No. 25-

IN THE
Supreme Court of the United States

SVENHARD'S SWEDISH BAKERY,

Petitioner,

v.

BAKERY AND CONFECTIONERY UNION AND INDUSTRY INTERNATIONAL PENSION FUND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case concerns the interpretation of a bankruptcy statute.

Subject to the bankruptcy court's approval, debtors in Chapter 11 bankruptcy may generally assume executory contracts that predate the bankruptcy petition. 11 U.S.C. § 365(a). If a contract is assumed, the debtor must cure any defaults under the agreement, and the agreement will survive the bankruptcy. One exception to the general rule permitting assumption is that a debtor may not assume "a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor[.]" 11 U.S.C. § 365(c)(2).

The question presented by this case is whether Section 365(c)(2) precludes Chapter 11 debtors from assuming pre-petition contracts that require no extension of new credit, money, property, or financing of any kind to the debtor post-bankruptcy.

PARTIES TO THE PROCEEDING BELOW

Petitioner (appellant in the court of appeals) is Svenhard's Swedish Bakery.

Respondent (appellee in the court of appeals) is the Bakery and Confectionery Union and Industry International Pension Fund.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Svenhard's Swedish Bakery certifies that it has no parent company and no publicly held corporation owns ten percent or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *In re Svenhard's Swedish Bakery*, No. 23-60045 (9th Cir.) (opinion issued September 12, 2025);

- *In re Svenhard's Swedish Bakery*, BAP No. EC-23-1001-GLB (9th Cir. B.A.P.) (opinion issued August 29, 2023); and

- *In re Svenhard's Swedish Bakery*, Case No. 19-15277-C-11 (Bankr. E.D. Cal.) (decision issued December 19, 2022).

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INTRODUCTION

This case raises an important issue of federal bankruptcy law: When is a Chapter 11 debtor precluded from assuming a beneficial contract under the Bankruptcy Code?

Svenhard's Swedish Bakery ("Svenhard's") was a California bakery that participated in a pension fund requiring contributions on behalf of its unionized employees. After encountering financial difficulties, Svenhard's failed to make the required payments. Svenhard's and the pension fund negotiated and entered a settlement agreement, pursuant to which Svenhard's was required to pay reduced sums, in exchange for the pension fund's agreement to execute releases of liability. Svenhard's missed a settlement payment and the pension fund declared a default.

Svenhard's filed for Chapter 11 bankruptcy and moved the bankruptcy court to "assume" the settlement pursuant to Bankruptcy Code Section 365(a), which allows a debtor to seek permission to assume and continue pre-bankruptcy contracts that the debtor considers beneficial for reorganization or the bankruptcy estate. The bankruptcy court denied Svenhard's request. On appeal, the Ninth Circuit affirmed based on a narrow exception in Section 365(c)(2), which precludes assumption of any executory contract "to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor." Parting with long-standing precedent, the Ninth Circuit held that the term "financial accommodation" precludes assumption of contracts that reflect a "financial favor" to the debtor—even if they

do not involve any loans or funding to the debtor post-bankruptcy.

This Court should accept review because the Ninth Circuit's decision is wrong as a matter of law. Indeed, two other circuits reached the opposite conclusion: Section 365(c)(2) must be narrowly construed to mean "the extension of money or credit to accommodate another." The Ninth Circuit's novel interpretation lacks support in, and is expressly contradicted by, existing legislative history, as well as decades of precedent from other courts.

The error is also significant. A debtor's ability to assume beneficial contracts is a critical component of Chapter 11 bankruptcy. It can make the difference between a successful reorganization or a forced liquidation. If permitted to stand, the Ninth Circuit's ruling will eviscerate that benefit by giving creditors, rather than debtors, the power to control which contracts can be assumed—contrary to all available evidence of Congress's intent.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is published at 154 F.4th 1100 and reproduced at Petitioner's Appendix ("Pet. App.") at 1a–13a.

The opinion of the Bankruptcy Appellate Panel for the United States Court of Appeals for the Ninth Circuit is published at 653 B.R. 471 and reproduced at Petitioner's Appendix at 14a–28a.

The opinion of the United States Bankruptcy Court for the Eastern District of California is published at 647 B.R. 554 and reproduced at Petitioner's Appendix at 30a–50a.

JURISDICTION

The court of appeals issued its opinion on September 12, 2025 (Pet. App. 1a–13a) and denied Svenhard's timely petition for rehearing on November 13, 2025 (Pet. App. 51a). On February 5, 2026, this Court granted Svenhard's application for an extension of time to file a petition for a writ of certiorari, extending that deadline from February 11, 2026, to March 25, 2026.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 365(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.

11 U.S.C. § 365(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.

11 U.S.C. § 365(f)(1), (2):

(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.

11 U.S.C. § 502(a), (b):

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount . . . [.]

STATEMENT OF THE CASE

I. Legal Framework

The U.S. Constitution grants Congress the authority to establish "uniform laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4; *see also Ry. Lab. Execs.' Ass'n v. Gibbons*, 455 U.S. 457,

469–71 (1982) (bankruptcy law must apply uniformly to a defined class of debtors).

Consistent with that authority, Congress enacted the Bankruptcy Act of 1898, which established a uniform system of bankruptcy throughout the United States that remained largely unchanged for 80 years. In 1970, Congress formed the Commission on the Bankruptcy Laws of the United States to analyze and recommend changes in the substance and administration of bankruptcy laws. Those efforts culminated in the Bankruptcy Reform Act of 1978 ("Act"), which substantially revised federal bankruptcy law by, among other things, establishing a strong business reorganization chapter: Chapter 11. The statute at issue in this case—11 U.S.C. § 365(c)(2)—was enacted as part of that legislation.

A hallmark of Chapter 11 bankruptcy is that the debtor typically remains in control, or "in possession," of its assets while undergoing reorganization. As with bankruptcies filed under other chapters, Chapter 11 bankruptcy begins with the filing of a petition that automatically stays collection efforts against the debtor. 11 U.S.C. § 362(a). After filing the bankruptcy petition, a Chapter 11 debtor conducts its case toward a goal of confirming a plan to reorganize or otherwise administer its assets for the benefit of creditors.

Relevant to this case, a debtor in Chapter 11 bankruptcy may seek to assume or reject certain contracts entered prior to bankruptcy. 11 U.S.C. § 365(a) ("the trustee, subject to the court's approval, may assume

or reject any executory contract . . . of the debtor").[1] If a debtor assumes an executory contract,[2] it must cure all defaults under the agreement, and the agreement will survive the bankruptcy. A debtor that assumes an executory contract may also assign that contract to a third party so long as it meets certain requirements and the party to whom assignment is made provides adequate assurance of performance. *See* 11 U.S.C. § 365(f). If, however, the debtor chooses to reject a contract, the rejection is treated as a breach, leaving the other party with a claim in bankruptcy for damages caused by the breach. The ability to assume or reject contracts facilitates reorganization by allowing Chapter 11 debtors to keep contracts that are beneficial and reject those that are not.

The general rule that a debtor may assume executory contracts is subject to several narrow exceptions. One such exception is that the debtor may not assume or assign any executory contract if it 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." 11 U.S.C. § 365(c)(2).

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1. Although Section 365 refers to the "[t]he trustee," Section 1107(a) provides that a debtor in possession "shall have all the rights . . . and shall perform all the functions and duties . . . of a trustee serving in a case under this chapter," subject to certain exceptions not relevant here.

2. "Executory contract" is a term of art that, through decades of jurisprudence, has been defined as a contract for which material performance remains due by both parties to the contract and for which failure to perform would result in a breach. If a contract is determined not to be executory, it is incapable of being assumed, because performance remains due by only one party, reducing the contract to a claim by or against the debtor.

The issue raised by this case is what constitutes a "financial accommodation" to the debtor.

II. Factual Background

For over fifty years, Svenhard's operated as a premier, family-owned bakery in Oakland, California. Pet. App. 3a. Svenhard's participated in the Bakery and Confectionery Union and Industry Pension Fund (the "Fund"), which required Svenhard's to make employee pension contributions. *Id.*

Svenhard's encountered financial difficulties and developed a plan to reduce its costs and increase its operating efficiency by closing its Oakland facility (where it employed Bakery and Confectionery Union members for production) and moving its production to a facility in Exeter, California. *See id.* As a result, Svenhard's withdrew from and stopped contributing to the Fund. *Id.* The Fund notified Svenhard's that it had effectively withdrawn from the fund and was therefore subject to two liabilities: (1) a capped ERISA withdrawal liability of 20 annual payments of $1,945,074 (payable in 240 monthly installments of $162,941.00), and (2) a delinquent contribution liability of nearly $515,000 for severance pay and accrued vacation for laid off employees. Pet. App. 4a.

Svenhard's had limited assets, most of which were already pledged to other creditors. Svenhard's informed the Fund that it was unable to pay the amounts demanded and offered to pay reduced amounts. Pet. App. 17a. The Fund analyzed Svenhard's financial information and concluded that asserting its full claim would cause secured creditors to assert their rights to Svenhard's assets, leaving little to nothing for the Pension Fund. Pet. App.

4a. Consequently, in April 2019, the Fund and Svenhard's entered into a settlement agreement to resolve their dispute (the "Settlement Agreement"). *Id.*

Under the terms of that Settlement Agreement, Svenhard's agreed to pay the Fund 240 monthly payments of $12,500 (totaling $3 million) for the withdrawal liability, and $8,580.80 per month (totaling approximately $600,000), plus interest, for the contribution liability. *Id.* In exchange, the Fund agreed to execute a specifically negotiated release for the withdrawal liability and the contribution liability when each settled liability had been paid in full. Pet. App. 17a. The parties further agreed that, if Svenhard's failed to make any required monthly installment payment, the Fund could declare a default, and if the default was not cured within five business days, the Fund would have the option to declare as due the full unpaid withdrawal and contribution liabilities, plus interest on each. *Id.*

Svenhard's began performing its contractual obligations in June 2019. In November 2019, Svenhard's ceased all operations. *Id.* Svenhard's failed to make the December payment, and on December 13, 2019, the Fund declared a default. *Id.*

On December 19, 2019, prior to the expiration of the cure period under the Settlement Agreement, Svenhard's filed a voluntary petition for Chapter 11 bankruptcy. *Id.*

III. Procedural History

Svenhard's moved the bankruptcy court to assume and assign the Settlement Agreement pursuant to Section 365, which provides that, subject to the bankruptcy

court's approval, a debtor may assume any "executory contract" and assign the debtor's rights and obligations under that contract to another person or entity. *See* 11 U.S.C. § 365(a).[3] Svenhard's did so based on the outcome of a mediation with the Official Committee of Unsecured Creditors and secured creditor United States Bakery,[4] which resulted in a comprehensive agreement that would resolve the bankruptcy, providing a favorable return to unsecured creditors and payment in full of the amounts to which the Fund had agreed in the Settlement Agreement. Pet. App. 5a. That mediated agreement was conditioned on Svenhard's ability to obtain the bankruptcy court's permission to assume and assign the Settlement Agreement. *Id.*

The bankruptcy court denied Svenhard's motion. Pet. App. 6a. First, the court ruled that the Settlement

3. Svenhard's argued that the Settlement Agreement was "executory" because, at the time of its bankruptcy petition, both parties had material, unperformed obligations: Svenhard's was required to make monthly payments (and the time to cure the December 2019 default had not expired), and the Fund was contractually obligated, among other things, to execute two separate releases, at times coinciding with the final payment of each of the separate obligations owed by Svenhard's. *See* Pet. App. 19a, 24a–25a.

4. In 2014, Svenhard's entered into a series of transactions to sell certain assets to affiliates of United States Bakery ("USB"). Svenhard's then immediately commenced a five-year "lease-back" of those assets from USB, which allowed Svenhard's to continue operating its business. After Svenhard's filed for bankruptcy, litigation ensued between the Fund, USB, and Svenhard's. *See* Pet. App. 18a. The mediated agreement proposed to resolve the pending litigation between Svenhard's and USB, so long as Svenhard's was able to assume and assign the Settlement Agreement to USB, who would then pay Svenhard's the funds necessary to cure the default on the Settlement Agreement. Pet. App. 18a–19a.

Agreement was not "executory" within the meaning of Section 365(a) and therefore not subject to assumption. *Id.* In the alternative, the bankruptcy court ruled that the Settlement Agreement was a "financial accommodation" to the debtor, assumption of which is prohibited by Section 365(c). *Id.*; *see also* 11 U.S.C. 365(c)(2) ("The trustee may not assume or assign any executory contract . . . if . . . 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[.]").

Svenhard's appealed, and the Ninth Circuit Bankruptcy Appellate Panel ("BAP") affirmed on the first basis without reaching the bankruptcy court's alternative ruling on "financial accommodation." Pet. App. 6a.

On September 12, 2025, the Ninth Circuit affirmed on the grounds that the Settlement Agreement is an unassumable "financial accommodation." Pet. App. 7a. The court acknowledged that Congress did not define the term "financial accommodation," and further acknowledged that it had previously interpreted Section 365(c)(2) narrowly as prohibiting assumption of contracts that require the extension of loans, money, or financing to debtors post-bankruptcy. Pet. App. 7a, 11a–12a. After consulting dictionary definitions, the court nevertheless concluded that Congress intended the phrase "financial accommodation" to have a more expansive meaning based on the definition of "accommodation," which means "[a]n arrangement or engagement made as *a favor to another*." Pet. App. 8a (emphasis added). Thus, the court concluded:

> "An agreement to accept as full payment much less than the amount contractually due in recognition of the debtor's financial inability

> to pay the full amount is assuredly a 'financial favor,' and one provided 'to satisfy a need' of the debtor. Thus, the ordinary and common meaning of 'financial accommodations' at the time of enactment [of Section 365(c)(2)] included *contracts to forebear or reduce payments to which one was otherwise entitled, if those contracts were agreed upon to aid a debtor's poor financial condition*."

Pet. App. 9a (emphasis added); *see also* Pet. App. 12a–13a ("[A]greeing to take less than ten cents on the dollar as payment of an obligation is tantamount to an 'extension of money' to the debtor, in the amount that will not have to be paid."). The court held that "[t]he Settlement Agreement is plainly such a contract," because it "involves the forbearance and reduction of the amount to which the [Fund] would otherwise be entitled, and the [Fund] agreed to that arrangement expressly because of Svenhard's poor financial condition." Pet. App. 9a–10a.[5]

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit reached an erroneous decision on an important question of federal bankruptcy law.

The Ninth Circuit's decision—expanding the reach of Section 365(c)(2) to a contract that does not require the issuance of new funds, credit, or financing of any kind to a debtor post-bankruptcy, and instead requires *the debtor* to pay amounts negotiated prior to bankruptcy—is

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5. Because it affirmed the bankruptcy court's alternative ruling, the Ninth Circuit did not decide whether the Settlement Agreement was an "executory" contract.

unprecedented. It is also wrong as a matter of law. Indeed, no other circuit has interpreted Section 365(c)(2) as such, and for good reason: Congress adopted Section 365(c)(2) to prevent a party from being forced to issue new funds or new financing to a debtor in bankruptcy based on a pre-bankruptcy contract premised on the financial strength and creditworthiness of the debtor at that time.

A. The Ninth Circuit's interpretation is contrary to legislative history.

Section 365 was adopted as part of the 1978 Bankruptcy Reform Act, which was "the culmination of over 8 years' work by a congressional commission, two congressional committees, and numerous outside groups." 124 Cong. Rec. H11089 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards). Because the phrase "financial accommodation" is not defined by statute, courts around the country have turned to that extensive legislative history to discern Congress's intent. *See, e.g.*, *In re Thomas B. Hamilton Co., Inc.*, 969 F.2d 1013, 1018 (11th Cir. 1992) ("the legislative history of § 365 provides insight into Congress' intent in using this term"); *In re TS Indus., Inc.*, 117 B.R. 682, 686 (Bankr. D. Utah 1990) (describing legislative history). But the Ninth Circuit took a different approach. Relying exclusively on dictionaries, the court created a new definition that finds no support in, and is expressly contradicted by, the available evidence of Congress's intent.

1. The Commission on the Bankruptcy Laws of the United States

In 1970, Congress formed the Commission on the Bankruptcy Laws of the United States (the "Commission") to analyze and recommend changes in the substance

and administration of bankruptcy laws. Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468. The Commission's deliberations culminated in a report, setting out a proposed statute with explanatory notes. *See* Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, pt. 2 (1973).

The Commission's recommended statutory language regarding executory contracts was as follows:

> "*(f) Special Provisions for Certain Contracts.*
>
> Notwithstanding the other provisions of this section,
>
> (1) a contract for the transfer of property by the debtor may not be rejected if the transferee is in possession, whether or not title has passed to him; and
>
> (2) neither a contract providing for a performance by the debtor of duties which are nondelegable under applicable law, whether or not delegation is prohibited or restricted in the contract, nor a contract of employment under which the debtor is the employer may be assumed without the consent of the other party or parties thereto."

Id. at 154. The corresponding notes explained that the proposed rule "carries out a policy, implemented judicially under the present Act, against the use of legal compulsion under the Act to force a nondebtor party either to accept the personal services of or to perform personal services

for the debtor." *Id.* at 158. The Commission's report set the stage for years of Congressional action that ultimately led to the adoption of Section 365(c)(2).

2. Activity in the House and Senate

In February 1978, the House passed H.R. 8200, which included proposed language permitting the trustee to assume and assign executory contracts unless (1) applicable law excused a party "from accepting performance or rendering performance to the trustee or an assignee of such contract," and (2) the party did not consent to assumption or assignment. *Hearings Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 95th Cong. (1977) (on S. 2266 and H.R. 8200) ("Senate Hearings 2266"). In describing the legislation, the House Report explained:

> "The purpose of this subsection, at least in part, is *to prevent the trustee from requiring new advances of money or other property*. The section permits the trustee to continue to use and pay for property already advanced, but is *not designed to permit the trustee to demand new loans or additional transfers of property under lease commitments*.
>
> Thus, under this provision, *contracts such as loan commitments and letters of credit are nonassignable, and may not be assumed by the trustee*."

H.R. Rep. No. 95-595, at 348 (1977) (emphases added).

Concurrent to activities in the House, the Senate received testimony on S. 2266, an analog measure that included the same proposed language. Multiple commentators asked for additional clarity to ensure that loan contracts and other lending instruments were not subject to assumption.

- Mr. Root, an attorney from Cadwalader, Wickersham & Taft, raised concerns on behalf of the long-term mortgage and unsecured senior debt investment community regarding commitments to lend money to, or purchase debt securities from, a debtor. He explained that as written, the bill could be read to allow assumption of such commitments. Mr. Root thus recommended an amendment to make clear that an executory contract could not be assumed if "the contract is principally for the loan of money to, or for the purchase of securities from and issued by, the debtor." Senate Hearings 2266 at 521–25 (Remarks of Mr. Stuart D. Root).

- Mr. Grimmig, on behalf of the American Bankers Association, testified that the "present wording . . . does not make it clear that the right to reaffirm executory contracts does not extend to lending commitments and further deliveries of equipment under master leases." *Id.* at 576 (Remarks of Mr. Grimmig). Mr. Grimmig advocated for "a clear amendment of § 365 to preclude the preposterous situation of a

lending institution being required to make loans to a bankrupt." *Id.*

- The National Association of Real Estate Investment Trusts ("NAREIT") also submitted a memorandum, explaining that "it is possible to read section 365 as permitting a trustee or debtor to force a lender to lend money to him or even to his assignee based upon a pre-filing commitment." *Id.* at 718. NAREIT recommended that "[t]he statute should be amended to clearly preclude any suggestion that extensions of new credit to a debtor or trustee could be required, whether in the form of loans, securities purchase, or equipment deliveries." *Id.*

Based on that testimony, the Senate Committee amended Section 365 to add a new subsection, expressly providing that "the trustee may not assume an executory contract to make a loan or deliver equipment to or issue a security of the debtor[.]" S. 2266, 95th Cong., 2d Sess. (July 14 (legislative day, May 17, 1978)), p. at 362. The accompanying Senate report described the new section as:

> "prohibit[ing] the trustee's assumption of an executory contract *requiring the other party to make a loan or deliver equipment to or to issue a security of the debtor*. The purpose of this subsection is to make it clear that a party to a transaction which is based upon the financial strength of a debtor *should not be required to extend new credit to the debtor whether in the*

> *form of loans, lease financing, or the purchase or discount of notes*."

S. Rep. No. 95-989, 95th Cong. (1978) at 58–59 (emphases added).

As the legislation moved forward, the House and Senate managers of the legislation ultimately agreed to resolve the differences between the two bills without a formal conference. Kenneth N. Klee, *Legislative History of the New Bankruptcy Law*, 28 DePaul L. Rev. 941, 954 (1979). The result was a "substitute amendment" to H.R. 8200 that ultimately became law:

> "(c) The trustee may not assume or assign an executory contract or unexpired lease of the debtor . . . , If—
>
> . . .
>
> (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."

124 Cong. Rec. H11055 (daily ed. Sept. 28, 1978). In describing the amendment, legislators explained that "[c]haracterization of contracts to make a loan, or extend other debt financing or financial accommodations, *is limited to the extension of cash or a line of credit* and is not intended to embrace ordinary leases or contracts to provide goods or services with payments to be made over time." 124 Cong. Rec. H11093 (daily ed. Sept. 28, 1978)

(statement of Rep. Edwards) (emphasis added); *see also* 124 Cong. Rec. S17410 (daily ed. Oct. 6, 1978) (statement of Sen. Deconcini).

* * *

Bankruptcy statutes cannot be interpreted in a vacuum. The legislative history shows that Congress intended to prevent debtors from being able to demand new funding (*i.e.*, new credit, money, or other financing instruments) after bankruptcy, pursuant to contracts entered before bankruptcy based on the financial strength of the debtor at the time. Absent from that history is any indication that Congress was concerned with the assumption of contracts that were entered *despite* the debtor's financial hardship (even before bankruptcy), let alone contracts that do not entitle the debtor to seek any new funding (and in fact require *the debtor* to pay a creditor amounts expressly negotiated and agreed to prior to bankruptcy). In such cases, the creditor does not need, and is not entitled to, the protections of Section 365(c)(2). *See In re Jonesboro Tractor Sales, Inc.*, 619 B.R. 223, 233 (Bankr. E.D. Ark. 2020) ("[B]ecause [creditor] is not required to extend financing to the Debtor, the Dealership Agreement is in line with the purpose of Section 365(c)(2), which is to prevent a trustee from requiring new advances of money from a creditor. [Creditor] does not need the protections of Section 365(c)(2) because it is not required to advance new money to the Debtor."). The Ninth Circuit erred by manufacturing a new definition of "financial accommodation" based solely on dictionary definitions, contrary to available evidence of Congress's intent.

B. The Ninth Circuit's decision conflicts with the broader context of the Bankruptcy Code.

The Ninth Circuit's interpretation is also contrary to, and cannot be reconciled with, the broader context of the Bankruptcy Code.

Section 502 requires bankruptcy courts to determine the amount of a creditor's claim "as of the date of the filing of the petition" and to allow the claim in that amount. 11 U.S.C. § 502(b); *see also In re LCO Enters.*, 12 F.3d 938, 941 (9th Cir. 1993) ("[T]he amount and priority of an unsecured creditor's claim is fixed on the date of the filing of the petition.").

There is no dispute that, as of the petition date, Svenhard's owed the Fund the unpaid balances of the Settlement Agreement. Thus, even if reduction of an existing debt could qualify as a "financial accommodation" (as the Ninth Circuit concluded), the Settlement Agreement was at most a pre-petition accommodation because it was extended to Svenhard's *prior to bankruptcy* and, pursuant to Section 502, was fixed as of the petition date. Thus, even if one accepts the Ninth Circuit's expansive interpretation of "financial accommodation," Section 365(c)(2) is not a bar to assumption because the Settlement Agreement requires no *further* accommodations post-bankruptcy. Denying assumption of the Settlement Agreement does not serve the purpose of Section 365(c)(2), because it does not protect a creditor—the Fund—from accommodations that it may have offered pre bankruptcy, but which do not require any further accommodation after the filing of a bankruptcy petition.

II. The Ninth Circuit's decision departs from long-standing precedent and conflicts with decisions by the Seventh and Eleventh Circuits.

Until now, no circuit had interpreted Section 365(c)(2) as precluding assumption of a pre-petition agreement that requires no extension of new credit, money, property, or financing of any kind to a debtor after bankruptcy. Review should be granted, because the Ninth Circuit's novel interpretation is a stark departure from prior precedent in the Ninth Circuit and beyond.

A. Ninth Circuit

Before this case, the Ninth Circuit had long recognized that the term "financial accommodation" was intended to be "strictly construed." *See In re Easebe Enters., Inc.*, 900 F.2d 1417, 1419 (9th Cir. 1990), *overruled on other grounds by In re Robert L. Helms Constr. & Dev. Co., Inc.*, 139 F.3d 702 (9th Cir. 1998) (citation omitted). In *Easebe*, the Ninth Circuit first considered whether a contract providing the debtor with a future option to purchase real property via financing from a lessor could be assumed in bankruptcy. After considering a leading bankruptcy treatise, the Ninth Circuit followed the decisions of other courts and held that contracts involving financing—*i.e.*, "contracts requiring money or other property to be delivered [by a non-debtor] in exchange for a [debtor's] promise to pay"—are non-assumable. *Id.* at 1419. Because the option in question entitled the debtor to "receiv[e] the property in exchange for a promise to pay," Section 365 (c)(2) prohibited assumption. *Id.* at 1420.

The following year, the Ninth Circuit reiterated that the phrase "financial accommodation" refers to an agreement involving "the extension of money or credit to accommodate another." *In re Sun Runner Marine, Inc.*, 945 F.2d 1089, 1092 (9th Cir. 1991) (quoting *In re Placid Oil Co.*, 72 B.R. 135, 139 (Bankr. N.D. Tex. 1987)). The contract in *Sun Runner Marine* was an agreement requiring a non-debtor to extend loans to the debtor's customers, where the loan proceeds were distributed directly to the debtor and were "an indispensable means of financing the debtor's business." *Id.* at 1092. Pursuant to the agreement, the debtor also became secondarily liable for the repayment of those loans. *Id.* Based on those facts, the Ninth Circuit held that the contract constituted a "financial accommodation[] for the benefit of the debtor." *Id.*; *see also id.* at 1093 ("The prohibition against assumption of contracts for 'financial accommodation' exists for the protection of a party who has made a yet unperformed lending commitment[.]") (quoting *In re Placid Oil Co.*, 72 B.R. 139).

Both *Easebe* and *Sun Runner Marine* involved pre-petition agreements entitling the debtor to seek new credit, new funding, or new property following bankruptcy. The Ninth Circuit's decision in this case—expanding the reach of Section 365(c)(2) to an agreement that does not require the counterparty to extend new money or credit to a debtor whose post-petition creditworthiness is arguably different than it was at the time the agreement was entered—is a significant departure from that earlier (correct) interpretation.

B. Eleventh Circuit

More than thirty years ago, the Eleventh Circuit held that the phrase "financial accommodation" must be

narrowly construed to mean "the extension of money or credit to accommodate another." *Hamilton*, 969 F.2d at 1020.

The debtor in *Hamilton* was a merchant who bought and sold retail goods. *Id.* at 1014. Prior to filing for bankruptcy, the debtor entered into a credit card processing agreement with a card-processing bank ("C&S") to enable the debtor to accept customers' credit cards in the course of its business. Pursuant to that agreement, the debtor received payment from C&S, and C&S received payment through the Visa and MasterCard system from the customer's card-issuing bank.

After the merchant filed for bankruptcy, C&S sought to terminate the agreement on the grounds that it constituted a financial accommodation to a debtor. *Id.* at 1017–18. Specifically, C&S relied on a contract provision that allowed a customer's card-issuing bank to "charge back" payments in certain situations (for example, in the case of defective goods or transactions disputed by customers). The agreement allowed such "chargebacks" to be passed from the customer's card-issuing bank to C&S, who then had a right to pass the chargebacks on to the debtor. Thus, the chargeback provision created a potential liability running from the debtor to C&S for recovery of any chargeback amounts. C&S claimed that the agreement was a financial accommodation because C&S had "relied upon the financial strength" of the debtor when executing the agreement, but was now "subject to new and ongoing financial risks" based on the debtor's changed financial circumstances. *Id.* at 1017.

The Eleventh Circuit rejected that argument. In doing so, the court reviewed the legislative history of Section

365(c)(2), a leading bankruptcy treatise, and bankruptcy court decisions, all of which led the court to conclude "that the term 'financial accommodations' should be construed to mean 'the extension of money or credit to accommodate another.'" *Id.* at 1018–20; *see also id.* ("We also agree that a contract is not one to extend financial accommodations merely because it involves an extension of credit that is incidental to the overall arrangement between the parties.").

Applying that definition, the Eleventh Circuit ruled that the credit card processing agreement was not a financial accommodation, despite the presence of incidental financing components, because its overarching purpose was not to extend financing to the debtor merchant in bankruptcy. *Id.* at 1020. In doing so, the Eleventh Circuit emphasized that a contrary ruling would run afoul of the strong policy for allowing Chapter 11 debtors to assume beneficial agreements. *Id.* ("If these agreements may not be assumed by the trustee following a bankruptcy filing, rehabilitation will be virtually impossible for any merchant who relies heavily on credit card sales.").

C. Seventh Circuit

Twelve years later, relying in part on *Hamilton*, the Seventh Circuit came to the same conclusion in *In re United Airlines, Inc.*, 368 F.3d 720 (7th Cir. 2004).

In *United Airlines,* a debtor airline contracted with National Processing, a merchant bank, to handle transactions by customers paying with credit cards. *Id.* at 720. As in *Hamilton*, the contract provision in question dealt with financial responsibility for "chargebacks":

> "Chargebacks are reversals of transactions. If the passenger has a refundable ticket and does not fly, [debtor] will credit the passenger's card; similarly, if [debtor] cancels the flight and the passenger does not rebook, a chargeback will occur. If [debtor] were to ground its fleet or substantially curtail its service, chargebacks would exceed new sales, and the daily balances in the system would go negative. [Debtor] would owe the difference to National Processing, which would distribute proceeds to the issuing banks and their customers. If [debtor] could not pay, however, then the merchant bank, the issuing bank, or the customer would bear the loss."

Id. at 722–23. National Processing argued that because VISA and MasterCard rules allocate that loss to the merchant bank, it had "guaranteed [debtor's] (contingent) debts to the passengers. *Id.* at 723. Thus, National Processing argued that the entire agreement was a "financial accommodation" that could not be assumed by the debtor airline in bankruptcy. *Id.*

The Seventh Circuit disagreed. The purpose of § 365(c)(2), the court explained, is to protect lenders from being forced to persist in offering credit to newly bankrupt parties on the same favorable terms negotiated before the bankruptcy filing revealed the credit-unworthiness of the borrower:

> "Section 365(c)(2) prevents the assumption of a loan commitment or equivalent promise because the cost of future credit [to the debtor]

> depends on the probability of repayment, and bankruptcy reveals that the risk of nonpayment [by the debtor] is higher than the would-be creditor likely assumed."

Id. at 723. The contract in question was not a "financial accommodation," the Seventh Circuit concluded, because it did not require National Processing to lend even "one penny" to the debtor. *Id.* at 723 ("Any loan is made by the [customer's] issuing bank, not the merchant bank; the loan is to the issuing bank's customer ([debtor's] passenger), not to [debtor]."). The fact that the contract benefitted the debtor airline did not transform the contract into a "financial accommodation." *Id.* at 725 (noting that Section 365(c)(2) "speaks of a contract that *is* a financial accommodation, not one that has economic effects for one party similar to a financial accommodation") (emphasis in original).

* * *

The Seventh and Eleventh Circuits have long recognized that the narrow exception in Section 365(c)(2) cannot be permitted to swallow the general rule, contrary to the strong policies favoring assumption of contracts to facilitate reorganization in a Chapter 11 bankruptcy. Although *Hamilton* and *United Airlines* both considered a different type of agreement—*i.e.*, a credit card agreement with a chargeback provision—the underlying rationale and analysis applies with equal force to this case: The term "financial accommodation" must be narrowly construed to mean the extension of new money, credit, or other financing to a debtor post-bankruptcy.

Review should be granted, because this case provides a good vehicle for this Court to resolve the split created by the Ninth Circuit's decision and to provide definitive guidance on the correct interpretation Section 365(c)(2).

III. The Ninth Circuit's decision undermines a core policy behind Chapter 11 bankruptcy.

This Court should accept review because the Ninth Circuit's decision will have a significant detrimental effect on debtors' ability to reorganize.

The ability to assume and reject executory contracts is a critical tool for a debtor in Chapter 11 bankruptcy. Indeed, the purpose of Section 365(a) is to give the debtor the option of assuming contracts where continued performance on both sides would benefit the bankruptcy estate, and the option to reject contracts where further performance would not. *See generally* Jay Lawrence Westbrook & Kelsi Stayart White, *The Demystification of Contracts in Bankruptcy*, 91 Am. Bankr. L.J. 481, 514–15 (2017). By adopting this statutory framework, Congress made its intent known: Subject to court approval, the debtor in a Chapter 11 bankruptcy decides whether continuing any given contract is in its best interest.

The Ninth Circuit's decision effectively shifts that determination away from debtors. It allows *creditors* to re-evaluate the desirability of continuing contracts with debtors with the benefit of hindsight, so long as some component of the contract can be construed as a "financial favor" to the debtor—even if the contract does not obligate the creditor to issue any new financial favors to the debtor post-bankruptcy.

As the Eleventh Circuit cautioned, adopting a broad interpretation of the provision could "turn every contract where the debtor owed money into a contract for financial accommodations and would allow the exception to swallow the rule." *Hamilton*, 969 F.2d at 1019 (quoting *In re The Travel Shoppe, Inc.*, 88 B.R. 466, 470 (Bankr. N.D. Ga.1988)). The Seventh Circuit, too, recognized that nearly every executory contract "has some provision that could be characterized as a short-term loan to one side or the other," simply because "[c]redit is implied whenever performance is not simultaneous." *United Airlines,* 368 F.3d at 724. This is exactly the error of and danger in the Ninth Circuit's ruling.

By expanding the definition of "financial accommodation" to include "financial favors" that predate bankruptcy, the Ninth Circuit opened the door even wider. If creditors are permitted to avoid contracts that involved *pre*-bankruptcy "favors" (but which require no new financing or new accommodation post-bankruptcy), virtually all contracts are in jeopardy. This would include beneficial settlements, like the Settlement Agreement in this case, which often involve one party's acceptance of reduced payment obligations as a means of limiting risk and resolving disputes. But it would also include pre-petition contracts that could be construed (by the creditor) as reflecting a favorable financial term for the debtor. Take for example an airline debtor with a futures contract for jet fuel at a favorable rate. If the fuel company is permitted to characterize the deal as a "financial accommodation" to the debtor, then the company could cancel the contract and re-negotiate a fuel contract at current rates, thereby turning the debtor airline's reorganization on its head. If creditors are permitted to re-evaluate their contracts

with Chapter 11 debtors by negotiating for more value (by insisting on higher payments or, in this case, payments in full), then debtors will be deprived of the ability to decide which contracts are beneficial and should be assumed—a decision that can spell the difference between a successful reorganization and a liquidation. The result would be that creditors, rather than debtors, effectively control the fate of a debtor in Chapter 11 bankruptcy based on outsized leverage that Congress never intended for them to wield.

The Ninth Circuit's decision should not be permitted to stand because it creates an additional barrier for debtors that appears nowhere in the text of the statute, contrary to the strong policy favoring Chapter 11 reorganization.

CONCLUSION

Based on the foregoing, Svenhard's requests that the Court grant this petition and reverse the Ninth Circuit's decision.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED SEPTEMBER 12, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-60045
BAP No. 23-1001

IN RE: SVENHARD'S SWEDISH BAKERY,

Debtor.

SVENHARD'S SWEDISH BAKERY,

Appellant,

v.

BAKERY AND CONFECTIONARY UNION AND INDUSTRY INTERNATIONAL PENSION FUND,

Appellee.

Filed September 12, 2025

OPINION

Appeal from the Ninth Circuit Bankruptcy Appellate Panel
Gan, Lafferty III, and Brand, Bankruptcy Judges, Presiding

Argued and Submitted May 20, 2025
San Francisco, California

Before: Marsha S. Berzon, Michelle T. Friedland, and Salvador Mendoza, Jr., Circuit Judges.

Per Curiam Opinion

PER CURIAM:

The Bankruptcy Code limits the circumstances under which a debtor's contracts survive bankruptcy proceedings. In particular, under § 365 of the Bankruptcy Code, a "debtor in possession"—"a debtor that is the subject of a Chapter 11 case and who has not been ousted from possession by the appointment of a Chapter 11 trustee," 8 Michael A. Wolf, *Powell on Real Property* § 57A.02 (2025)—may, subject to court approval, "assume or reject any executory contract" to which the debtor is a party and, if the executory contract is assumed, may assign the debtor's rights and obligations under that contract to another person or entity, 11 U.S.C. § 365(a), (f); *id.* § 1107(a). But that power is subject to exceptions. As relevant here, a debtor in possession is prohibited from assuming or assigning any contract "to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor." *Id.* § 365(c)(2).

In this case, the bankruptcy court denied a motion to assume and assign a contract brought by Debtor-Appellant Svenhard's Swedish Bakery ("Svenhard"). The bankruptcy court held that the particular contract to which Svenhard is a party is not "executory" within the meaning of § 365(a) and, in the alternative, that it is a "financial accommodation" and therefore not assumable

or assignable under § 365(c)(2). The Bankruptcy Appellate Panel ("BAP") affirmed on the first ground, leaving the second undecided.

We affirm on the second ground, holding that the contract is a financial accommodation, without reaching whether it is executory.

I.

A.

Svenhard was a commercial bakery that owned facilities in Oakland, California, and Exeter, California. Svenhard had long been a participating employer in the Bakery and Confectionary Union and Industry International Pension Fund ("the Pension Fund") and so was obligated to make pension contributions on behalf of certain employees covered by and participating in the Pension Fund.

In early 2014, financial difficulties prompted Svenhard to sell its business to United States Bakery ("USB"). As part of that sale, Svenhard agreed to transfer the Exeter facility and its equipment to USB, to lease the Exeter facility and its equipment back from USB for five years, and to close the Oakland facility. In 2015, Svenhard proceeded to close the Oakland facility and to move its operations to Exeter. As part of that process, Svenhard terminated its Oakland workforce and stopped contributing to the Pension Fund.

The Pension Fund notified Svenhard that it believed that Svenhard had effectively withdrawn from the Pension Fund and was subject to two liabilities under the Employee Retirement Income Security Act of 1974 ("ERISA"): a withdrawal liability of approximately $50 million (capped by ERISA to approximately $39 million) and a delinquent-contribution liability of more than $500,000 for failing to make severance and vacation payouts. Svenhard did not timely contest those liabilities through the procedures provided by ERISA. *See* 29 U.S.C. § 1399(b). Instead, Svenhard gave the Pension Fund financial information describing Svenhard's "limited assets."

The Pension Fund ultimately agreed to settle Svenhard's liabilities ("Settlement Agreement") for a significantly reduced amount, to be paid in monthly installments over twenty years. Specifically, Svenhard promised to pay $12,500 each month for 240 months (totaling $3 million) to satisfy the withdrawal liability. Svenhard also agreed to pay the delinquent-contribution liability, with interest, in monthly installments of $8,580.80. The Settlement Agreement expressly indicated that the Pension Fund agreed to that arrangement because, after reviewing Svenhard's financial information, the Pension Fund concluded that pursuing the full value of its claims against Svenhard "would almost certainly cause. . . secured creditors to assert their rights to Svenhard's assets, leaving little or nothing for the Pension Fund" to recover. The Settlement Agreement further stated that the reduced monthly payments would likely allow Svenhard "to be able to pay while continuing to operate its business." A few months later, however, Svenhard ceased operations and defaulted on the Settlement Agreement.

B.

Around the same time that Svenhard defaulted on the Settlement Agreement, it filed a Chapter 11 bankruptcy petition. In those proceedings, USB filed a motion to convert Svenhard's bankruptcy from Chapter 11 to Chapter 7. The bankruptcy court denied that motion, and USB appealed —first to the United States District Court for the Eastern District of California, which dismissed the appeal for lack of jurisdiction, and then to our court. While that appeal was pending in our court, Svenhard, USB, and a committee of Svenhard's unsecured creditors participated in a mediation facilitated by the Ninth Circuit Mediation Program. Although the Pension Fund was one of Svenhard's unsecured creditors, it recused itself from the mediation at Svenhard and USB's request.

Through that mediation, Svenhard and USB reached a conditional compromise to settle their litigation. That compromise was contingent upon, among other things, a ruling from the bankruptcy court allowing the Settlement Agreement between Svenhard and the Pension Fund to be assumed by Svenhard and assigned to USB.

C.

Pursuant to its compromise with USB, Svenhard filed two motions in bankruptcy court. First, Svenhard filed a motion for approval of the compromise under Federal Rule of Bankruptcy Procedure 9019. Second, Svenhard filed a motion under § 365 to assume the Settlement Agreement as an "executory" contract and to assign it

to USB "as a valid and subsisting contract." The Pension Fund opposed Svenhard's motions, contending that the Settlement Agreement could not be assumed or assigned under § 365 and that a proceeding on a motion to assume and assign was not an appropriate proceeding in which to decide the validity of the Settlement Agreement.[1]

The bankruptcy court denied Svenhard's motion to assume and assign on two grounds: first, that the Settlement Agreement is not "executory" within the meaning of § 365(a); and, second, that it is a "financial accommodation" that cannot be assumed or assigned under § 365(c)(2). The bankruptcy court declined to decide whether the Settlement Agreement is a "valid and subsisting" contract, reasoning that it would be procedurally improper to do so on a motion to assume and assign.

Svenhard appealed to the BAP, which affirmed the bankruptcy court's decision that the Settlement Agreement is not "executory" without deciding whether it is a "financial accommodation" under § 365(c)(2). The BAP

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1. The Pension Fund has asserted that the Settlement Agreement is voidable for fraud because Svenhard "failed to disclose to the Pension Fund the scope of its relationship with USB, let alone that USB was covertly encouraging negotiations to reduce the outstanding liabilities owed to the Pension Fund." Those issues are the subject of separate litigation in the United States District Court for the District of Oregon. *See Bd. of Trs. of the Bakery & Confectionary Union & Indus. Int'l Pension Fund v. U.S. Bakery, et al.*, No. 3:21-cv-00617-SI.

also affirmed the bankruptcy court's refusal to decide the validity of the Settlement Agreement.

Svenhard timely appealed.

II.

We have jurisdiction under 28 U.S.C. § 158(d). "Because appeals from the BAP are subject to *de novo* review, [we] independently review[] the Bankruptcy Court's decision. We review conclusions of law *de novo* and conclusions of fact for clear error." *In re Vortex Fishing Sys., Inc.*, 277 F.3d 1057, 1064 (9th Cir. 2002).

Svenhard argues that the Settlement Agreement can be assumed under 11 U.S.C. § 365(a) because it is "executory." Svenhard further argues that the financial-accommodation exception under § 365(c)(2) does not apply because the Settlement Agreement is "not a contract to make a loan, nor is it a contract to extend money or credit to Svenhard[]." We need not and do not decide whether the Settlement Agreement is "executory" because—even if we were to accept that the Settlement Agreement is "executory"—we conclude that it constitutes a "financial accommodation" that is not assumable or assignable under § 365(c)(2).

We begin with the text of the Bankruptcy Code. Section 365(c) provides that a debtor in possession "may not assume or assign any executory contract . . . if . . . 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." 11 U.S.C. §§ 365(c), 1107(a).[2] In interpreting that provision, we apply the "fundamental canon of statutory construction . . . that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, [and] common meaning." *Perrin v. United States,* 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979).

Because Congress did not define the term "financial accommodations," "'we follow the common practice of consulting dictionary definitions . . .' and look to how the term[] [was] defined 'at the time [the statute] was adopted'" to determine that term's ordinary, contemporary, and common meaning. *United States v. TRW Rifle 7.62×51mm Caliber,* 447 F.3d 686, 689 (9th Cir. 2006) (third alteration in original) (quoting *United States v. Carter,* 421 F.3d 909, 911 (9th Cir. 2005)). When § 365(c)(2) of the Bankruptcy Code was enacted in 1978, *see* An Act to Establish a Uniform Law on the Subject of Bankruptcies, Pub. L. No. 95-598, 92 Stat. 2549 (1978), Black's Law Dictionary defined "accommodation" as "[a]n arrangement or engagement made as a favor to another" or "something done to oblige, usually . . . a loan of money or commercial paper," *Accommodation, Black's Law Dictionary* (rev. 4th ed. 1968). Other dictionaries from that period were in accord. *See Accommodation, The Am. Heritage Dictionary of the Eng. Language* (New

2. Section 365(c) refers to the "[t]he trustee." Section 1107(a) provides that a debtor in possession "shall have all the rights . . . and shall perform all the functions and duties . . . of a trustee serving in a case under this chapter," subject to certain exceptions not relevant here.

College ed. 1976) ("A loan or other financial favor."); *Accommodation, Webster's Third New Int'l Dictionary* (1976) ("[S]omething that is supplied for convenience or to satisfy a need."). An agreement to accept as full payment much less than the amount contractually due in recognition of the debtor's financial inability to pay the full amount is assuredly a "financial favor," and one provided "to satisfy a need" of the debtor. Thus, the ordinary and common meaning of "financial accommodations" at the time of enactment included contracts to forebear or reduce payments to which one was otherwise entitled, if those contracts were agreed upon to aid a debtor's poor financial condition.[3]

The Settlement Agreement is plainly such a contract. The Settlement Agreement itself memorialized that Svenhard was liable for tens of millions of dollars that it could not fully repay because of its "limited assets," and that the Pension Fund accordingly agreed to "accept a schedule of payments . . . that Svenhard [was] likely to be able to pay while continuing to operate its business." In other words, the Settlement Agreement involves the forbearance and reduction of the amount to which the Pension Fund would otherwise be entitled, and the Pension Fund agreed to that

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3. The definition of "accommodation" has remained substantially the same. *See, e.g., Accommodation, Black's Law Dictionary* (12th ed. 2024) ("A loan or other financial favor."); *Accommodation, Merriam-Webster's Collegiate Dictionary* (11th ed. 2022) ("[S]omething supplied for convenience or to satisfy a need."); *Accommodation, The Am. Heritage Dictionary of the Eng. Language* (3d ed. 2000) ("A financial favor.").

arrangement expressly because of Svenhard's poor financial condition.[4]

Svenhard argues that the term "financial accommodations" includes only loans or other extensions of money or credit, neither of which are present here. But, again, the ordinary meaning of "accommodation" at the time of § 365's enactment was "something done to oblige, *usually*"— not exclusively—"a loan of money or commercial paper." *Accommodation, Black's Law Dictionary* (4th ed. 1968) (emphasis added); *see also Accommodation, The Am. Heritage Dictionary of the Eng. Language* (New College ed. 1976) ("A loan or *other financial favor.*" (emphasis added)).

Also, "[t]he superfluity canon guides [us] to infer that Congress did not intend to make any portion of a statute

4. Svenhard argues that even if one purpose of the Settlement Agreement was to reduce Svenhard's liabilities because of its poor financial condition, another purpose was to "settle[] a pending dispute between the parties over the *amount* of those original liabilities." That purported other purpose does not comport with the Settlement Agreement's terms. On appeal, Svenhard suggests that its pre-settlement withdrawal liability may have been around $23 million—not $39 million as stated in the Settlement Agreement. The terms of the Settlement Agreement provided that Svenhard would pay the Pension Fund only $3 million for its withdrawal liability. That figure is so far below either liability figure—$23 million or $39 million—that it could not have been meant to settle the amount actually due. Rather, the Settlement Agreement's purpose was to accommodate Svenhard's inability to pay its withdrawal liability —whether $23 million or $39 million— by requiring payment only of a much lower amount.

superfluous," *In re Pangang Grp. Co.,* 901 F.3d 1046, 1056 (9th Cir. 2018), and it requires us to "give effect to every word of a statute wherever possible," *id.* (quoting *Leocal v. Ashcroft,* 543 U.S. 1, 12, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004)). Although there may be overlap between what constitutes a "loan," "debt financing," or "financial accommodations" under § 365(c)(2), that Congress used each of those terms indicates that each should carry distinct meaning. Otherwise, Congress "could have omitted the word[s] ["financial accommodations"]. . . altogether." *Carcieri v. Salazar,* 555 U.S. 379, 391, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009). Our obligation "to give effect, if possible, to every word Congress used" therefore counsels reading "financial accommodations" to include more than only loans or other debt financing. *Id.* (quoting *Reiter v. Sonotone Corp.,* 442 U.S. 330, 339, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979)).

The cases on which Svenhard primarily relies to argue that a contract is a "financial accommodation" only if it involves loans or other debt financing—*In re Easebe Enterprises, Inc.,* 900 F.2d 1417 (9th Cir. 1990), *overruled on other grounds by In re Robert L. Helms Construction & Development Co.,* 139 F.3d 702 (9th Cir. 1998) (en banc), and *In re Sun Runner Marine, Inc.,* 945 F.2d 1089 (9th Cir. 1991)—do not support that proposition.

In *Easebe,* we held that a contract through which a debtor would receive property in exchange for a promise to pay fell under § 365(c)(2)'s prohibition on assumption and assignment. 900 F.2d at 1420. In so holding, we explained that § 365(c)(2) "prohibits the assumption of debt financing

or *other financial accommodations* as well as loans," and that, like here, "the transaction at issue [did] not require the [counterparties] to lend [the debtor] any funds." *Id.* (emphasis added). We acknowledged that § 365(c)(2) should be "strictly construed so as not to extend to an ordinary contract to provide goods and services that has incidental financial accommodations or extensions of credit," but that recognition does not help Svenhard here. *Id.* at 1419 (citation modified). The Settlement Agreement is not a contract for goods and services that has only "incidental" financial accommodations. No goods or services were exchanged as part of the Settlement Agreement; its only apparent purpose was to accommodate Svenhard's financial needs and thereby ensure that the Pension Fund received *some* payment on Svenhard's obligation. Thus, our holding here that the Settlement Agreement falls under § 365(c)(2) is consistent with *Easebe.*

Our decision in *Sun Runner* is also consistent with the result we reach here. In *Sun Runner,* we held that a lender's agreements to offer loans to third parties constituted "financial accommodations" to the debtor because those third-party loans were "an indispensable means of financing the debtor's business." 945 F.2d at 1092. We observed that "[t]he term 'financial accommodation' has been defined as the extension of money or credit to accommodate another," but we did not conclude that the term was *limited* to loans or other extensions of money or credit. *Id.* Such a conclusion would have required us to stray beyond the particular facts of that case, which involved loans. In any event, agreeing to take less than ten cents on the dollar as payment of an obligation is

tantamount to an "extension of money" to the debtor, in the amount that will not have to be paid.

Although our precedents have not defined the entire scope of what may constitute "financial accommodations" under § 365(c)(2), the plain text of the statute indicates that "financial accommodations" must include more than just loans and other debt financing. Because the Settlement Agreement falls within the ordinary meaning of "financial accommodations," it accordingly cannot be assumed or assigned under § 365(c)(2).

In light of that conclusion, we need not reach Svenhard's argument that, had the bankruptcy court granted the motion to assume, the bankruptcy court should also have declared that the Settlement Agreement was valid and subsisting.

III.

For the foregoing reasons, we **AFFIRM**.

APPENDIX B — OPINION OF THE UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT, FILED AUGUST 29, 2023

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

BAP No. EC-23-1001-GLB
Bk. No. 19-15277

IN RE: SVENHARD'S SWEDISH BAKERY,

Debtor.

SVENHARD'S SWEDISH BAKERY,

Appellant,

v.

UNITED STATES BAKERY; OFFICIAL COMMITTEE OF UNSECURED CREDITORS; CONFECTIONERY UNION AND INDUSTRIAL PENSION FUND,

Appellees.

Filed August 29, 2023

OPINION

Appeal from the United States Bankruptcy Court
for the Eastern District of California
Christopher M. Klein, Bankruptcy Judge, Presiding

Before: GAN, LAFFERTY, and BRAND, Bankruptcy Judges.

GAN, Bankruptcy Judge:

INTRODUCTION

Chapter 11[1] debtor Svenhard's Swedish Bakery ("Debtor") appeals the bankruptcy court's order denying its motion to assume and assign, pursuant to § 365, a purported executory contract. The contract in question is a settlement agreement between Debtor and the Confectionery Union and Industrial Pension Fund (the "Pension Fund") which provides for the release of approximately $46,000,000 of Debtor's liability after payment of reduced amounts on specified terms.

The bankruptcy court held that the settlement agreement is not an executory contract because the Pension Fund's only contractual obligation—to release its claim upon full payment under the agreement— is not due until after Debtor fully performs. Debtor has not demonstrated reversible error; we AFFIRM.

1. Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure.

FACTS[2]

A. Prepetition events

Until 2019, Debtor operated a bakery producing Swedish pastries. In 2014, Debtor executed a series of transactions to sell its business to United States Bakery ("USB"), and it commenced a five-year lease-back of its operations. In 2015, Debtor closed its bakery in Oakland, California and relocated its operations to Exeter, California. As a result of closing the Oakland facility and terminating its union workforce, Debtor effectively withdrew from the Pension Fund.

The Pension Fund notified Debtor that it had incurred a withdrawal liability of $50,150,043[3] ("Withdrawal Liability"), and later informed Debtor that it had failed to make pension contributions of $514,857.67 related to severance pay and accrued vacation ("Contribution Liability"). Debtor did not make a timely request for review of the assessment of Withdrawal Liability pursuant to 29 U.S.C. § 1399(b)(2), and consequently, the amount was due and owing as demanded by the Pension Fund.

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2. We exercise our discretion to take judicial notice of documents electronically filed in the bankruptcy case and related proceedings. *See Atwood v. Chase Manhattan Mortg. Co. (In re Atwood),* 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

3. According to Debtor, the provision of ERISA governing payment of withdrawal liability provides that Debtor could be required only to pay $162,941 per month for 20 years, which totals $39,105,804.

Debtor informed the Pension Fund that it could not pay the Withdrawal Liability and offered to pay a reduced amount. Debtor provided the Pension Fund with financial information, and after protracted negotiations, the parties signed a settlement agreement (the "Settlement") in April 2019. Under the Settlement, Debtor agreed to pay the Pension Fund $3,000,000, through 240 monthly installments of $12,500, in satisfaction of the Withdrawal Liability. Debtor also agreed to pay the Contribution Liability with interest at 5.25% through monthly installments of $8,580.80.

The Settlement provides that upon Debtor's full payment of the agreed amounts, the Pension Fund will execute a release of its claim for Withdrawal Liability and a separate release of its claim for the Contribution Liability. The Settlement further provides that if Debtor fails to make any payment, the Pension Fund can declare a default and, if Debtor fails to cure the default, Debtor is liable for the full Withdrawal Liability of $39,105,840, plus allowed interest, and the full unamortized Contribution Liability, less actual payments made.

In November 2019, USB terminated the lease-back agreements and Debtor ceased operations. Debtor missed the December 2019 payment under the Settlement, and on December 13, 2019, the Pension Fund declared a default. Debtor filed its chapter 11 petition on December 19, 2019.

B. The bankruptcy and settlement with USB

The Pension Fund filed a proof of claim based on the Settlement, and asserted it was owed $45,400,506.78

for the Withdrawal Liability and $566,994.14 for the Contribution Liability.

After Debtor filed the bankruptcy case, the Pension Fund sued USB in the United States District Court for the Eastern District of California ("District Court"), asserting claims for the Withdrawal Liability and the Contribution Liability under a theory of successor liability. Debtor also filed an adversary complaint against USB, alleging various claims including successor liability, breach of fiduciary duty, fraud, and violations of California Business and Professions Code § 17200. USB successfully moved to withdraw the adversary proceeding to the District Court, and both cases were subsequently transferred to the United States District Court for the District of Oregon.

USB sought to dismiss Debtor's bankruptcy case. After the bankruptcy court denied the motion and the District Court dismissed its appeal, USB appealed to the Ninth Circuit. While the appeal was pending, USB, Debtor, and the Committee of Unsecured Creditors (the "Committee") agreed to participate in the Ninth Circuit's appellate mediation program.[4]

Debtor and USB reached a comprehensive agreement which provided for USB to pay Debtor $3,000,000 and cure the default on the Settlement, and for Debtor to assume and assign the Settlement to USB. USB also agreed to

4. Although the Pension Fund was a member of the Committee, at the request of Debtor and USB, it did not participate in the mediation.

withdraw its proof of claim and dismiss its pending appeal, and Debtor agreed to dismiss its pending action against USB. The agreement was conditioned on bankruptcy court approval of the agreement and approval of Debtor's motion to assume and assign the Settlement as a valid and subsisting contract.

C. The motion to assume and assign and the court's ruling

In November 2022, Debtor filed a motion to assume and assign the Settlement under § 365 and a motion to approve the agreement with USB under Rule 9019.[5] Debtor asserted that the Settlement was an executory contract because both parties had remaining material obligations: Debtor was required to make monthly payments, and the Pension Fund was required to execute releases of its claims. The Committee joined the motion, and the Pension Fund objected.

The Pension Fund argued that the Settlement could not be assumed and assigned because it was not an executory contract under Ninth Circuit law. The Pension Fund maintained its obligation to execute the releases was not due unless Debtor made all payments under the Settlement, and thus, its obligation was contingent as of the petition date. The Pension Fund further argued that it would be inappropriate for the court to determine whether

5. The bankruptcy court denied the Rule 9019 motion and we dismissed the appeal from that order as interlocutory. This appeal involves only the bankruptcy court's order denying Debtor's motion to assume and assign the Settlement under § 365(a).

the Settlement was a “valid and subsisting contract” as part of a summary proceeding under § 365.

After a hearing, the bankruptcy court held that the Settlement was not executory because it lacked the requisite mutuality of obligation given that the Pension Fund’s obligations to execute the releases were conditioned on Debtor’s full performance. The court additionally held that the Settlement was a financial accommodation to Debtor and thus, not assumable under § 365(c)(2). Finally, the court declined to determine whether the Settlement was a valid and subsisting contract, and cited *Diatom, LLC v. Committee (In re Gentile Family Industries)*, BAP No. CC-13-1563-KiTaD, 2014 WL 4091001, at *5 (9th Cir. BAP Aug. 19, 2014), for the proposition that the “validity of a contract if disputed cannot be determined in the context of a motion to assume or reject.”

The bankruptcy court entered a written decision and order denying Debtor’s motion to assume and assign the Settlement, and Debtor timely appealed.

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (O). We have jurisdiction under 28 U.S.C. § 158.

ISSUES

Did the bankruptcy court err by denying Debtor’s motion to assume and assign the Settlement under § 365(a)?

Did the bankruptcy court err by declining to decide whether the Settlement was a valid and subsisting contract?

STANDARDS OF REVIEW

Whether a contract is "executory" for purposes of § 365 is a question of fact, which we review for clear error. *Carruth v. Eutsler (In re Eutsler),* 585 B.R. 231, 234-35 (9th Cir. BAP 2017) (citing *Unsecured Creditors' Comm. v. Southmark Corp. (In re Robert L. Helms Constr. & Dev. Co.),* 139 F.3d 702, 706 n.13 (9th Cir. 1998) (hereinafter "*In re Helms Constr.*") (en banc). Factual findings are clearly erroneous if they are illogical, implausible, or without support in the record. *Retz v. Samson (In re Retz),* 606 F.3d 1189, 1196 (9th Cir. 2010).

We review de novo the bankruptcy court's decision to decline to decide whether a contract is "valid and subsisting" as part of its decision on a motion under § 365(a). *See Durkin v. Benedor Corp. (In re G.I. Indus.),* 204 F.3d 1276, 1279 (9th Cir. 2000). Under de novo review, "we consider a matter anew, as if no decision had been made previously." *Francis v. Wallace (In re Francis),* 505 B.R. 914, 917 (9th Cir. BAP 2014).

DISCUSSION

A. Assumption of executory contracts under § 365

Pursuant to § 365, a debtor in possession may assume or reject any executory contract, subject to court

approval, and assign the executory contract upon adequate assurance of future performance by the assignee.

The term "executory contract" is not defined in the Bankruptcy Code, but the Ninth Circuit has adopted the following definition, known as the "Countryman test," formulated by Professor Countryman: "[A] contract is executory if 'the obligations of both parties are so unperformed that the failure of either party to complete performance would constitute a material breach and thus excuse the performance of the other.'" *In re Helms Constr.*, 139 F.3d at 705 (quoting *Griffel v. Murphy (In re Wegner),* 839 F.2d 533, 536 (9th Cir. 1988)); *see* Vern Countryman, *Executory Contracts in Bankruptcy: Part I,* 57 Minn. L. Rev. 439, 460 (1973).

To determine whether a contract is executory, we first determine whether both parties have remaining material obligations. *Com. Union Ins. Co. v. Texscan Corp. (In re Texscan Corp.),* 976 F.2d 1269, 1272 (9th Cir. 1992). If either party has "substantially performed," the contract is not executory. *Marcus & Millichap Inc. v. Munple, Ltd. (In re Munple, Ltd.),* 868 F.2d 1129, 1130 (9th Cir. 1989). We then determine, as of the petition date, whether failure to perform would give rise to a material breach and excuse performance by the other party. *In re Texscan Corp.,* 976 F.2d at 1272 (citing *Collingwood Grain, Inc. v. Coast Trading Co. (In re Coast Trading Co.),* 744 F.2d 686, 692 (9th Cir. 1984) and *In re Wegner,* 839 F.2d at 536). "The materiality of a remaining obligation and whether the failure to perform a remaining obligation is a material breach of the contract is an issue of state law." *Id.* (citation omitted).

Under Maryland law, which governs the Settlement, "any breach of contract may give rise to a cause of action for damages, [but] only a material breach discharges the non-breaching party of its duty to perform." *Jay Dee/Mole Joint Venture v. Mayor and City Council of Baltimore,* 725 F.Supp.2d 513, 526 (D. Md. 2010). A breach is material "if it affects the purpose of the contract in an important or vital way." *In re Cho,* 581 B.R. 452, 462 (Bankr. D. Md. 2018) (cleaned up).

B. The bankruptcy court did not err by determining the Settlement is not executory.

Debtor does not demonstrate, nor do we discern, error in the bankruptcy court's ruling that the Settlement is not an executory contract. The Settlement plainly provides for the Pension Fund to release claims upon full payment by Debtor. Thus, the failure of the Pension Fund to execute the releases would not constitute a material breach sufficient to excuse Debtor's performance.

The express requirement for the Pension Fund to execute releases "[u]pon full payment" creates a performance condition under Maryland law. *See Chirichella v. Erwin,* 270 Md. 178, 310 A.2d 555, 557 (1973) (stating that phrases such as "if," "provided that," "when," "after," "as soon as," or "subject to" are sufficient to create express conditions). "Generally, when a condition precedent is unsatisfied, the corresponding contractual duty of the party whose performance was conditioned on it does not arise." *B & P Enters. v. Overland Equip. Co.,* 133 Md. App. 583, 758 A.2d 1026, 1038 (Md. Ct. Spec. App. 2000).

Thus, the Pension Fund could not breach the Settlement by refusing to execute the releases unless Debtor had fully performed by making all payments. *See NSC Contractors, Inc. v. Borders,* 317 Md. 394, 564 A.2d 408, 413 (1989) ("It is fundamental that where a contractual duty is subject to a condition precedent . . . there is no duty of performance and there can be no breach by nonperformance until the condition precedent is either performed or excused.") (quoting *Laurel Race Course v. Regal Constr. Co.,* 274 Md. 142, 333 A.2d 319, 327 (1975)); Restatement (Second) of Contracts § 235, *cmt. b* ("Non-performance is not a breach unless performance is due. Performance may not be due because . . . a condition has not occurred."). Because the Pension Fund's contractual obligations are due only after Debtor fully performs by making all required payments, a breach by the Pension Fund could not logically excuse Debtor's performance of its duty to make payments.

Debtor suggests that payments under the Settlement would result in satisfaction of the Contribution Liability several years prior to satisfaction of the Withdrawal Liability, and therefore if the Pension Fund refused to execute the Contribution Liability release, such breach would excuse Debtor's remaining payment obligation. But this argument conflates the two separate exchanges involved in the Settlement. Debtor is required to make two sets of monthly payments: (1) $8,580.80 to satisfy the Contribution Liability with interest at 5.25%, in exchange for the Pension Fund's release of its claim; and (2) $12,500 for 240 months, in exchange for the Pension Fund's release of the Withdrawal Liability. The Pension

Fund's failure to release the Contribution Liability would not excuse Debtor from making payments related to the Withdrawal Liability.

Additionally, we question whether the Pension Fund's obligation to execute the releases is "material." Debtor argues that the releases are essential to the Settlement and vitally affect its purpose. The purpose of the Settlement is to mutually resolve the claims. If the Pension Fund refused to execute the releases after full payment by Debtor, the Settlement and proof of payment would operate as a complete defense to a collection action in the same manner as a signed release. Given the nature of the Settlement, the releases are likely ministerial and not sufficient to render the Settlement executory. *See Enter. Energy Corp. v. United States (In re Columbia Gas Sys. Inc.,* 50 F.3d 233, 243 (3d Cir. 1995) (describing "execution of the release to be found in the settlement of any case" as a ministerial act); *Mitchell v. Streets (In re Streets & Beard Farm P'ship),* 882 F.2d 233, 235 (7th Cir. 1989) (holding unperformed delivery of legal title to be a formality rather than "the kind of significant legal obligation that would render the contract executory"); *In re GEC Indus., Inc.,* 107 B.R. 491, 492 (Bankr. D. Del. 1989) (holding seller's unperformed warranty obligations insufficient to make contract executory; buyer's administrative steps to submit claims for breach of warranty are merely procedural and do not make the contract executory).

Debtor suggests the bankruptcy court misconstrued *Helms,* which dealt only with an unexercised option, and argues that the bankruptcy court's ruling creates new

precedent that bars debtors from assuming or rejecting all contracts where both parties do not have immediate and concurrent performance obligations. Debtor contends that virtually all settlement agreements which require payment in exchange for a release of liability should be deemed executory. We disagree.

The bankruptcy court found support for its decision in *Helms,* but its decision was grounded in long-standing precedent and application of the Countryman test. It is conceivable that some contracts with sequential performance may be executory, but not all settlement agreements will satisfy the Countryman test. The Countryman test requires bankruptcy courts to "test" the factual circumstances of each purported executory contract and evaluate whether both parties have sufficient remaining obligations such that failure to perform would constitute a material breach and excuse performance by the other.

The purpose of the test is to permit a debtor in possession to evaluate substantially underperformed contracts and use its business judgment to assume those with positive net value to the estate while rejecting those which result in a loss. Central to this purpose is the requirement that the estate have remaining performance obligations which might outweigh the expected benefit of the remaining performance to be received. In other words, an executory contract is one where both parties have something at risk.

Here, the Settlement requires nothing of the Pension Fund but the ministerial act of executing releases upon

full payment. Failure to do so would not be a material breach, and because the releases are not required until after full payment by Debtor, it is not possible for the Pension Fund to materially breach the Settlement and excuse Debtor's performance.

The bankruptcy court did not err by determining that the Settlement is not an executory contract. Thus, we need not reach the court's alternative holding that the Settlement is unassumable as a contract for financial accommodations to Debtor.

C. The bankruptcy court properly declined to determine whether the Settlement was a valid and subsisting contract.

Debtor argues that the court erred by refusing to rule that the Settlement is a valid and subsisting contract because no party disputed its validity. But Debtor fails to articulate why the court was required to determine the validity of the Settlement in the context of a summary § 365(a) proceeding. The bankruptcy court properly declined to enter an order regarding the validity of the Settlement, regardless of whether it was in dispute. *See In re G.I. Indus.*, 204 F.3d at 1282 ("A bankruptcy court's hearing on a [§ 365 motion] is a summary proceeding that involves only a cursory review of a trustee's decision. . . ."); *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.),* 4 F.3d 1095, 1099 (2d Cir. 1993) ("At heart, a motion to assume should be considered a summary proceeding, intended to efficiently review the trustee's or debtor's decision to adhere to or reject

a particular contract. . . ."). Moreover, Debtor does not explain why such an order is necessary if the validity of the Settlement is uncontested.

CONCLUSION

Based on the foregoing, we AFFIRM the bankruptcy court's order denying Debtor's motion to assume and assign the Settlement.

APPENDIX C — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, FILED DECEMBER 19, 2022

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

Case No. 19-15277-C-11
Docket Control No. DT-61

IN RE: SVENHARD'S SWEDISH BAKERY,

Debtor.

ORDER

A continued hearing on debtor's motion to approve settlement agreement with United States Bakery pursuant to Federal Rule of Bankruptcy Procedure 9019 (dkt. 459) was heard by the court on December 19, 2022. Findings of Fact and Conclusions of Law having been orally entered on the record, it is:

IT IS HEREBY ORDERED that debtor's motion to approve settlement agreement with United States Bakery pursuant to Federal Rule of Bankruptcy Procedure 9019 is DENIED.

Dated: December 19, 2022

/s/ Christopher M. Klein
United States Bankruptcy Judge

APPENDIX D — OPINION OF THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, FILED DECEMBER 19, 2022

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

Case No. 19-15277-C-11
Docket Control Nos. DT-61 & DT-62

IN RE: SVENHARD'S SWEDISH BAKERY,

Debtor.

OPINION ON MOTION TO APPROVE COMPROMISE

CHRISTOPHER M. KLEIN, Bankruptcy Judge:

It was a great settlement: extinguish a $46 million liability for $3 million on the condition of adherence to a precise payment schedule. The entity that acquired the debtor's business thwarted payments, caused default, and let three years pass. Now defending lawsuits seeking $46+ million, the acquirer wants to use Bankruptcy Code § 365 to revive the discounted payment agreement.

The salient question is: whether a garden-variety discounted payment agreement to release a large debt contingent on prior full payment of an agreed smaller sum under specific terms is an "executory contract" that may be assumed and assigned per Bankruptcy Code § 365 over the creditor's objection.

The answer is: this contract is not a § 365 executory contract. First, the agreement lacks the mutuality of obligation required to constitute a § 365 executory contract. Second, en banc law of the circuit confirms it is not executory. Third, it is a contract to extend financial accommodations to the debtor that § 365(c)(2) excludes from assumption and assignment.

The fact the proposed assumption comes by way of the Ninth Circuit Appellate Mediation Program does not alter the equation.

The motions to assume the contract and to approve the compromise are both DENIED. The contract is not an executory contract that can be assumed and assigned. The compromise flunks the governing "fair and equitable" test because probability of success in litigation of the § 365 assumption/assignment question is zero and because the creditor holding more than 82.5% of the unsecured debt in the chapter 11 case objects.

Parties

The contestants are chapter 11 debtor Svenhard's Swedish Bakery, United States Bakery (USB), which acquired the Svenhard's business, and the Bakery & Confectionery Union & Industry International Pension Fund (Pension Fund).

The Pension Fund filed a proof of claim for $45,967,500.92 based on withdrawal liability occasioned by Svenhard's termination, allegedly at USB's direction

and supervision, of its bakery operations in Oakland, California.[1]

Svenhard's is suing USB on eight counts based on USB's acquisition of Svenhard's and its termination of Svenhard's business: (1) Successor Liability; (2) Breach of Fiduciary Duty; (3) Aiding and Abetting Breach of Fiduciary Duty; (4) Fraud; (5) Conversion; (6) Rescission; (7) Violation of California Business & Professions Code § 17200; and (8) Equitable Subordination.[2]

The Pension Fund is suing USB and two USB subsidiaries on a theory of successor liability to collect

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1. For convenience, the claim is described herein as $46+ million and uses the term "withdrawal liability" to conflate the withdrawal and contribution liabilities. The $45,967,500.92 proof of claim as of the December 19, 2019, case filing reflects a "withdrawal liability" and a "contribution liability" plus accrued interest. The "withdrawal liability" is $39,629,322.96, plus interest at a rate prescribed by PBGC regulations from May 1, 2016. The "contribution liability" is $563,106.39, plus accrued interest. Complaint, ¶¶ 48 & 56, *Board of Trustees of the Bakery and Confectionery Union and International Union Pension Fund v. United States Bakery, Mountain States Bakeries LLC, Central California Baking Company*, (filed 11/10/20), No. 1:20-cv-01587-DAD-BAM, U.S. Dist. Ct. E.D. Cal.; transferred to D. Or., note 3 *infra*. Dkt. 493.

2. *Svenhard's Swedish Bakery v. United States Bakery; Mountain States Bakeries LLC; Central California Baking Company; Murrey R. Albers; Michael Petitt; and Kenneth Hall*, U.S. Dist. Ct. D. Or. No. 20-cv-01454-SI. It was filed in this court as Adv. No. 2020-1029. The reference was withdrawn and the civil action transferred to the District of Oregon.

Svenhard's unpaid pension obligations under ERISA and 29 U.S.C. § 1392.[3]

Also pending is Ninth Circuit appeal No. 21-16991 from the District Court's dismissal of USB's appeal from this court's denial of USB's motion to convert the chapter 11 to chapter 7. The District Court ruled it lacked jurisdiction because USB did not obtain leave to appeal the interlocutory order.

Through appellate mediation, from which the Pension Fund was excluded, USB and Svenhard's agreed to make peace by way of Svenhard's assuming the defaulted discounted payment agreement with the Pension Fund for which USB would make the payments.[4]

These motions ask this court to ratify that treaty.[5]

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3. Note 1, *supra*. Now pending in the U.S. District Court for the District of Oregon as No. 3:21-CV-00617-SI.

4. The full terms of the settlement included: (1) Entry of a final, non appealable order assuming and assigning the discounted payment agreement to USB as a valid and subsisting contract; (2) USB funds the amount to cure the default on the agreement; (3) USB pays the debtor $3,000,000; (4) USB forfeits all rights and claims to assets of the debtor's estate; (5) Debtor and USB will dismiss with prejudice Adv. No. 20-01030, 9th Circuit Case No. 21-16991, and Oregon District Court Case No. 20-cv-01454-SI; (6) USB withdraws Proof of Claim No. 54; and (7) Mutual releases.

5. Debtor's Motion to Approve Settlement Agreement With United States Bakery Pursuant to Federal Rule of Bankruptcy Procedure 9019, DC No. DT-061, Dkt 459; Debtor's Motion to Assume and Assign Settlement Agreement With Confectionery Union and Industrial Pension Fund, DC No. DT-062, Dkt 461.

Facts

USB acquired the Svenhard's bakery business in a multi-year creeping acquisition beginning in 2014, featuring multiple transactions with lease-backs and license-backs that permitted operations to continue in the Svenhard's name.

In 2015, allegedly at USB's direction, Svenhard's operations were moved from Oakland, California, to Exeter, California, where Svenhard's continued to operate under a lease-back from USB.

The relocation to Exeter occasioned termination, effective December 4, 2015, of a collective bargaining agreement with Local 125 of the Bakery, Confectionery, Tobacco Workers & Grain Millers International Union according to which Svenhard's was required to contribute to the ERISA-qualified Pension Fund.[6]

The Pension Fund notified Svenhard's, pursuant to 29 U.S.C. § 1399, there was an accrued Withdrawal Liability said to be $50,150,043, payable in monthly installments of $162,941. In addition, there was a Delinquent Contribution Liability of $514,847.67 on account of severance and accrued vacation.

Svenhard's did not timely request review of the assessment of Withdrawal Liability pursuant to 29 U.S.C. § 1399. Hence, the full amount became due and owing.

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6. Svenhard's Partnership, L.P., was a signatory but has disappeared from the dispute for unexplained reasons.

Svenhard's pled poverty and eventually persuaded the Pension Fund to agree to a discount on the uncontested liabilities based on Svenhard's supposed financial condition.

A discounted payment agreement encompassing both Withdrawal Liability and Contribution Liability was executed April 15, 2019, between the Pension Fund and Svenhard's requiring monthly payments totaling $21,080.80.

The terms for the Withdrawal Liability, stated in the agreement as $39,105,840, provided for Svenhard's to make 240 monthly payments of $ 12,500/month (i.e. a total of $3,000,000), upon completion of which the entire $39,105,840 (plus interest from May 1, 2016) would be discharged.

The $3,000,000 discounted Withdrawal Liability could be prepaid at any time by paying all remaining monthly installments, discounted to present value at a rate of 5.1%.

The Delinquent Contribution Liability payment agreement capitalized interest accrued as of the date of the agreement and provided for Svenhard's to pay $598,482.96 at a rate of $8,580.80 per month, amortizing the debt at a rate of 5.25% until paid in full, which could be by prepayment of the unamortized amount.

If all required discounted payments of the Withdrawal Liability were not made, then the full non-discounted amount (stated as $39,105,840) would be due with

interest at rates prescribed by Pension Benefit Guaranty Corporation regulations calculated from May 1, 2016, with credit only for amounts actually paid.

If all required payments on the Delinquent Contribution Liability were not timely paid, then the entire unamortized amount of that liability would be due with interest at 5.25%.

Paragraphs 12 and 14 of the discounted payment agreement provided for separate releases to be provided to Svenhard's "upon full payment of the amounts" required for the Withdrawal Liability and the Delinquent Contributions Liability.

Svenhard's made the first six $21,080.80 payments (June-November 2019) under the discounted payment agreement.

In November 2019, USB terminated its lease-back to Svenhard's and took control of Svenhard's commercial bakery operations, as well as possession of Svenhard's facilities.

USB's termination of the Svenhard's leaseback had the effect of starving Svenhard's of the ability to make the $21,080.80 payment due December 1, 2019.

The Pension Fund declared a default on December 13, 2019, on the $3,000,000 discounted payment agreement and gave five business days in which to cure the default.

Svenhard's filed its chapter 11 case on December 19, 2019, one day before the cure period expired. The filed proofs of claim total $69,247,970.68 ($10,612,005.58 secured; $2,965,396.05 priority; $55,670,569.05 unsecured).

No payment has been made on the discounted payment agreement since November 2019.

As noted, Svenhard's and the Pension Fund have separate civil actions pending against USB in the District of Oregon.

Jurisdiction

Jurisdiction is founded on 28 U.S.C. § 1334(a). A motion to approve a compromise is a core proceeding for a Bankruptcy Judge to hear and determine. 28 U.S.C. § 157(b)(2).

Analysis

These are motions to assume the defaulted discounted payment agreement and to approve as "fair and equitable" a compromise premised on the proposed assumption. The compromise standards provide the framework for analysis, but the central issue is whether the transaction is permitted by the Bankruptcy Code.

I. Compromise Must Be "Fair and Equitable"

A compromise must be "fair and equitable" taking into account four factors: (1) probability of success in litigation;

(2) difficulties, if any, in matter of collection; (3) complexity of litigation involved and expense, inconvenience, and delay necessarily attending it; and (4) the paramount interest of the creditors and a proper deference to their reasonable views in the premises. *E.g.*, *Martin v. Kane (In re A&C Properties)*, 784 F.2d 1377, 1380 (9th Cir. 1986).

Here, the questions of collectability and of obviating complexity, expense, inconvenience and delay are overshadowed by the questions of the legal merits of what is proposed and of the expressed interest of creditors.

II. Probability of Success in Litigation

The first crucial "fair and equitable" factor is probability of success in litigation. The answer turns on whether the discounted payment agreement is an "executory" contract that may be assigned and assumed pursuant to § 365.

Despite the number of zeroes involved, the terms of the discounted payment agreement are commonplace. Courts routinely encounter compromises according to which a large sum, either claimed or already adjudged, will be deemed fully paid on the condition that a smaller sum is paid by a time or times certain.

From 10,000 feet, Bankruptcy Code § 365 (Executory Contracts and Unexpired Leases) is deceptively simple.

The trustee, subject to the court's approval, may assume or reject an executory contract. 11 U.S.C. § 365(a).

The trustee, with stated exceptions, may assign an executory contract that has been assumed. 11 U.S.C. § 365(f)(1).

A. Is the Agreement Proposed For Assumption Executory?

The Bankruptcy Code does not define "executory contract." The absence of a precise definition has bedeviled courts since enactment of the Bankruptcy Code of 1978.

The Supreme Court has noted that the term executory contract was intended to mean a contract on which performance remains due to some extent on both sides, but it has not provided more helpful guidance. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522 n.6, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984) (dictum).

A leading approach to the meaning of executory contract is that of Professor Vern Countryman, which holds that the obligations of both parties must be so far unperformed that failure of either party to complete performance would constitute a material breach and thus excuse the performance of the other party. Vern Countryman, *Executory Contracts in Bankruptcy: Part 1*, 57 Minn. L. Rev. 439, 460 (1973).[7]

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7. There are approaches other than the Countryman analysis. There is a functional test and an exclusionary approach. Jay L. Westbrook & Kelsi Stayard White, *The Demystification of Contracts in Bankruptcy*, 91 Am. Bankr. L.J. 481, 491-95 (2015); Jay L. Westbrook, *A Functional Analysis of Executory Contracts*, 74 Minn. L. Rev. 227, 282-85 (1989); Michael T. Andrew, *Executory*

Whether a contract is "executory" is a question of fact to be determined by the bankruptcy court. *Unsecured Creditors' Committee v. Southmark Corp. (In re Robert L. Helms Construction & Dev. Co.)*, 139 F.3d 702, 706 n.13 (9th Cir. 1998) (en banc).[8]

1. Mutuality of Obligation

The Ninth Circuit follows the Countryman test that focuses on mutuality of obligation. *Griffel v. Murphy (In re Wegner)*, 839 F.2d 533, 536 (9th Cir. 1988).

Correlatively, mutuality connotes simultaneity. When a party has substantially performed its side of a bargain, such that the party's failure to perform further would not be a material breach excusing performance by the other party, the contract is no longer executory. *Marcus & Millichap Inc. v. Munple, Ltd. (In re Munple, Ltd.)*, 868 F.2d 1129, 1130 (9th Cir. 1989).

As of the date of the filing of the Svenhard's chapter 11 petition, the discounted payment agreement nominally had

Contracts Revisited: A Reply to Professor Westbrook, 62 Colo. L. Rev. 1 (1991); Am. Bankr. Inst. Comm'n to Study Reform of Chapter II, 23 AM. BANKR. INST. L. REV. 1, 121-25 (2015).

8. After the Supreme Court's 2018 decision in *Village at Lakeridge*, it may be more accurate to describe the question whether a contract is executory for purposes of § 365 as a mixed question of law and fact as to which facts predominate for which the standard of review is clear error. *U.S. Bank Nat'l Ass'n v. Village at Lakeridge, LLC*, 583 U.S. ___, 138 S.Ct. 960, 966-67, 200 L.Ed.2d 218 (2018).

obligations remaining on both sides. Svenhard's obligation was immediate and precise, with timely payment being of the essence. The Pension Fund's obligation was contingent on prior full performance by Svenhard's of its side of the bargain.

The narrow question is whether the mutual obligations were so far unperformed that the failure by either party to perform would constitute a material breach excusing performance by the other party. *Commercial Union Ins. Co. v. Texscan Corp. (In re Texscan Corp.)*, 976 F.2d 1269, 1273 (9th Cir. 1992).

a. Materiality

Materiality of the remaining obligation is a question of state law. *Texscan*, 976 F.2d at 1272; *Wegner,* 839 F.2d at 536.

The choice of law provision in the discounted payment agreement selects the law of the state of Maryland.

Under Maryland law, a breach is material if it affects the purpose of the contract in some important or vital way. *In re Cho*, 581 B.R. 452, 462-63 (Bankr. D. Md. 2018) (citing cases).

Under the terms of the agreement in question, the Pension Fund has no present duty that is unperformed. Rather, its obligation to execute a release is contingent on prior full performance by Svenhard's of a contractual obligation as to which time was of the essence. The Pension Fund need do nothing to avoid a material breach.

Accordingly, at the time of the chapter 11 filing, the Pension Fund had no obligation to perform and needed to do nothing to avoid being in breach. As the time that was of the essence to the contract has now long since lapsed, under Maryland law the Pension Fund is not capable of a material breach.

b. Excuse Performance

A contract is not executory when either party has substantially performed an obligation such that failure to perform further would not constitute a material breach by the other party. *Munple*, 868 F.2d at 1130.

The structure of the requirement that Svenhard's have substantially performed by paying in full before a release was required is significant.

If the Pension Fund were to refuse to honor its obligation to execute a release after receiving full payment, there would be no performance remaining due from Svenhard's to be excused. The Pension Fund's obligation matures only after Svenhard's has already fully performed.[9]

Under *Munple*, such a contract is not executory.

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9. The parties do not mention *Munple*. They argue that the fact that separate releases required for the contribution and withdrawal liabilities mean that one could precede the other makes the contract executory. This court is not persuaded that the Ninth Circuit's *Munple* analysis is so easily circumvented.

2. Ninth Circuit En Banc Decision in *Helms*

The Ninth Circuit's en banc decision in *Helms* confirms this court's analysis that the discounted payment agreement, which is contingent on prior full performance by the debtor, is not a § 365 "executory contract."

As noted, the question whether a contract is "executory" is a question of fact for the bankruptcy court to determine. *Helms*, 139 F.3d at 706 n.13.

Under *Helms*, the question is whether at the time of filing, "does each party have something it must do to avoid materially breaching the contract?" *Helms*, 139 F.3d at 706.

The answer in this instance, as a question of fact, is "no." On the day of filing, the Pension Plan did not have to do anything to avoid materially breaching the contract. Its obligation was a condition contingent on future completion of full performance by Svenhard's according to the agreed schedule.

Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused. Restatement (Second) of Contracts § 225(1) (1981).

This court determines as a matter of fact, that the deferred payment agreement is not a § 365 executory contract. Hence, the agreement cannot be assumed and assigned pursuant to § 365.

3. Financial Accommodation Contracts under § 365(c)(2)

Even if it were to be concluded that the discounted payment agreement does qualify as a § 365 executory contract, there nevertheless remains a fatal flaw.

The essence of the discounted payment agreement to accept $3 million on account of the $46+ million withdrawal liability is the provision to Svenhard's of a financial accommodation premised on its alleged inability to pay the full liability.

Executory contracts to provide financial accommodations to or for the benefit of the debtor are excluded by § 365(c)(2) from eligibility for assumption and assignment.

Financial accommodations are extensions of money or credit for the benefit of the debtor. *Transamerica Comm'l Fin. Corp. v. Citibank, N.A. (In re Sun Runner Marine, Inc.)*, 945 F.2d 1089, 1092 (9th Cir. 1991).

Financial accommodations may include prepetition workout agreements. *In re Prosser*, 388 F. Appx. 100 (3d Cir. 2010), *aff'g* 2008 WL 2275397 (D.V.I. 2008); *Steele v. Boutiette (In re Boutiette)*, 168 B.R. 474, 481 (Bankr. D. Mass. 1994);

The deferred payment agreement is an accommodation allowing Svenhard's to pay a sum of money over time that is a fraction of the total liability. It benefits Svenhard's by

enabling the discharge of a much larger liability. Hence, it is a financial accommodation for purposes of § 365(c)(2).

In short, as a matter of law, § 365(c) (2) dictates that the movant's proposed assumption of the deferred payment agreement is dead on arrival.

4. No Executory Contract Capable of Assumption

In sum, the discounted payment agreement in question is, as a matter of fact, not an "executory contract" within the meaning of § 365. Even if it were to be deemed executory, the nature of the agreement as a financial accommodation, as a matter of law dictated by § 365(c) (2), prevents Svenhard's from assuming and assigning it.

It follows that the probability of success in litigation seeking to assume and assign the discounted payment agreement is doomed to failure. On this count alone, the mediated result is not a "fair and equitable" compromise.

III. Views of Creditors

The views of creditors and a proper deference to their reasonable views in the premises also loom large in considering whether the proposed settlement is "fair and equitable."

The Pension Fund, which holds more than 82.5% of the unsecured debt in the case, objects to the assumption and assignment of its discounted payment agreement.

The reasonableness of the Pension Fund objection may be measured, first, by the obvious merit of the objector's argument that the subject contract is not an "executory contract" for purposes of § 365.

Second, in the related civil actions aimed at establishing successor liability the exposure of the role of USB suggests that the Pension Fund has a meritorious basis for questioning the validity of the discounted payment agreement in the first place.

Since approving the compromise might affect issues in those civil actions before they are decided on the merits, the Pension Fund is taking a reasonable position that the compromise coming from a mediation that excluded the Pension Fund is a subterfuge designed to frustrate meritorious litigation.

The Committee of Unsecured Creditors supports the settlement. It reasons that it is caught in the middle of the Pension Fund-USB dispute, that Svenhard's may not prevail in its lawsuit against USB, that it will not be possible to fund a chapter 11 plan if the two civil actions in the District of Oregon drag on, and that the litigation could last for a long time.[10] There is considerable practical common sense in this view from the holders of a small fraction of the unsecured debt, nevertheless it is a distinctly minority view.

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10. Joinder and Separate Statement of Committee of Unsecured Creditors Regarding Continued Hearing on Debtor's Motion to Assume and Assign Settlement Agreement and Motion to Approve Compromise, at 2-4. Dkt. 518.

Balancing the competing positions of the respective creditor blocs, this court is persuaded that a reasonable deference to the views of the holder of more than 82.5% of the unsecured debt counsels that the mediated result is not a "fair and equitable" compromise.

This conclusion deferring to the reasonable views of creditors means that the compromise flunks the "fair and equitable" test regardless of whether the discounted payment agreement may be assumed and assigned.

IV. No Decision whether Contract "Valid and Subsisting"

The court is also asked to determine that the discounted payment agreement is a "valid and subsisting" contract.

USB says that the determination of a "valid and subsisting" contract is an essential term of the compromise and that without a binding determination on that account there is no deal.[11] It is apparent USB's strategy is to wipe

11. Specifically: "USB cannot agree to pay the Debtor $3,000,000 unless it receives the assignment of a valid and subsisting contract that is binding and enforceable on the parties and which is no longer subject to attack in this *or any other proceeding*." Creditor United States Bakery's Response to Bakery & Confectionery Union & Industry International Pension Fund's Opposition to Debtor's Motion to Approve Settlement Agreement and Motion to Assume and Assign Settlement Agreement, at 2. (emphasis supplied) Dkt. 495. That "any other proceeding" is, of course, the Pension Fund's civil action in Oregon. Sly.

out the Pension Fund's $46+ million claim that is being asserted in the District Court litigation in Oregon.[12]

The Pension Fund objects that judicial resolution of the question of the "validity" of the contract would be premature.

The Pension Fund notes that information has surfaced during the course of the litigation regarding the undisclosed role of USB in negotiations with the Pension Fund that, if true, suggests the agreement may have been infected by misrepresentations about Svenhard's finances that may provide a meritorious basis to renounce the 93% discount to which it agreed in the discounted payment agreement.

It is not essential to the § 365 contract assumption question that there be a determination regarding enforceability of the subject contract.

The judicial determination that a contract may be assumed or rejected under § 365 does not necessarily launder the contract of all defenses and excuses to performance that are otherwise available to the parties. *Durkin v. Benedor Corp. (In re G.I. Indus., Inc.)*, 204 F.3d 1276, 1280-82 (9th Cir. 2000).

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12. *E.g.*, USB: "upon assumption and assignment there will no longer be a Pension Fund claim to adjudicate in the bankruptcy proceeding because USB will have assumed all those obligations." *Id.* Dkt. 495.

Furthermore, it is procedurally incorrect to embed a "valid and subsisting" determination in a motion to assume or reject a contract. *Diatom, LLC v. Committee (In re Gentile Family Indus.)*, 2014 WL 4091001, *5 (9th Cir. BAP 2014) ("validity of a contract, if disputed, cannot be determined in the context of a motion to assume or reject. An adversary proceeding is required.").

If this court is to decide the question whether the contract is "valid and subsisting," it must do so in an adversary proceeding governed by ordinary adversary proceeding civil litigation rules, rather than summary claims procedure. The debtor, for example, could file a complaint for a declaratory judgment that the contract is "valid and subsisting" against which the Pension Fund could defend or counterclaim. Or, the Pension Fund could file its own complaint.

This court is ready, willing, and able to entertain such an adversary proceeding but must leave such a filing to the genius of counsel.

* * *

Conclusion

It is no small irony that USB now wants a determination that the contract agreeing to a 93% discount of the withdrawal liability remains enforceable.

USB's actions in November 2019 terminating Svenhard's business operations stripped Svenhard's of the

source of funds to continue to comply with the discounted payment agreement. If USB had done then what it now proposes three years later, there likely would be no issue because the discounted payment agreement would have continued to be performed as agreed and on schedule.

USB could have provided funds to maintain the Pension Fund payments so Svenhard's could continue to perform its side of the bargain. Instead, it was USB's reflexive hardball strategy of resistence to the chapter 11 case that triggered the Pension Fund default and provoked Svenhard's adversarial attack on USB, which had the incidental consequence of belling the proverbial cat as to facts that have exposed USB to successor liability claims.

Although settlement of the various disputes regarding USB's acquisition of Svenhard's without burdensome trials may be desired as a matter of judicial policy, the mediated compromise presented to this court is not adequate to the task.

The motions to approve the compromise and to assume and assign discounted payment agreement are DENIED.

Separate orders will issue.

Dated: December 19, 2022

/s/ Christopher M. Klein
United States Bankruptcy Judge

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED NOVEMBER 13, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-60045
BAP No. 23-1001

IN RE: SVENHARD'S SWEDISH BAKERY,

Debtor.

SVENHARD'S SWEDISH BAKERY,

Appellant,

v.

BAKERY AND CONFECTIONARY UNION AND INDUSTRY INTERNATIONAL PENSION FUND,

Appellee.

Filed November 13, 2025

ORDER

Before: BERZON, FRIEDLAND, and MENDOZA, Circuit Judges.

The panel has unanimously voted to deny Appellant's petition for panel rehearing. Judge Friedland and Judge Mendoza have voted to deny the petition for rehearing en banc, and Judge Berzon so recommends. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petitions for panel rehearing and rehearing en banc are DENIED.