

IN THE SUPREME COURT OF THE UNITED STATES

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No. 17-1657

MISSION PRODUCT HOLDINGS, INC., PETITIONER

v.

TEMPNOLOGY, LLC, NKA OLD COLD LLC

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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MOTION OF THE UNITED STATES FOR LEAVE  
TO PARTICIPATE IN ORAL ARGUMENT AS AMICUS CURIAE  
AND FOR DIVIDED ARGUMENT

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Pursuant to Rules 28.4 and 28.7 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully moves that the United States be granted leave to participate in oral argument in this case as amicus curiae supporting petitioner and that the United States be allowed ten minutes of argument time. Petitioner has consented to the allocation of ten minutes of argument time to the United States.

Section 365 of the Bankruptcy Code, 11 U.S.C. 365, provides that the bankruptcy trustee, "subject to the court's approval, may

assume or reject any executory contract," i.e., any contract under which both parties still have obligations to perform. 11 U.S.C. 365(a). The trustee's rejection of a contract pursuant to that authority "constitutes a breach of such contract." 11 U.S.C. 365(g). It is undisputed that, if the trustee "rejects" such a contract and thus chooses to stop performing the debtor's obligations under it, the counterparty may file a claim against the estate for damages caused by the non-performance.

The question presented in this case is whether, when the debtor has previously granted a counterparty a license to use the debtor's trademark, the trustee's later "rejection" of the contract that granted the license has the legal effect of terminating the license itself. The United States has filed a brief as amicus curiae supporting petitioner, arguing that rejection does not have the effect of revoking a license that the debtor could not have revoked outside bankruptcy. Under the Bankruptcy Code, the trustee's "reject[ion]" of a contract under which both parties have remaining performance obligations simply means that the trustee has refused to assume those obligations and has halted its own performance. 11 U.S.C. 365(a). Although such non-performance "constitutes a breach of the contract," 11 U.S.C. 365(g), it does not rescind the debtor's pre-bankruptcy grant of a trademark license.

The United States has a substantial interest in the resolution of this case. The United States Patent and Trademark Office plays

a central role in the administration of the federal trademark system, and United States Trustees are charged with supervising the administration of bankruptcy cases. See 28 U.S.C. 581–589a. Moreover, the resolution of this case may implicate the interests of the United States and its agencies outside the trademark context, as creditors in bankruptcy proceedings under federal programs involving loans, contracts, leases, assistance and benefit payments, and tax-collection activities.

The United States has participated in oral argument as amicus curiae in prior cases involving interpretation of the Bankruptcy Code, e.g., Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752 (2018); U.S. Bank Nat'l Ass'n v. Village at Lakeridge, LLC, 138 S. Ct. 960 (2018); Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973 (2017), as well as the trademark laws, e.g., B&B Hardware, Inc. v. Hargis Indus., Inc., 135 S. Ct. 1293 (2015); Hana Financial, Inc. v. Hana Bank, 135 S. Ct. 907 (2015). Oral presentation of the views of the United States is therefore likely to be of material assistance to the Court.

Respectfully submitted.

NOEL J. FRANCISCO  
Solicitor General  
Counsel of Record

DECEMBER 2018