 2012), the U.S. Court of Appeals for the Seventh Circuit declined to follow either approach in its entirety. While the Seventh Circuit agreed that a § 365(n) election does not protect licensee rights in trademarks due to the omission of trademarks from the definition of intellectual property, it rejected both the line of authority embracing *Lubrizol's* holding that a trademark license is terminated upon rejection and the reasoning of Judge Ambro that equitable principles could preserve a licensee's rights in trademarks post-rejection. Instead, the Seventh Circuit held that the debtor's rejection of a trademark license, which was part of a supply agreement that related to the manufacturing and sale of electric fans by a third party, did not automatically extinguish the licensee's right to use the debtor's trademarks. In response to cases such as *In re Old Carco, LLC*, *supra*, the court stated that "an omission is just an omission. The limited definition in § 101(35A) means that § 365(n) does not affect trademarks one way or the other." *Id.* at 375. The court examined the legislative history of § 365(n) and suggested that "the omission [of trademarks from the definition] was designed to allow more time for study, not to approve *Lubrizol*." *Id.* (citations omitted). It then rejected any equity-based attempt to circumvent the statutory omission, stating that "[r]ights depend ... on what the Code provides rather than on notions of equity." *Id.* at 376.

The Seventh Circuit determined it was more appropriate to focus on § 365(g), which sets forth the consequences of a rejection under § 365(a). Under § 365(g) "the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease ...." 11 U.S.C. § 365(g). By classifying rejection as a breach, § 365(g) establishes that in bankruptcy, as outside of it, the non-rejecting party's rights remain in place. *Sunbeam*, 686 F.3d at 377. Thus, rejection does not terminate the contract. *Id.* at 377–78. "[R]ejection is not the functional equivalent of a rescission [as *Lubrizol* suggests], rendering void the contract and requiring that the parties be put back in the positions they occupied before the contract was formed .... It merely frees the estate from the obligation to perform and has absolutely no effect upon the contract's continued existence." *Id.* at 377 (citations omitted) (internal quotations omitted).

Here, the bankruptcy court, after considering both the negative inference and equity-based lines of authority, adopted the former.[7] The court, noting that § 101(35A) identifies six categories of intellectual property that are subject to protection under § 365(n), none of which includes trademarks, concluded:

> Under the maxim of *expressio unius est exclusio alterious* the expression of one thing is the exclusion of other things, *see*, *e.g.*, *United States v. Hernandez–Ferrer*, 599 F.3d 63, 67–68

[7] The bankruptcy court made no references to the *Sunbeam* decision.

> (1st Cir. 2010)[,] the omission of trademarks from the definition of intellectual property in § 101(35A) indicates that Congress did not intend for them to be treated the same as the six identified categories.

In re Tempnology, LLC, 541 B.R. at 8. Thus, the bankruptcy court ruled that Mission "does not retain rights to the Debtor's trademarks and logos post-rejection." *Id.*

Although Mission acknowledges that the definition of intellectual property in § 101(35A) does not encompass the Debtor's trademark and logo, it argues that the bankruptcy court should have used its equitable powers to determine that Mission's rights in the Debtor's trademark and logo were protected by § 365(n). According to Mission, the legislative history of § 365(n) makes it clear that the statute's failure to encompass trademarks within the definition of intellectual property protected upon rejection was intended, not to resurrect the draconian result in *Lubrizol*, but to allow courts to determine on a case-by-case basis whether trademark rights should be preserved under § 365(n) on equitable grounds. Mission maintains, because the parties bargained for trademark rights under the Agreement, and because the Debtor's trademark and logo are inseparable from the Debtor's other intellectual property and the products themselves, that Mission's election to preserve its licensee rights should include its rights in the Debtor's trademark and logo.

The Debtor contends, however, that the bankruptcy court properly adopted the negative inference approach and that *Lubrizol* applies to the Debtor's trademark and logo. According to the Debtor, Congress unambiguously defined the types of intellectual property entitled to protection under § 365(n), and it did not include trademarks in any of the protected categories. The Debtor maintains that courts may not look to legislative history to interpret unambiguous statutes and because the statute here is clear, there is no need to look to the legislative history to understand the scope of § 365(n). Thus, the Debtor maintains, the bankruptcy court correctly held that § 365(n) does not apply to the Debtor's trademark and logo and, therefore, Mission does not have a "protectable interest in the Debtor's trademarks that survive[d] rejection...."

We agree that § 365(n) incorporates the definition of intellectual property set forth in § 101(35A), and that the definition does not encompass trademarks and logos. But we decline Mission's invitation to rule that, despite the omission of trademarks from the Code's definition of intellectual property, Mission's licensee rights in the Debtor's trademark and logo should be preserved under § 365(n) on equitable grounds as suggested in § 365(n)'s legislative history. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) (collecting authorities). Thus, if a statute is unambiguous, the court need not resort to legislative history to construe its meaning. Moreover, "[w]hat the Bankruptcy Code provides, a judge cannot override by declaring that enforcement would be 'inequitable.' " *Sunbeam*, 686 F.3d at 375. While it is true that the legislative history expresses the sentiment that bankruptcy courts develop the "equitable treatment" of trademarks under § 365(n), we are not bound by Congress' aspirational asseverations.

We agree with the bankruptcy court that, based on a plain reading of the statute, Mission's rights in the

Debtor's trademark and logo were not and could not be protected by its § 365(n) election. We must part company with the bankruptcy court, however, on the *effect* the Debtor's rejection of the Agreement had on Mission's licensee rights in the Debtor's trademark and logo. The bankruptcy court ruled that, because the Debtor's trademark and logo were not protected by Mission's election under § 365(n), Mission did "not retain rights to the Debtor's trademarks and logos post-rejection." This conclusion endorses *Lubrizol's* approach to the rejection of executory contracts, namely that rejection terminates the contract. *Lubrizol*, however, is not binding precedent in this circuit and, like the many others who have criticized its reasoning,[8] we do not believe it articulates correctly the consequences of rejection of an executory contract under § 365(g). We adopt *Sunbeam's* interpretation of the effect of rejection of an executory contract under § 365 involving a trademark license.

> What § 365(g) does by classifying rejection as breach is establish that in bankruptcy, as out-

---

[8] *See, e.g.*, *In re Exide Techs.*, 607 F.3d at 966 (concurring opinion by Judge Ambro) (disagreeing with bankruptcy court's determination that *Lubrizol* and its progeny " 'retain vitality' " as they relate to trademark licenses); *In re Crumbs Bake Shop, Inc.*, 522 B.R. at 770 ("This Court is not persuaded by the decision in *Lubrizol* and is not alone in finding that its reasoning has been discredited.") (citing *Sunbeam*, 686 F.3d at 377–78). In addition, scholars uniformly criticize *Lubrizol*, concluding that it confuses rejection with the use of an avoiding power. *See, e.g.*, Douglas G. Baird, *Elements of Bankruptcy* 130–40 & n.10 (4th ed. 2006); Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection"*, 59 U. Colo. L. Rev. 845, 916–19 (1988); Jay Lawrence Westbrook, *The Commission's Recommendations Concerning the Treatment of Bankruptcy Contracts*, 5 Am. Bankr. Inst. L. Rev. 463, 470–72 (1997).

> side of it, the other party's rights remain in place. After rejecting a contract, a debtor is not subject to an order of specific performance. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984); *Midway Motor Lodge of Elk Grove v. Innkeepers' Telemanagement & Equipment Corp.*, 54 F.3d 406, 407 (7th Cir. 1995). The debtor's unfulfilled obligations are converted to damages; when a debtor does not assume the contract before rejecting it, these damages are treated as a pre-petition obligation, which may be written down in common with other debts of the same class. But nothing about this process implies that any rights of the other contracting party have been vaporized.

Sunbeam, 686 F.3d at 377.

Applying *Sunbeam's* rationale, we conclude that, while the Debtor's trademark and logo were not encompassed in the categories of intellectual property entitled to special protections under § 365(n), the Debtor's rejection of the Agreement did not vaporize Mission's trademark rights under the Agreement. Whatever post-rejection rights Mission retained in the Debtor's trademark and logo are governed by the terms of the Agreement and applicable non-bankruptcy law.

Thus, we conclude that the bankruptcy court did not err in ruling that Mission's § 365(n) election failed to protect its rights under the Agreement as licensee of the Debtor's trademark and logo, but it erred in ruling that Mission's rights in the Debtor's trademark and logo as set forth in the Agreement terminated upon the Debtor's rejection of the Agreement.

C. **Whether the bankruptcy court erred in deciding the 365(n) Motion without requiring the Debtor to commence an adversary proceeding?**

Mission argues that the bankruptcy court committed error in deciding the 365(n) Motion without requiring the Debtor to commence an adversary proceeding under Bankruptcy Rule 7001. The bankruptcy court viewed the dispute as to the scope and applicability of § 365(n) in the context of the Debtor's motion to reject the Agreement, from which it arose, treating it is a contested matter under Bankruptcy Rule 9014.

Bankruptcy Rule 7001 requires an adversary proceeding in order, among other things, "to determine the validity, priority or extent of a lien or other interest in property" or for a declaratory judgment relating to the foregoing. Fed. R. Bankr. P. 7001(2) & (9). According to Mission, by its 365(n) Motion, the Debtor sought a declaratory judgment regarding the enforceability of Mission's rights, how those rights related to the rights of the Debtor (or the purchaser of the Debtor's assets), and the scope of the specific property to which Mission's rights attached. Thus, Mission contends, the Debtor was seeking a final determination of the extent of Mission's rights in certain property, including its rights to the Debtor's intellectual property, and the matter could only be adjudicated through an adversary proceeding.

In support, Mission cites *In re Eastman Kodak Co.*, No. 12–10202, 2012 WL 2255719 (Bankr. S.D.N.Y. June 15, 2012), contending that the 365(n) Motion requested relief "that is nearly identical to the relief sought in *In re Eastman Kodak* ...." In that case, Eastman Kodak Company and certain affiliates planned to sell its digital imaging patents as part of its chapter 11 reorganization efforts. Two parties, Apple Inc. and FlashPoint Technology, Inc., disputed Kodak's ownership of ten digital imaging patents. Kodak filed a motion for an order in aid of the planned sale requesting a finding that Apple and FlashPoint had no ownership interests in the disputed patents and permitting a sale free and clear of their claims. Apple and FlashPoint objected, asserting, among other things, that the motion was procedurally improper because their ownership rights could not be determined summarily by motion. The bankruptcy court agreed, concluding the relief sought by Kodak was "for all intents and purposes, an action for a declaratory judgment to determine an interest in property by excluding the claimed interests of Apple and Flashpoint," and accordingly ruled that the matter had to be brought as an adversary proceeding, not as a contested motion. *Id.* at *2.

In contrast to the case before us, *In re Eastman Kodak* dealt with a dispute over ownership of property. Here, the dispute is over the scope of Mission's rights as a licensee of intellectual property in light of its election under § 365(n) after the Debtor rejected the contract giving rise to the license. Mission has never asserted ownership rights in the Debtor's property as Apple and FlashPoint did in *In re Eastman Kodak*.

Our case is more akin to *In re The Education Resources Institute, Inc.*, 442 B.R. 20 (Bankr. D. Mass. 2010). In that case, the debtor, The Education Resources Institute, Inc. ("TERI"), filed a "Motion for Interpretation of Order" asking the court to interpret an order authorizing the rejection of certain contracts with The First Marblehead Corporation. *Id.* at 21. TERI and First Marblehead disagreed about the implications of the court's order authorizing the rejection of certain contracts between the parties, including the parties' rights with respect to TERI's loan database. First Marblehead argued that the motion should be denied, because it sought declaratory and injunctive relief and therefore must be filed as an adversary proceeding under Bankruptcy Rule 7001. The bankruptcy court disagreed, noting:

> The Court agrees with First Marblehead that, to the extent TERI asks the Court to enjoin First Marblehead from doing anything or asks the Court to order First Marblehead to take a particular action, Rule 7001(7) requires the filing of an adversary proceeding. ... But to the extent the motion asks the Court merely to interpret the Contracts Order, a request which *does* strike the Court as one for declaratory relief, an adversary proceeding is not required.... Standing alone, TERI's request for an interpretation of the Contracts Order is not related to any of the types of relief listed in subsections (1) through (8) of that Rule and may be brought by motion as a contested matter pursuant to Bankruptcy Rules 9013 and 9014.

Id. at 23–24 (citations omitted).

The bankruptcy court also noted First Marblehead would not be prejudiced by the procedure employed. The court observed:

> There are no factual issues in dispute requiring an extended discovery period or evidentiary hearing and both parties have had a fair opportunity to fully address the relevant legal issues. Accordingly, requiring the filing of an adversary proceeding at this juncture would provide nothing other than fruitless delay.

Id. at 24 (citing *In re NSCO, Inc.*, 427 B.R. 165, 176 n.12 (Bankr. D. Mass. 2010) (failure to file adversary proceeding excused where parties given fair opportunity to address issues in the context of a contested matter and no factual issues were in dispute); *Aegean Fare, Inc. v. Massachusetts (In re Aegean Fare, Inc.)*, 33 B.R. 745, 746 n.1 (Bankr. D. Mass. 1983) (failure to file adversary proceeding excused where issues were clearly delineated in motion and non-moving party was able to draft detailed response)).

In this case, the Debtor filed the 365(n) Motion seeking an interpretation of the bankruptcy court's order granting the Debtor's request to reject the Agreement, and the scope of Mission's retained rights after such rejection in light of its § 365(n) election, a request which may be interpreted as one for declaratory relief. The Debtor was not seeking a determination of the validity or extent of a lien or interest in property.

In any event, even if the 365(n) Motion should have been filed as an adversary proceeding, the bankruptcy court's failure to require the Debtor to do so was harmless error as there was no prejudice to Mission. Neither party expressed the need for or engaged in any discovery. Nor were there any facts in dispute. The parties were given ample opportunity to brief all issues and were given a full and fair hearing. Requiring the Debtor to file an adversary proceeding would only have delayed resolution of the critical issues in dispute and added unnecessary expense on both sides.

In light of the foregoing, we conclude the bankruptcy court did not err in deciding the 365(n) Motion without requiring the Debtor to commence an adversary proceeding under Bankruptcy Rule 7001.

CONCLUSION

For the reasons set forth above, we **AFFIRM IN PART** and **REVERSE IN PART**. We **REVERSE** the 365(n) Order to the extent the bankruptcy court ruled that Mission's rights in the Debtor's trademark and logo as set forth in the Agreement terminated upon the Debtor's rejection of the Agreement. We **AFFIRM** all other aspects of the 365(n) Order, including the bankruptcy court's ruling that Mission's § 365(n) election did not protect its rights under the Agreement as licensee of the Debtor's trademark and logo.

APPENDIX C

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

Bk. No. 15-11400-JMD
Chapter 11

TEMPNOLOGY, LLC,

Debtors,

ORDER

This proceeding having come before the Court on November 3, 2015, for hearing on the Debtor's Motion for Determination of the Applicability and Scope of Mission Product Holdings, Inc.'s Election Pursuant to 11 U.S.C. § 365(n)(1)(B) (Doc. No. 211) (the "Motion"), and the Court having issued its memorandum opinion of even date, it is hereby ORDERED:

1. The Motion is granted.
2. Mission Product Holdings, Inc.'s ("Mission") election pursuant to 11 U.S.C. § 365(n) provides Mission rights as a non-exclusive licensee only as to any patents, trade secrets, and copyrights as are granted to Mission in section 15(b) of the Agreement.
3. Mission's election pursuant to 11 U.S.C. § 365(n) provides no protectable interest in the Debtor's trademarks or trade names.
4. Mission's election pursuant to 11 U.S.C. § 365(n) provides no protectable interest in the Debtor's "Exclusive Products" and the "Exclusive Terri-

tory" as those terms are defined in the Agreement.

This is a core proceeding in accordance with 28 U.S.C. § 157(b) as to which this Court has jurisdiction of the subject matter and the parties.

ENTERED at Manchester, New Hampshire.

Dated: November 12, 2015

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge

APPENDIX D

UNITED STATES BANKRUPTCY COURT
D. NEW HAMPSHIRE

541 B.R. 1
Bk. No. 15–11400–JMD

IN RE TEMPNOLOGY, LLC, DEBTORS

Signed November 12, 2015

MEMORANDUM OPINION

J. Michael Deasy, Bankruptcy Judge

I. INTRODUCTION

The matter before the Court is the "Debtor's Motion for Determination of the Applicability and Scope of Mission Product Holdings, Inc.'s Election Pursuant to 11 U.S.C. § 365(n)(1)(B)" (Doc. No. 211) (the "Motion") filed by Tempnology, LLC (the "Debtor"), the chapter 11 debtor-in-possession, and the objection thereto filed by creditor Mission Product Holdings, Inc. ("Mission"). On October 2, 2015, the Court entered an order granting the Debtor's motion to reject its contract with Mission subject to Mission's election to preserve its rights under 11 U.S.C. § 365(n).[1] Through the present Motion,

[1] Unless expressly stated otherwise, all references to "Bankruptcy Code" or to specific sections shall be to the Bankruptcy Reform Act of 1978, as amended by the Bankruptcy Abuse Pre-

the Debtor seeks a determination that those rights do not extend to the grant of certain exclusive distribution rights or to the use of the Debtor's trademarks and logos. For the reasons set forth below, the Court will grant the Motion.

II. JURISDICTION

This Court has authority to exercise jurisdiction over the subject matter and the parties pursuant to 28 U.S.C. §§ 157(a), 1334, and U.S. District Court for the District of New Hampshire Local Rule 77.4(a). This is a core proceeding under 28 U.S.C. § 157(b).

III. FACTS

The facts are not in dispute. The Debtor is a Portsmouth, New Hampshire based material innovation company that, among other things, develops chemical-free cooling fabrics under the Coolcore brand for use in consumer products.

On November 21, 2012, the Debtor and Mission entered into a Co–Marketing and Distribution Agreement (the "Agreement"). Pursuant to section 1(A) of the Agreement, the Debtor granted Mission "exclusive distribution rights within the United States and first rights of notice and of refusal ... on exclusive distribution rights in certain other countries," defined as the "Exclusive Territory," with respect to "the Cooling Accessories," defined as products of specific types that are listed in an attached exhibit to the Agreement and cer-

---

vention and Consumer Protection Act of 2005 ("BAPCPA"), Pub.L. No. 109–8, 119 Stat. 23, 11 U.S.C. § 101, *et seq.* All references to "Bankruptcy Rule" shall be to the Federal Rules of Bankruptcy Procedure.

tain future derivatives of those products.[2] In section 5 of the Agreement, the Debtor agreed that "it will not license or sell the Cooling Accessories ... to anyone other than [Mission] during the Term" of the Agreement in the Exclusive Territory.[3] Similarly, in section 6 of the Agreement, the Debtor agreed that "[i]n the U.S. and elsewhere in the Exclusive Territory ... it will not sell any Cooling Accessories, New Products or Cooling Accessory Derivatives, directly or indirectly, to any retailer or other entity ... throughout the Term." Finally, section 7 of the Agreement, titled "Cooperation and Further Assurances," provides in relevant part:

> [The Debtor] agrees that (i) it shall take no actions to directly or indirectly frustrate its exclusivity obligations hereunder; (ii) [the Debtor] shall fully cooperate with [Mission] to ensure that no third parties take any actions that frustrate the purposes of the exclusivity provisions herein, and (iii) [the Debtor] shall take such actions as are necessary to enforce [the Debtor's] intellectual property rights and contractual rights against third parties."[4]

Mission's "product exclusivity rights as delineated in Sections 5 and 6" were subject to it meeting certain purchasing forecasts as described in section 8 of the Agreement.[5]

Intellectual property is addressed in section 15 of the Agreement. Subparagraph (a) broadly defines "In-

---

[2] *Id.* at § 1(A).

[3] *Id.* at § 5.

[4] *Id.* at § 7.

[5] *Id.* at § 8.

tellectual Property Rights" to include, *inter alia*, the Debtor's copyrights, patentable and unpatentable inventions, discoveries, designs, technology, trademarks, and trade secrets.[6] In subsection (b), the Debtor granted Mission the following license (the "Non–Exclusive License"):

> Excluding those elements of the CC Property consisting of Marks, Domain Names, [the Debtor] hereby grants to [Mission] and its agents and contractors a nonexclusive, irrevocable, royalty-free, fully paid-up, perpetual, worldwide, fully-transferrable license, with the right to sublicense (through multiple tiers), use, reproduce, modify, and create derivative work based on and otherwise freely exploit the CC Property in any manner for the benefit of [Mission], its licensees and other third parties.[7]

"CC Property" is defined, in relevant part, as "all products (including without limitation the Cooling Accessories) ... developed or provided by [the Debtor] hereunder and all Intellectual Property Rights with respect to any of the foregoing...."[8] In subsection (d), the Debtor granted Mission "a non-exclusive, non-transferable, limited license ... to use its Coolcore trademark and logo (as well as any other Marks licensed hereunder) for the limited purpose of performing its obligations hereunder" during the term of the Agreement.[9]

---

[6] *Id.* at § 15(a).

[7] *Id.* at § 15(b).

[8] *Id.*

[9] *Id.* at § 15(d).

The Agreement had an initial term of two years and was subject to renewal.[10] Either party could terminate the Agreement without cause upon written notice.[11] Any event of termination, however, would trigger a two year wind down period during which Mission would retain the right to purchase, distribute, and sell the Cooling Accessories in accordance with the provisions of the Agreement.[12]

The Debtor filed a voluntary chapter 11 petition on September 1, 2015. The following day, on September 2, 2015, the Debtor filed an omnibus motion to reject executory contracts *nunc pro tunc* to the petition date, including the Agreement. Mission objected asserting that the Agreement was not executory, and expressly reserving its rights under § 365(n). On October 2, 2015, the Court held a hearing on rejection and, after the conclusion of oral arguments, entered an order allowing the Debtor to reject the Agreement subject to Mission's election to retain its rights under § 365(n).

On October 15, 2015, the Debtor filed the Motion seeking a determination that Mission's rights under § 365(n) were limited to only the grant of the Non–Exclusive License under section 15(b) of the Agreement. Mission objected, asserting that § 365(n) also protected its exclusive distribution rights and use of the Debtor's trademarks for the remainder of the wind down period, which will expire in July, 2016.[13] The

[10] *Id.* at § 2.

[11] *Id.* at § 3.

[12] *Id.* at § 4.

[13] Mission also argued that the Motion was procedurally improper and the relief requested must be the subject of an adversary proceeding under Fed. R. Bankr. P. 7001(2) and (9). The

Court heard oral arguments on November 3, 2015, and, in light of the imminent auction of the Debtor's assets free and clear of all liens and interests, indicated its intention to grant the Motion, but took the matter under advisement in order to complete the findings and rulings in this opinion.

IV. POSITIONS OF THE PARTIES

A. *The Debtor*

The Debtor does not dispute that the Non–Exclusive License, granted to Mission pursuant to section 15(b) of the Agreement, is entitled to protection under § 365(n), but argues that Mission's so-called "exclusivity rights" under sections 1, 5, 6, and 7 of the Agreement are not. The Debtor contends that these provisions simply grant exclusive distribution rights and are not rights to intellectual property. For this reason, the Debtor asserts that Mission places too much emphasis on the parenthetical language of § 365(n) that states "including a right to enforce any exclusivity provision of such contract" without acknowledging that the provision only applies to "rights ... to such intellectual property." 11 U.S.C. § 365(n)(1)(B).

Additionally, the Debtor argues Mission does not retain any rights to the Debtor's trademarks under the Agreement. To start, the Debtor notes that trademarks were excluded from the definition of CC Property in section 15(b) of the Agreement, and are not part of the Non–Exclusive License. Instead, Mission's license to use the Debtor's trademarks under the Agreement

Court rejected this argument, viewing the Motion in the context of rejection under § 365, which is a contested matter under Fed. R. Bankr. P. 9014.

was expressly limited in section 15(d) of the Agreement. In any event, the Debtor asserts that the omission of trademarks from § 101(35A) mandates the conclusion that trademarks are not protected under § 365(n).

B. *Mission*

The primary thrust of Mission's argument is that § 365(n) permits a licensee of intellectual property to retain its rights "including a right to enforce *any* exclusivity provision of such contract." 11 U.S.C. § 365(n)(1)(B) (emphasis added). Mission construes its exclusivity rights under sections 1, 5, 6, and 7 of the Agreement as the grant of an exclusive license apart from the Non–Exclusive License under section 15(b) of the Agreement. In doing so, it focuses on the language sections 5 and 6 of the Agreement where the Debtor agrees that it will not license or sell the Cooling Accessories to anyone else during the term of the Agreement. Contending that one cannot sell without a license, Mission urges that the negative language implies the grant of an exclusive license to the underlying products.

Mission counters the Debtor's assertion that this exclusive license is not one to intellectual property by emphasizing that § 365(n) explicitly applies to "any embodiment of such intellectual property." 11 U.S.C. § 365(n). Mission posits that because it has the exclusive right to distribute the Cooling Accessories, and the Cooling Accessories are the embodiment of the Debtor's intellectual property subject to patents, these exclusive rights must fall within the protection of § 365(n). Mission finds further support for its position in section 7 of the Agreement, wherein the Debtor agrees to take such actions to enforce the Debtor's intellectual property rights from third parties.

With respect to the Debtor's trademarks, Mission disagrees that they fall outside the definition of intellectual property in the Bankruptcy Code. Instead, it relies on *In re Crumbs Bake Shop, Inc.*, 522 B.R. 766, 772 (Bankr. D.N.J. 2014), for the proposition that the Court may use its equitable powers to determine whether a licensee may retain rights to a debtor's trademarks post-rejection.

V. DISCUSSION

Section 365(a) of the Bankruptcy Code permits a debtor-in-possession to assume or reject any executory contract of the debtor subject to Court approval. 11 U.S.C. § 365(a). The rejection of an executory contract constitutes a breach of the contract as of the petition date, entitling the counter-party to damages. 11 U.S.C. § 365(g). Section 365(n), however, affords additional protections to licensees of intellectual property. It provides:

If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect-

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including the right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced for-

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

11 U.S.C. § 365(n)(1). "Thus, in the event that a bankrupt licensor rejects an intellectual property license, § 365(n) allows a licensee to retain its licensed rights along with its duties absent any obligations owed by the debtor-licensor." *In re Exide Techs*., 607 F.3d 957, 965 (3d Cir. 2010) (Ambro, J., concurring). Upon the licensee's election to retain its rights, the trustee or debtor-in-possession must allow the licensee to exercise those rights free from interference. 11 U.S.C. § 365(n)(2), (3).

Congress enacted § 365(n) as a direct response to the decision by the United States Court of Appeals for the Fourth Circuit in *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985). In *Lubrizol*, the Fourth Circuit held that rejection of an intellectual property license deprives the licensee of the rights previously granted under the license. *Id.* at 1048. The result was widely viewed as unjust, as monetary damages, assuming the debtor's estate could eventually pay them, would not make up for the loss of a one of a kind technology around which the licensee built its business. *See* S. Rep. No. 100–505, 100th Cong. 2d Sess. (1988), reprinted in 1988 U.S.C.C.A.N. 3201–3202. Lawmakers were concerned that technologists would respond to *Lubrizol* by insisting on outright assignments of intellectual property rather than agree to a licensing arrangement that could evaporate in the event of bankruptcy. *Id.* at 3202. Seeing this as a threat to the system of licensing of intellectual property that had evolved in the United States, the express purpose of § 365(n) was "to make clear that the rights of an intellectual property licensee to use the licensed property cannot be unilaterally cut off as a result of the rejection of the license pursuant to Section 365 in the event of the licensor's bankruptcy." *Id.* at 3200.

In the present case, no one disputes that under § 365(n), Mission retains the Non–Exclusive License granted to it pursuant to section 15(b) of the Agreement and may exercise those rights free from interference by the Debtor or any prospective buyer. Therefore, the only issues before the Court are whether Mission retains its exclusive distributions rights and rights to the Debtor's trademarks.

While there is no question that a contract, like the Agreement, can serve more than one purpose, it is clear from both the statutory text of § 365(n) and its legislative history that the protection afforded to licensees is solely limited to intellectual property rights. Thus, not all rights under an executory contract that licenses intellectual property will necessarily be retained post-rejection. The central question is whether the rights claimed are truly "rights to ... intellectual property." 11 U.S.C. § 365(n)(1)(B). For several reasons, the Court finds that Mission's exclusivity rights are not.

Although not dispositive, it is apparent that the focus of the Agreement is marketing and distribution. To that end, section 1(A) of the Agreement is a grant of "exclusive distribution rights" with respect to the Cooling Accessories. Even when read in conjunction with sections 5, 6, and 7, of the Agreement, there is nothing that to suggest that the rights granted by those paragraphs amount to anything more than the right to sell and distribute specified products. In contrast, the Non–Exclusive License granted in section 15(b) of the Agreement uses wholly dissimilar language and is explicit in its effect.

Critically, the Non–Exclusive License appears to be unrelated to the distribution aspect of the Agreement. Indeed, under the Non–Exclusive License, Mission's ability to "reproduce" and "freely exploit" the "CC Property," which includes the Cooling Accessories and all Intellectual Property Rights, seemingly renders distribution irrelevant in as much as Mission no longer needed the Debtor to manufacture and sell the products. In this way, the Non–Exclusive License, which is perpetual, irrevocable, and royalty free, appears to serve as consideration for Mission's efforts in marketing and selling the Debtor's products, and protection from the Debtor's termination of the Agreement after Mission had done substantial work building the market and the brand.

Admittedly, the Cooling Accessories are patented products, but the Court is unpersuaded that Mission's exclusive right to sell them, by itself, rises to the level of a protected right to the "embodiment of ... intellectual property" under § 365(n)(1)(B). Section 365(n) is a narrow exception to the general rule that counterparties to executory contracts are left with only a claim for damages upon rejection. Construing the naked right to sell a patented product as a right to intellectual property itself would extend the protection of § 365(n) far beyond its stated purpose of protecting the licensee that builds its business around licensed intellectual property to which there is no substitute. Not surprisingly, Mission has not cited any case that has applied § 365(n) so broadly, which may explain why this argument was raised for the first time at the November 3, 2015, hearing and did not appear in its papers.

For all these reasons the Court concludes that the exclusive distribution rights granted to Mission in the Agreement are not rights that it retains post-rejection under § 365(n)(1)(B).

The final issue before the Court is whether Mission retains rights to the Debtor's trademarks post-rejection. The Bankruptcy Code defines "intellectual property" to include trade secrets, inventions, processes, designs, plants protected under title 35, patent applications, plant varieties, works of authorship protected under title 17, or mask work protected under chapter 9 of title 17. 11 U.S.C. § 101(35A). Notably absent from the list is trademarks, which according to the accompanying Senate Report, was consciously excluded because further study was needed before taking legislative action. *See* S. Rep. No. 100–505, 100th Cong.2d Sess. 5 (1988), reprinted in 1988 U.S.C.C.A.N. 3201–3204. A minority of courts conclude, as Mission urges this Court to do, that "Congress intended the bankruptcy courts to exercise their equitable powers to decide, on a case by case basis, whether trademark licensees may retain the rights listed under § 365(n)." *In re Crumbs Bake Shop, Inc.*, 522 B.R. at 772; *see In re Exide Techs.*, 607 F.3d at 966 (Ambro, J., concurring). Most courts, however, reason by negative inference that the omission of trademarks from § 101(35A) means that *Lubrizol's* holding was not overruled with respect to trademark licenses and those rights are not afforded any protection under § 365(n). *See e.g., In re Old Carco*

LLC, 406 B.R. 180, 211 (Bankr. S.D.N.Y. 2009); *In re Dynamic Tooling Sys., Inc.*, 349 B.R. 847, 856 (Bankr. D. Kan. 2006); *In re HQ Global Holdings, Inc.*, 290 B.R. 507, 513 (Bankr. D. Del. 2003); *In re Centura Software Corp.*, 281 B.R. 660, 674–75 (Bankr. N.D. Cal. 2002).

Having reviewed both lines of reasoning, the Court finds the rationale of the majority more persuasive. Section 101(35A) identifies six categories of intellectual property that will be subject to protection under § 365(n), while trademarks were knowingly omitted. Under the maxim of *expressio unius est exclusio alterious* the expression of one thing is the exclusion of other things, *see, e.g., United States v. Hernandez–Ferrer*, 599 F.3d 63, 67–68 (1st Cir. 2010) the omission of trademarks from the definition of intellectual property in § 101(35A) indicates that Congress did not intend for them to be treated the same as the six identified categories. Therefore, Mission does not retain rights to the Debtor's trademarks and logos post-rejection.

VI. CONCLUSION

For the reasons stated above, the Court shall enter a separate order granting the Motion. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Fed. R. Bankr. P. 7052.

APPENDIX E

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

Bk. No. 15-11400-JMD
Chapter 11

TEMPNOLOGY, LLC,

Debtor,

ORDER OF THE COURT

Hearing Date:	10/2/2015
Nature of Proceeding:	Doc# 35 Doc# 35 Omnibus Motion to Reject Executory Contracts Nunc Pro Tunc to the Petition date with Delco Illuminacio y Compementos, Trainers Choice, UK Sports Product, CAI Marketing Group, Hyman Intl, CIA Global Group Ltd, Yija International Trade Group, Cool Canuck, Mission Product Holdings, Ryan Drew, Justin Cupps, SKS Trade, LHR de Mexico, Perennial Sales Filed by Debtor
Outcome of Hearing:	The motion to reject the contract of Mission Product Holdings pursuant to 11 U.S.C. § 365(a) is granted and

the contract is rejected as of the petition date subject to Mission Product Holdings' election to preserve its rights under 11 U.S.C. § 365(n).

IT IS SO ORDERED:

<u>/s/ J. Michael Deasy</u> 10/2/2015
J. Michael Deasy
Bankruptcy Judge

APPENDIX F

11 U.S.C.A. § 365

§ 365. Executory contracts and unexpired leases

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)

(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title;

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or

(D) the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance—

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(1)

(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

(d)

(1) In a case under chapter 7 of this title, 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.

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4)

(A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of—

(i) the date that is 120 days after the date of the order for relief; or

(ii) the date of the entry of an order confirming a plan.

(B)

(i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.

(ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.

(5) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(e)

(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(A)

(i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f)

(1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if—

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title—

(A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title—

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h)

(1)

(A) If the trustee rejects an unexpired lease of real property under which the debtor is the lessor and—

(i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or

(ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease and for the term of any renewal or extension of such lease, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(C) The rejection of a lease of real property in a shopping center with respect to which the lessee elects to retain its rights under subparagraph (A)(ii) does not affect the enforceability under applicable nonbankruptcy law of any provision in the lease pertaining to radius, location, use, exclusivity, or tenant mix or balance.

(D) In this paragraph, "lessee" includes any successor, assign, or mortgagee permitted under the terms of such lease.

(2)

(A) If the trustee rejects a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller and—

(i) if the rejection amounts to such a breach as would entitle the timeshare interest purchaser to treat the timeshare plan as terminated under its terms, applicable nonbankruptcy law, or any agreement made by timeshare interest purchaser, the timeshare interest purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection; or

(ii) if the term of such timeshare interest has commenced, then the timeshare interest purchaser may retain its rights in such timeshare interest for the balance of such term and for any term of renewal or extension of such timeshare interest to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the timeshare interest purchaser retains its rights under subparagraph (A), such timeshare interest purchaser may offset against the moneys due for such timeshare interest for the balance of the term after the date of the rejection of such timeshare interest, and the term of any renewal or extension of such timeshare interest, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such timeshare plan, but the timeshare interest purchaser shall not have any right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(i)

(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) If such purchaser remains in possession—

(A) such purchaser shall continue to make all payments due under such contract, but may,[1] offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

---

[1] So in original. The comma probably should not appear.

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(l) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.

(n)

(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for—

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract—

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive—

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract or any agreement supplementary to such contract—

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

(o) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

(p)

(1) If a lease of personal property is rejected or not timely assumed by the trustee under subsection (d), the leased property is no longer property of the estate and the stay under section 362(a) is automatically terminated.

(2)

(A) If the debtor in a case under chapter 7 is an individual, the debtor may notify the creditor in writing that the debtor desires to assume the lease. Upon being so notified, the creditor may, at its option, notify the debtor that it is willing to have the lease assumed by the debtor and may condition such assumption on cure of any outstanding default on terms set by the contract.

(B) If, not later than 30 days after notice is provided under subparagraph (A), the debtor notifies the lessor in writing that the lease is assumed, the liability under the lease will be assumed by the debtor and not by the estate.

(C) The stay under section 362 and the injunction under section 524(a) (2) shall not be violated by notification of the debtor and negotiation of cure under this subsection.

(3) In a case under chapter 11 in which the debtor is an individual and in a case under chapter 13, if the debtor is the lessee with respect to personal property and the lease is not assumed in the plan confirmed by the court, the lease is deemed rejected as of the conclusion of the hearing on confirmation. If the lease is rejected, the stay under section 362 and any stay under section 1301 is automatically terminated with respect to the property subject to the lease.

APPENDIX G

CO-MARKETING AND DISTRIBUTION AGREEMENT

This Co-Marketing, Sourcing and Distribution Agreement (this "Agreement"), is made effective as of November 21, 2012 ("Effective Date"), by and between Tempnology, LLC d/b/a Coolcore ("***CC***") and Mission Product Holdings, Inc.("***MP***").

<u>WITNESSETH</u> :

WHEREAS, CC and MP have executed a Binding Term Sheet dated as of November 21, 2012 (the "Term Sheet") in which the parties outlined key terms for an arrangement related to product sourcing, co-marketing and distribution of certain textile-based cooling products produced by or through CC.

WHEREAS, the Term Sheet anticipates that the parties will negotiate and agree upon a definitive agreement that will supersede the Term Sheet and the parties desire to do so; and

NOW, THEREFORE, in consideration of the mutual agreements set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties do hereby agree as follows:

1) **Territory:**

   A) During the term of this Agreement and upon the terms and conditions set forth herein (including without limitation the terms of Sections 5 and 6 hereof), with respect to the Cooling Accessories (as defined below) MP will have, and CC hereby grants MP, exclusive distribution rights within the United States and first rights of notice and of refusal as further defined below in this paragraph on exclusive distribution rights in certain other countries, excluding the specific countries identified in the License and Distribution agreement dated as of January 21, 2013 (the "ReYs Agreement") between CC and Qingdao Rey.S Culture and Media Company ("ReYs") — namely, the countries of China, Japan, Taiwan, Hong Kong, Korea, Singapore, Malaysia, Indonesia, Philippines, Thailand and Vietnam (the "ReYs Territories"). The United States as well as such other countries and territories that MP acquires exclusive distribution rights to pursuant to its first rights of refusal and notice hereunder are referred to collectively as the "Exclusive Territory". For the avoidance of doubt, during the term of the ReYs Agreement, ReYs has the exclusive right to sell CC's Cooling Accessories under the Coolcore trademark in the ReYs Territories. For the purposes of this Agreement, the term "Cooling Accessories" shall mean products of the specific types listed on Exhibit A hereto manufactured by or on behalf of CC and additional products that are hereafter developed by CC that are added to the term Cooling Accessories pursuant to the terms of Section 13 hereof (such additional products being sometimes herein referred to as "Cooling Accessory Derivatives" if they are not substantially distinct from the items on Exhibit A and "New

Products" if they are substantially distinct from the items on Exhibit A, it being understood that both Cooling Accessory Derivatives and New Products shall be deemed Cooling Accessories hereunder).

B) For clarity, it is expressly understood that MP shall have the right to sell Cooling Accessories throughout the world, and shall have exclusive rights (consistent with the Product Exclusivity provisions of Sections 5 and 6 below) in the Exclusive Territory. CC shall inform MP prior to agreeing to sell any Cooling Accessories (directly or indirectly) in any territory outside the United States, excluding (for the term of the ReYs Agreement only) the ReYs Territories; provided that CC shall inform MP of any pending renewals and renegotiations of the ReYs Agreement and the associated terms of any renewal or renegotiation shall be treated in the same manner as any other "International Term Sheet" (as such term is defined below). It is, however, expressly understood and agreed that, at no time in the future, will ReYs be classified as a "Sports Distributor" (as such term is defined below) based on the ReYs Agreement for the purposes of the right of first refusal set forth below and therefore MP shall only be entitled to a right of first notice with respect thereto as provided for under Subsection 1(D) hereof.

* * *

2) Term:

The initial term of this Agreement will commence upon the Effective Date and expire on July 1, 2016 (the "Initial Term"). Following the Initial Term, the Agreement will automatically renew (subject to the parties' termination rights specified below) for additional one-year periods (each a "Renewal Term") from July 2 of the then-current calendar year until July 1 of the following calendar year. Each such yearly period (whether during the Initial Term or a Renewal Term) is referred to herein as a "Contract Year," except that the first Contract Year will run from the Execution Date until July 1, 2014. The Initial Term and any Renewal Terms are together referred to as the "Term".

3) **Termination:**

Either party may terminate this Agreement without cause by providing written notice during May or June of any Contract Year, in which case the Agreement will terminate as of the last day of the second full Contract Year following timely notice of termination. For example, a termination notice delivered on June 1, 2014 would result in an effective date of termination of July 1, 2016. Notwithstanding the foregoing, and except as otherwise provided herein, either one of the parties may terminate this Agreement following the commission by the other party of a breach of a material term hereof (excluding alleged breaches by MP in the nature of nonpayment, which are subject to termination pursuant to Section 3(i) below only), after written notification to the other party that it shall have 90 days to remedy such breach. If such breach is not remedied or cured within the 90-day period, the aggrieved party may terminate this Agreement after the expiration of such cure period by written notice to the defaulting party. A breach by a party hereunder shall be deemed cured if the party alleged to have committed such breach ceases within the above specified cure period the activity which is the basis of the alleged breach. If there is a dispute as to whether a breach exists or has been cured, this Agreement shall remain in effect until such dispute is resolved pursuant to the Dispute Resolution provision below. In addition to the foregoing, (i) CC may terminate this Agreement (but not any PO's under which undisputed amounts have been paid) if MP has failed to pay any amount in excess of $25,000 in the aggregate due under any PO (or PO's) on a timely basis and such failure continues to exist after the passage of 30 days after CC has confirmed that MP has received written notice from CC to MP of the existence of such failure (provided that if MP in good faith disputes whether payment thereof is due this Agreement shall remain in effect until such dispute is resolved pursuant to the Dispute Resolution provision below), and (ii) CC may terminate this Agreement immediately upon written notice (or if immediate termination is not permitted under applicable law, then upon the shortest notice and cure period permitted) upon the filing of a petition in bankruptcy or for reorganization under any bankruptcy, receivership, insolvency or other similar law by or against MP; or upon MP's becoming insolvent (as finally determined by a court of competent jurisdiction) or making an assignment for benefit of creditors or taking other similar action; and (iii) MP may terminate this Agreement immediately upon written notice (or if immediate termination is not permitted under applicable law, then upon the shortest notice and cure period permitted) upon the filing of a petition in bankruptcy or for reorganization under any bankruptcy, receivership, insolvency or other similar law by or against CC or upon CC's becoming insolvent (as finally determined by a court of competent jurisdiction) or making an assignment for benefit of creditors or taking other similar action.

4) Effect of Termination:

In the event of any termination of this Agreement MP shall have the right to purchase, distribute and sell, in accordance with the provisions of this Agreement, and notwithstanding the termination of this Agreement, those Cooling Accessories and other products which shall have been delivered to MP or ordered by MP on or before the date of such termination for such period of time as is reasonably required by MP to sell such Cooling Accessories and other products, provided that in all events MP shall not have the right to sell any such Cooling Accessories and other products after the two-year anniversary of the effective date of such termination, provided, however, that in the event of a termination pursuant to Section 3(i) above, CC shall have no further obligation to ship any Cooling Accessories or other products to MP under any PO provided however that if MP has fully paid for all undisputed amounts currently due under a PO (i.e., due in accordance with the timing set forth in Section 16 below) CC shall nevertheless perform its obligations under such PO. In addition, notwithstanding any termination of this Agreement MP shall have the right to purchase, distribute and sell Cooling Accessories and other products hereunder to the extent necessary to permit MP to continue to fulfill its obligations pursuant to orders from its customers that are in effect and outstanding as of the effective date of expiration or termination (for any reason) of this Agreement, provided that in all events MP shall not have the right to purchase, distribute or sell any such Cooling Accessories and other cooling products after the two-year anniversary of the effective date of such termination, provided further, however, that in the event of a termination pursuant to Section 3(i) above, CC shall have no further obligation to ship any Cooling Accessories or other products to MP under any PO provided however that if MP has fully paid for all undisputed amounts currently due under a PO CC shall nevertheless perform its obligations under such PO. The period of time following the effective date of termination during which MP exercises its rights under this Section 4 shall be referred to as the "Wind-Down Period."

5) Product Exclusivity:

In the Exclusive Territory, CC agrees it will not license or sell the Cooling Accessories (including any Cooling Accessory Derivatives thereof) that are designated as exclusive on Exhibit A or otherwise mutually agreed in writing to be "Exclusive Cooling Accessories" (collectively, the "Exclusive Cooling Accessories") to anyone other than MP during the Term, with the understanding that, to the extent expressly provided in Exhibit B or otherwise expressly agreed in writing by the parties, CC has the right to sell the Cooling Accessories that are not "Exclusive Cooling Accessories" ("Non-Exclusive Cooling Accessories") to vertically integrated companies as well as customers that are not Sports Distributors or retailers in the Sporting Channel for private label or CC-labeled versions of the Cooling Accessories. MP shall have a right of first notice and refusal to distribute any Cooling Accessory Derivatives and New Products developed by CC as provided for under Section 13. Following written notification by CC of such Cooling Accessory Derivatives and New Products, MP will have forty-five (45) days to provide the terms under which it wishes to distribute such Cooling Accessory Derivatives and New Products. Any New Product that does not have the same function as an Exclusive Cooling Accessory shall be treated as a Non-Exclusive Cooling Accessory unless the parties mutually agree in writing to add it to the list of Exclusive Cooling Accessories. If MP declines to make a good faith offer to distribute such Cooling Accessory Derivatives or New Products within such 45-day period, CC shall thereafter be free (subject to all the limitations in Section 6, including without limitation, the restrictions on sale in the Sporting Channel) to sell such Cooling Accessory Derivative or New Products to any third party in any territory or country;

provided that such Cooling Accessory is not of comparable size and shape or function to any Exclusive Cooling Accessory (For example, CC would not be permitted to sell any Cooling Accessory Derivative, New Product or any other cooling product that functions as a towel, regardless of the size or shape of such product). If MP declines to make such a good faith offer, it shall not thereafter manufacture or have manufactured for it such Cooling Accessory Derivative or New Product without first providing CC with 45 days notice of the terms under which it proposes to have such Cooling Accessory Derivative or New Product manufactured and the opportunity for CC to match the terms under which MP is proposing to have such Cooling Accessory Derivative or New Product manufactured and (i) if CC agrees to match such terms in such 45 day period such Cooling Accessory Derivative or New Product shall be treated as a Cooling Accessory Derivative for all purposes hereunder and (ii) if CC does not agree to match such terms in such 45 day period and such Cooling Accessory Derivative or New Product is a woven product (as opposed to a knitted product) MP shall not be subject to the sourcing obligations under Section 14 with respect to such Cooling Accessory Derivative or New Product. If MP does make such a good faith offer within such 45-day period, CC shall consider MP's offer in good faith but will not be obligated to accept such offer; provided that if CC does not accept MP's good faith offer it shall notify MP of any third party offer subsequently received to distribute such Cooling Accessory Derivatives or New Products and shall provide MP with a 45-day period in which to match any third party offer for such Cooling Accessory Derivatives or New Products and MP's offer shall be deemed accepted by CC if it matches the third party offer. Should MP's offer be accepted pursuant to the foregoing, then the applicable Cooling Accessory Derivative or New Product will become a Cooling Accessory hereunder for all applicable channels and this Agreement shall be amended to reflect the terms of such offer.

6) Distribution Exclusivity and Collaboration:

a) In the U.S. and elsewhere in the Exclusive Territory, CC agrees it will not sell any Cooling Accessories, New Products or Cooling Accessory Derivatives, directly or indirectly, through an agent or otherwise, to any retailer or other entity in the "Sporting Channel" (as such term is hereinafter defined) throughout the Term except in compliance with the following provisions of this Section 6. In addition, both parties agree to use commercially reasonable efforts in good faith to finalize the structure, commission, plan and process associated with MP's representation of CC-branded apparel products to sporting goods and sport specialty retailers ("Sporting Channel"). So long as the parties have used such efforts, the failure to finalize same shall not constitute a breach hereof. For the avoidance of doubt, it is expressly understood that a retailer will be deemed within the Sporting Channel if fifty percent (50%) or more of such retailer's annual revenue is derived from sports and sporting goods supplies, including without limitation, any sports-related footwear (provided, however, that if the parties are unable to determine the actual revenues of an entity, reference shall be made the applicable percentage of its product catalogue offerings) and any retailer that qualifies as being within, or outside, the Sporting Channel as of the first day on which the initial sell-in period for an applicable product commences shall be grandfathered as such for the balance of the Term. CC agrees and acknowledges that no New Product, Cooling Accessory, Cooling Accessory Derivative or other cooling product will be directly or indirectly sold or distributed by CC or any agent or contractor of CC to any retailer or other entity in the Sporting Channel in the Exclusive Territory including sporting goods and sporting specialty retailer; provided, however that (so long as any apparel and Dr Cool products are not of comparable size and shape or function to the Exclusive Cooling Accessories) the foregoing restrictions shall apply with respect to apparel and Dr Cool products only during the Restricted Period. The "Restricted Period" shall mean, with respect to Dr Cool products, the 6-month period following the date on which CC notifies MP in writing that the first such CC Dr Cool product is ready for shipping to retail distribution and, with respect to cooling products in the apparel category, the 12-month period following the date that CC notifies MP in writing that its first such cooling apparel product is ready for shipping to retail distribution. Following any such notice from CC, the parties shall work in good faith to agree upon reasonable, mutually acceptable sales success criteria, which must be established no later than sixty (60) days prior to the date on which such products are in stock and ready for shipment to retailers. Once the parties agree upon such mutually acceptable sales success criteria this Agreement shall be amended to reflect the terms of such agreement. If, following the exercise of such good faith efforts, the parties are unable to agree upon such mutually acceptable sales success criteria within such 60 day period, CC shall be free (following the mandatory 6 or 12 month Restrictive Period specified above, which shall apply regardless of whether the parties reach mutually acceptable sales criteria) to sell such products to Sporting Channel entities without restriction under this Section 6(a) provided that if MP disputes in good faith whether CC actually exercised such good faith efforts and initiates a Dispute Resolution process as set forth below, CC's right to do so shall be suspended until the resolution of such process. If the agreed upon criteria are met by MP during the initial 6 (in the case of Dr Cool Products) and 12 (in the case of other cooling products) months of the Restricted Period (or during any extension of the Restricted Period), the Restricted Period shall be extended for an additional 6 or 12 months (as applicable). For the avoidance of doubt, the parties agree and acknowledge that the Restricted Periods may or may not run concurrently (due to different launch dates) and the extension of the Restricted Period for cooling products and in the apparel category and Dr Cool products shall be considered independently, making it possible for the Restricted Period to be extended for one without extending the other.

b) The parties agree to use commercially reasonable efforts during the first 60-90 days of the Term to devise a mutually agreeable distribution and sales strategy for the Running Specialty Channel that specifically addresses CC apparel/socks and MP/CC baselayer and socks. Specific topics to be discussed include distribution, segmentation, and rollout/launches within the Running Specialty Channel and the Sporting Goods Channel. The Running Specialty Channel is defined as retail stores with at least 95% of sales to runners. Provided that the parties use such efforts, the failure to agree upon such a strategy shall not constitute a breach of the terms hereof.

c) In addition to and without limiting the other exclusivity requirements hereunder, it is expressly agreed that MP will have exclusivity with respect to all Cooling Accessories (including Cooling Accessory Derivatives and New Products) and other cooling products sold to or through: Lowe's Home Improvement, Home Depot, QVC, HSN, Shop NBC and Direct Response subject to the following provisions of this Section 6(c). For further clarity, neither CC nor its affiliates will be permitted to sell cooling products (including Cooling Accessories and New Products) (during the period of the Term in which MP has any exclusivity rights under Sections 5 and 6 hereof) to any of the foregoing retailers or their affiliates other than through MP. Notwithstanding the foregoing, it is agreed that CC's exclusivity obligations under this Section 6(c) shall expire with respect to Dr Cool Products (so long as the Dr Cool Products are not of comparable size and shape or function to the Exclusive Cooling Accessories) 12 months following the date on which CC notifies MP in writing that the first such Dr Cool Product is ready for shipping to retail distribution and, with respect to CC's cooling products in the apparel category (so long as the cooling products are not of comparable size and shape or function to the Exclusive Cooling Accessories), the 12 months following the date that CC notifies MP in writing that its first such cooling apparel product is ready for shipping to retail distribution. Following any such notice from CC, the parties shall work in good faith to agree upon reasonable, mutually acceptable sales success criteria, which must be established no later than sixty (60) days prior to the date on which such products are in stock and ready for shipment to retailers. Once the parties agree upon such mutually acceptable sales success criteria this Agreement shall be amended to reflect the terms of such agreement. If, following the exercise of such good faith efforts, the parties are unable to agree upon such mutually acceptable sales success criteria within such 60 day period, CC shall be free (following the mandatory 12 month exclusive period specified above, which shall apply regardless of whether the parties reach mutually acceptable sales criteria) to sell those specific products (i.e., products with respect to which the parties have failed to agree upon acceptable sales success criteria) to those entities that are restricted under this Section 6(c) without restriction provided that if MP disputes in good faith whether CC actually exercised such good faith efforts and initiates a Dispute Resolution process as set forth below, CC's right to do so shall be suspended until the resolution of such process. If such criteria are met by MP, the exclusivity periods specified in this paragraph sentence shall be extended for additional 12-months periods, it being understood that such extensions shall be considered independently for CC's cooling products in the apparel category and the Dr Cool products.

7) Cooperation and Further Assurances:

CC agrees that (i) it shall take no actions to directly or indirectly frustrate its exclusivity obligations hereunder; (ii) CC shall fully cooperate with MP to ensure that no third parties take any actions that frustrate the purposes of the exclusivity provisions herein, and (iii) CC shall take such actions as are necessary to enforce CC's intellectual property rights and contractual rights against third parties. For the avoidance of doubt, CC represents and warrants that it has the right to enter into this Agreement and that it is not subject to any agreement with any other party that conflicts with CC's obligations hereunder or which would otherwise frustrate the purposes of this Agreement. Without limiting the foregoing, CC represents and warrants that any agreement CC previously has executed with Grabber (or its affiliates) has been terminated and Grabber and its affiliates have no further rights to sell or distribute additional inventory or fulfill any product orders for any products supplied directly or indirectly by or through CC or its affiliates. CC further agrees to take all actions necessary to ensure that its affiliates and any other related entities or representatives are bound by and will adhere to the terms of this Agreement.

* * *

13) New Product Development:

CC agrees to use commercially reasonable efforts to launch no fewer than 3 new products per Contract Year as Cooling Accessory Derivatives that are substantially distinct from those set forth on Exhibit A ("New Products"), as well as introduce no fewer than 2 new colors per Contract Year for all existing Cooling Accessories from the prior year portfolio ("Cooling Accessory Derivatives"). For clarity, in the event that MP and CC launch more than 3 New Products that were proposed by CC in a Contract Year, then CC's obligations to present and launch New Products in the following Contract Year shall be reduced in a corresponding manner (i.e., if the parties launch 4 New Products in a Contract Year, CC's obligation will be to launch no fewer than 2 New Products in the next Contract Year). CC agrees to use commercially reasonable efforts to update existing Cooling Accessories every 3 years. For the avoidance of doubt, the baselayer shirt, socks and yoga mat will serve as the three New Products for the first Contract Year.

* * *

15) Intellectual Property:

a) For purposes of this Agreement "Intellectual Property Right and Intellectual Property Rights" means (a) all copyright rights under the copyright laws of the United States and all other countries for the full term thereof (and including all rights accruing by virtue of bilateral or international copyright treaties and conventions), whether registered or unregistered, including, but not limited to, all renewals, extensions, reversions or restorations of copyrights now or hereafter provided for by law and all rights to make applications for copyright registrations and recordations, regardless of the medium of fixation or means of expression; (b) all rights to and under all new and useful, patentable and unpatentable inventions, discoveries, designs, technology and art, including, but not limited to, all improvements thereof and all know-how related thereto, including all letters patent and patent applications in the United States and all other countries (and all letters patent that issue therefrom) and all reissues, reexaminations, extensions, renewals, divisions and continuations (including continuations-in-part and continuing prosecution applications) thereof, for the full term thereof; (c) all statutory and common law trademark and service mark rights and the goodwill associated therewith, and all applications and registrations to issue therefrom under all intellectual property laws of the United States, each U.S. state, and all other countries for the full term and any renewals thereof

("Marks"); (d) Internet domain names and applications therefor and URLs ("Domain Names"); (e) electronic or other databases to the extent protected by intellectual property or other law in any jurisdiction; (f) all trade secrets; (g) all Confidential Information; (h) know-how; and (i) all worldwide intellectual property rights, industrial property rights, proprietary rights and common law rights, whether registered or unregistered, not otherwise included in the foregoing, including, without limitation, all trade dress, algorithms, concepts, processes, methods and protocols.

b) "CC Property" shall be defined as all products (including without limitation the Cooling Accessories), personal products, inventions, designs, discoveries, improvements, innovations, ideas, drawings, images, works of authorship, formulas, methods, techniques, concepts, configurations, compositions of matter, packaging, labeling, software applications, databases, computer programs as well as other creative content, methodologies and materials in existence prior to this Agreement (or created outside the scope of this Agreement) or developed or provided by CC hereunder and all Intellectual Property Rights with respect to any of the foregoing, excluding any materials provided by MP. It is understood and agreed that CC shall be under no obligation to share with or provide to MP any CC Property except as specifically called for under this Agreement. Excluding those elements of the CC Property consisting of Marks, Domain Names, CC hereby grants MP and its agents and contractors a non-exclusive, irrevocable, royalty-free, fully paid-up, perpetual, worldwide, fully-transferable license, with the right to sub-license (through multiple tiers), use, reproduce, modify, and create derivative work based on and otherwise freely exploit the CC Property in any manner for the benefit of MP, its licensees and other third parties (collectively "MP Licensees"). Excluding those elements of the CC Property consisting of Marks or Domain Names or any claims relating thereto but without otherwise limiting the foregoing, (i) MP will have the right to use for any and all purposes the CC Property, including any ideas, methods, techniques, materials and information, including any Intellectual Property Rights therein, provided to or otherwise obtained by MP as a result of this Agreement, without restriction, liability or obligation and (ii) CC hereby releases MP Licensees from all claims based on CC's patent, copyright, trade dress or other Intellectual Property Rights that arose prior to this Agreement (including, notwithstanding any provision herein to the contrary, any claims relating to Marks that arose prior to this Agreement) or that arise during or after the term of this Agreement.

c) "MP Property" shall be defined as all products, personal products, inventions, designs, discoveries, improvements, innovations, ideas, drawings, images, works of authorship, formulas, methods, techniques, concepts, configurations, compositions of matter, packaging, labeling, software applications, databases, computer programs as well as other creative content, methodologies and materials in existence prior to this Agreement (or created outside the scope of this Agreement) or developed or provided by MP hereunder and all Intellectual Property Rights with respect to any of the foregoing, excluding any materials provided by CC. It is understood and agreed that MP shall be under no obligation to share with or provide to CC any MP Property except as specifically called for under this Agreement. Excluding those elements of the MP Property consisting of Marks or Domain Names or any MP Property relating to any MP athletes or other talent or third party or any claims relating to any of the foregoing, (i) CC will have the right to use for any and all purposes relating to cooling products the MP Property, including any ideas, methods, techniques, materials and information and any Intellectual Property Rights therein, provided to or otherwise obtained by CC as a result of this Agreement, without restriction, liability or obligation and (ii) MP hereby releases CC Licensees from all claims based on MP's patent, copyright, trade dress or other Intellectual Property Rights that arose prior to this Agreement or, to the extent within the scope of the licenses granted herein, that arise during or after the term of this Agreement. Further, and notwithstanding anything to the contrary set forth in this Agreement, in the event of a termination of this Agreement pursuant to Section 3(i) or (ii) CC shall negotiate in good faith with MP (for a period of not less than 90 days following any such termination) with respect to the disposition (including sale to MP or destruction) of any products that MP had ordered and that CC had manufactured. If, following such 90 day period, the parties have been unable to mutually agree upon the disposition of such products, then for a period of 6 months thereafter, CC shall have the right, using the MP Property (as previously affixed to or integrated in the products), to dispose of any products that MP had ordered and that CC had manufactured anywhere to anyone.

d) During the Term of this Agreement and the Wind-Down Period, CC grants to MP a non-exclusive, non-transferable, limited license, which shall expire upon the termination of this Agreement except as necessary to allow either party to exercise its rights during the Wind-Down Period, to use its Coolcore trademark and logo (as well as any other Marks licensed hereunder) for the limited purpose of performing its obligations hereunder, exercising its rights and promoting the purposes of this Agreement as contemplated herein, in each instance so long as not done by MP in a (i) disparaging or inaccurate manner or (ii) manner which is inconsistent with the terms of this

Agreement. MP shall comply with any written trademark guidelines that CC provides in writing in advance. In addition, each party shall have the right to review and approve all uses of its Marks by the other party, except for those pre-approved uses by MP as specified above. Neither party will create a unitary composite mark involving a Mark of the other party without the prior written approval of the other party. Each party will display trademark symbols and proprietary notices in connection with its use of the other party's Marks in connection with this Agreement as may be reasonably requested and provided by the other party. Each party acknowledges the other party's right, title, and interest in and to its Marks and agrees that all use of the other party's Marks in connection with this Agreement will inure to the benefit, and be on behalf, of the other party and neither party shall attempt to register or otherwise cancel, interfere, or contest the other party's rights in and to its intellectual property and trademarks. For avoidance of doubt, each party acknowledges that its use of the other party's Marks will not create in it, nor will it represent that it has, any right, title, or interest in or to such Marks other than the limited licenses expressly granted herein. Except as otherwise agreed, the rights granted to MP under this paragraph are granted on a worldwide, provided that MP shall not have the right to use CC's Marks in any jurisdiction within the ReYs Territory.

Notwithstanding any other provision herein, the rights granted to MP under this Section shall continue throughout the Wind Down Period.

e) It is not the parties' intention to create any jointly owned Intellectual Property Rights hereunder. Rather, the parties intend that all Intellectual Property Rights should be categorized as either MP Property or CC Property and licensed pursuant to the terms herein.

f) Each party agrees to execute or cause its agents and/or employees to execute any documents necessary or desirable to secure or perfect the other party's legal rights and worldwide ownership in such other party's Intellectual Property Rights (e.g., the CC Property in the case of CC and the MP Property in the case of MP), including, but not limited to documents relating to patent, trademark and copyright applications, transfers or assignments.

g) During the Term, MP agrees that it shall not (nor will it direct any of its agents to) attempt to reverse engineer any trade secret information relating to the proprietary chemical compositions or proprietary product weaves of CC Cooling Accessories; provided that the foregoing restriction shall not apply during any Contract Year (or for any period of time thereafter): (i) in which either party has issued a notice of termination hereunder or (ii) in which total purchases by MP of Cooling Accessories hereunder has declined from the prior Contract Year. For the avoidance of doubt, CC recognizes that MP may require information regarding the chemical composition or proprietary product weaves of CC products, including without limitation, due to retailer or regulatory inquiries, and CC shall fully cooperate in providing such information upon MP's request.

* * *

ACCEPTED AND AGREED as of
The date first written above:

Tempnology, LLC (d/b/a Coolcore)	**Mission Product Holdings, Inc.**
By: [Signature]	By:
Name: Justin Cupps	Name: Josh Shaw
Title: President	Title: President

* * *

ACCEPTED AND AGREED as of
The date first written above:

Tempnology, LLC (d/b/a Coolcore)	**Mission Product Holdings, Inc.**
By:	By: [Signature]
Name:	Name: Josh Shaw
Title:	Title: President

* * *