

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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MISSION PRODUCT HOLDINGS, INC., )  
Petitioner, )  
v. ) No. 17-1657  
TEMPNOLOGY, LLC, NKA OLD COLD LLC, )  
Respondent. )  
- - - - -

Pages: 1 through 68  
Place: Washington, D.C.  
Date: February 20, 2019

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3   MISSION PRODUCT HOLDINGS, INC.,       )  
4                            Petitioner,                    )  
5                            v.                                ) No. 17-1657  
6   TEMPNOLOGY, LLC, NKA OLD COLD LLC,   )  
7                            Respondent.                    )  
8   - - - - -

9  
10   Washington, D.C.  
11   Wednesday, February 20, 2019

12  
13   The above-entitled matter came on for  
14   oral argument before the Supreme Court of the  
15   United States at 10:10 a.m.

16  
17   APPEARANCES:

18   DANIELLE SPINELLI, ESQ., Washington, D.C. ;  
19                            on behalf of the Petitioner.  
20   ZACHARY D. TRIPP, Assistant to the Solicitor General,  
21                            Department of Justice, Washington, D.C. ;  
22                            for the United States, as amicus curiae,  
23                            in support of the Petitioner.  
24   DOUGLAS HALLWARD-DRIEMEIER, ESQ., Washington, D.C. ;  
25                            on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:10 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument this morning in Case 17-1657, Mission  
5 Product Holdings versus Tempnology, LLC.

6 Ms. Spinelli.

7 ORAL ARGUMENT OF DANIELLE SPINELLI

8 ON BEHALF OF THE PETITIONER

9 MS. SPINELLI: Mr. Chief Justice, and  
10 may it please the Court:

11 Section 365 of the Bankruptcy Code  
12 lets the trustee decide whether the estate will  
13 become a party to an executory contract of the  
14 debtor. If so, the trustee assumes the  
15 contract and the estate steps in to the  
16 debtor's shoes. If not, the trustee rejects  
17 the contract.

18 The statute's plain text tells us what  
19 that means. Rejection constitutes a breach of  
20 such contract immediately before the date of  
21 the filing of the petition. The debtor will  
22 not fulfill any remaining unperformed  
23 obligations under the contract, and the  
24 counterparty will have a prepetition claim  
25 against the debtor for any resulting damages.

1           But that's all rejection is, the  
2           estate's decision not to take on the debtor's  
3           future performance obligations, which are  
4           therefore breached.

5           The overwhelming consensus of courts  
6           and scholars is that rejection can't give the  
7           estate any greater rights with respect to the  
8           rejected contract than the debtor would have  
9           outside bankruptcy.

10           And as Respondent doesn't contest,  
11           outside bankruptcy, a licensor could not use  
12           its own breach of contract as a basis to  
13           terminate the licensee's rights under the  
14           agreement.

15           JUSTICE ALITO: But you just said, and  
16           I think it's correct, that the debtor would be  
17           -- rejection means that the debtor has no  
18           obligation to perform future duties under the  
19           contract.

20           But, if the debtor in this case, as  
21           the owner of the trademark in question, did not  
22           continue to perform quality control activities  
23           in relationship to the mark, would that not  
24           imperil the future of -- the -- the validity of  
25           the mark? So how can -- how can the debtor not

1 continue to perform duties under the contract?

2 MS. SPINELLI: So the -- the quality  
3 control obligation is an obligation that's  
4 imposed by trademark law, not solely by the  
5 contract and, in many cases, not at all by the  
6 contract.

7 It is quite true that if --

8 JUSTICE SOTOMAYOR: How is that  
9 relevant? Meaning, yes, I -- I assume that  
10 there's both a contractual obligation and a  
11 legal obligation under trademark law, but to  
12 the extent that there's a rejection of the  
13 contract, the property owner is electing to  
14 say, as he -- as it is entitled to say under  
15 the law, I reject that obligation vis-a-vis  
16 you. Hence, you can't continue to use my mark  
17 because I can't assure -- I'm not capable --  
18 that's why you reject a contract, because it's  
19 not been official to the company -- I reject  
20 that obligation. Hence, I reject your being  
21 able to use it.

22 MS. SPINELLI: No. With respect,  
23 Justice Sotomayor, that is not how it works.

24 JUSTICE SOTOMAYOR: Why?

25 MS. SPINELLI: When --

1 JUSTICE SOTOMAYOR: Why? Why isn't  
2 that exactly how it works? Meaning, once I  
3 lend you something and say it's conditioned on  
4 my approval of what you're doing, and I  
5 withdraw that approval, haven't I withdrawn --

6 MS. SPINELLI: No. So the -- the  
7 license -- so let's imagine that the agreement  
8 itself imposed an obligation on the licensor to  
9 monitor the quality of the licensee's goods.

10 If that is so, the licensor is free --  
11 the -- the estate can choose not to assume that  
12 going-forward obligation, but rejection only  
13 relates to contractual obligations. It does --

14 JUSTICE SOTOMAYOR: One of the  
15 trademark amici briefs said, if you're the  
16 licensee, you don't have the right to produce  
17 an item. If this license was one in which I  
18 gave you the license to sell my goods, that  
19 they -- and I refuse to sell you the goods,  
20 they can't go out and make the goods, they  
21 can't go out and put the trademark on something  
22 else because they don't have the right to do  
23 that.

24 MS. SPINELLI: Different license  
25 agreements work in different ways. And it's --

1 JUSTICE SOTOMAYOR: I don't disagree,  
2 but the point is that you've been -- that by  
3 rejecting the contract, I've basically said you  
4 can't use my goods. You're -- you're entitled  
5 to sue me. You can't use my mark. You're  
6 entitled to sue me.

7 MS. SPINELLI: Justice Sotomayor, let  
8 me explain why I think that's not correct.

9 First of all, outside bankruptcy, as  
10 Respondent has conceded, the licensor's breach  
11 would not let it take away the licensee's right  
12 to use the mark. The licensor could say I'm  
13 breaching all day long, but the licensee could  
14 continue to use the mark.

15 JUSTICE KAGAN: When -- when you say  
16 that, Ms. Spinelli, what law do you look to to  
17 find that, to find that principle?

18 MS. SPINELLI: That --

19 JUSTICE KAGAN: I mean, you say you  
20 look to outside bankruptcy law.

21 MS. SPINELLI: Correct. Correct.

22 JUSTICE KAGAN: Are you looking to  
23 state law? Is it a kind of common law?

24 MS. SPINELLI: Trademarks are governed  
25 by state law, by federal -- and by federal

1 statute, the Lanham Act, and the case law  
2 that's developed under the Lanham Act.

3           So -- but this is actually a much  
4 simpler principle. It's simply that there --  
5 there is nothing that the licensor could do  
6 outside bankruptcy by breaching to stop the  
7 licensee from using the mark. The only thing  
8 that it could do is bring a suit to enjoin the  
9 licensee from using the mark, and in that case,  
10 the license would be a complete defense.

11           So, outside bankruptcy, it can't be  
12 done. The other point --

13           JUSTICE SOTOMAYOR: I do have a  
14 question about --

15           MS. SPINELLI: Of course.

16           JUSTICE SOTOMAYOR: -- 365(n).

17           MS. SPINELLI: Of course.

18           JUSTICE SOTOMAYOR: Which is 365(n) is  
19 not the default rule with respect to  
20 intellectual property. It gives more and less  
21 rights to the lessors and lessees than the  
22 common law would permit.

23           MS. SPINELLI: That's correct.

24           JUSTICE SOTOMAYOR: Seems  
25 counterintuitive to me or counterlogical, given

1 the explanation that the Congress gave, that it  
2 understood that trademark owners would get more  
3 rights than (n) provides to other licensors in  
4 the intellectual property field.

5 It mentioned the reason why the courts  
6 up to that time who had recognized rejection as  
7 termination, that trademark owners were  
8 different because they had quality control  
9 problems. So I read that and I think to  
10 myself: Why would you think of giving  
11 trademark owners more rights or less rights  
12 than -- than people under (n)?

13 MS. SPINELLI: Let me -- let me  
14 explain, Justice Sotomayor. It is certainly  
15 true that Congress made an advertent decision  
16 to leave trademarks out of 365(n), but the  
17 legislative history makes it very clear that,  
18 in enacting 365(n), Congress did so because it  
19 thought the rule of Lubrizol, which is that  
20 rejection deprives the counterparty of rights  
21 already conveyed under the agreement, was  
22 wrong. And that principle can't logically be  
23 confined --

24 JUSTICE SOTOMAYOR: But it didn't --  
25 it didn't think it was wrong completely.

1 MS. SPINELLI: I --

2 JUSTICE SOTOMAYOR: Because -- because  
3 it -- it did a sort of hybrid, giving more and  
4 less at the same time.

5 MS. SPINELLI: But it did completely  
6 repudiate the Lubrizol rule.

7 JUSTICE SOTOMAYOR: Not really.

8 MS. SPINELLI: It said --

9 JUSTICE SOTOMAYOR: It -- it -- it  
10 kept some of it and it rejected others because  
11 of the situational difference.

12 MS. SPINELLI: No, with respect,  
13 Justice Sotomayor, what it -- what it did is it  
14 said that the licensee can retain its rights  
15 under the contract. And that's precisely at  
16 issue in Lubrizol.

17 It did -- it did, in addition, go on  
18 to set out a specific federal regime governing  
19 subsidiary issues that arise with respect to  
20 the relationship between the licensee and the  
21 licensor following rejection. And you're  
22 correct that that regime differs in some  
23 respects from the state law that would  
24 otherwise apply.

25 But there is no question whatsoever

1 that Congress repudiated the basic rule of  
2 Lubrizol, saying that it was never intended  
3 that, in addition to relieving itself of the  
4 debtor's affirmative performance obligations,  
5 Congress never thought that rejection would  
6 enable the estate to take back rights already  
7 conveyed to the licensee.

8 JUSTICE GINSBURG: Could one say it  
9 didn't take any position on Lubrizol one way or  
10 another in the trademark context? It did quite  
11 specifically in the patent context, but it  
12 didn't either approve or disapprove.

13 MS. SPINELLI: One could say that,  
14 Justice Ginsburg. I -- I believe the reason  
15 that Congress didn't include trademarks in  
16 365(n) is because it -- first of all, it was  
17 dealing with an emergency with respect to  
18 patent licenses. The situation was described  
19 as urgent. That was what Lubrizol was about.

20 Congress recognized that trademarks do  
21 have some differences from patents, and it  
22 thought that further study was required in  
23 order to shape the federal rules that would  
24 govern the parties' relationship.

25 JUSTICE KAGAN: But -- but the

1 difference -- it said specifically, didn't it,  
2 what the difference it thought there was,  
3 right?

4 MS. SPINELLI: Yes, it did.

5 JUSTICE KAGAN: Which was this quality  
6 control --

7 MS. SPINELLI: Correct.

8 JUSTICE KAGAN: -- obligation that  
9 Justice Alito started us off with. And I guess  
10 just to take us back there, why is it that that  
11 obligation does not make trademarks different  
12 under -- you -- you say we look to state law.

13 I mean, is it -- are you saying that  
14 there's uniform state law that says that the  
15 quality control obligation sort of makes no  
16 difference with respect to this issue, that the  
17 entire contract is not unwound?

18 MS. SPINELLI: There's -- I don't  
19 believe anyone would say that the entire  
20 contract can be unwound by the unilateral act  
21 of the licensor. That's just basic contract  
22 law.

23 JUSTICE KAGAN: Right. I mean, the  
24 question is whether the quality control  
25 obligation makes trademarks different --

1 MS. SPINELLI: Not --

2 JUSTICE KAGAN: -- from normal  
3 contract law.

4 MS. SPINELLI: No.

5 JUSTICE KAGAN: That's the question.

6 MS. SPINELLI: And the answer is no.  
7 There is no support for that at all. What  
8 happens -- what happens when the licensor  
9 abdicates its quality control obligations,  
10 which, again, stem from trademark law, not from  
11 the contract, is that the licensor risks  
12 abandonment of the mark.

13 So the licensor may use the -- may  
14 lose its rights in the mark. If that happens,  
15 then the mark is up for grabs. The licensee  
16 can continue to use it. So can third parties.  
17 Whoever can establish rights in it through use  
18 will be the new owner.

19 But it absolutely does not change  
20 basic contract law principles, including that  
21 the breaching party cannot terminate the  
22 contract because it breaches. The opposite is  
23 true.

24 JUSTICE ALITO: What would that -- I'm  
25 sorry.

1 MS. SPINELLI: I'm sorry, Justice  
2 Alito.

3 JUSTICE ALITO: What would happen in  
4 this situation? So the debtor is the lessor of  
5 residential property. It rejects the lease,  
6 and you would say that the -- the -- however,  
7 the -- the lessee could continue to live --

8 MS. SPINELLI: Correct.

9 JUSTICE ALITO: -- in the residential  
10 property, and the lessor would be relieved of  
11 any further obligations under the contract?

12 MS. SPINELLI: Correct.

13 JUSTICE ALITO: But not statutory  
14 obligations?

15 MS. SPINELLI: Correct -- it --  
16 correct. So if --

17 JUSTICE ALITO: So if there was a  
18 statute that said that the -- any lessor of  
19 residential property has to provide heat, they  
20 would continue -- it would have to continue to  
21 do that?

22 MS. SPINELLI: Precisely. And the  
23 reason that's so is that the estate is the  
24 owner of the underlying property. So, if it's  
25 an apartment building, the estate now owns the

1 apartment building.

2 The estate is not given any kind of  
3 exemption from generally applicable law  
4 relating to property ownership simply because  
5 it's in bankruptcy or because a contract  
6 relating to that asset has been rejected.

7 This is the kind of thing the trustee  
8 deals with every day. The trustee is obligated  
9 with respect to all of the estate's assets to  
10 comply with generally applicable law, and it's  
11 also required to decide whether a particular  
12 asset is valuable enough to be worth investing  
13 estate funds in.

14 So, with regard to the quality control  
15 obligation, the trustee will have to make a  
16 decision: Is this mark valuable to the estate?  
17 And, if so, is it valuable enough to warrant  
18 making the really pretty minimal investment  
19 that's necessary to continue monitoring  
20 quality?

21 JUSTICE KAGAN: I mean, just thinking

22 --

23 MS. SPINELLI: That --

24 JUSTICE KAGAN: I'm sorry.

25 MS. SPINELLI: No, please, Justice

1 Kagan.

2 JUSTICE KAGAN: You know, just  
3 thinking about that example you gave, the  
4 analogy of the --- the lessor of real property,  
5 there is in many cities background law that  
6 says once the landlord stops maintaining the  
7 property, the city insists that the tenant  
8 leave because the property isn't safe anymore.

9 And I guess one question is whether  
10 there might be or is a similar background rule  
11 with respect to what happens to a trademark  
12 where the obligation for quality control is not  
13 being maintained? Is that a silly analogy?

14 MS. SPINELLI: It's not a silly  
15 analogy at all, but there is not analogous law.  
16 It -- you know, the -- again, the licensor's  
17 breach doesn't entitle it to terminate the  
18 licensee's rights.

19 JUSTICE SOTOMAYOR: Before you --

20 CHIEF JUSTICE ROBERTS: Does -- does  
21 the licensee have any rights with respect to  
22 quality control if the licensor is not  
23 fulfilling its duty?

24 MS. SPINELLI: So the licensee  
25 frequently takes upon itself the great burden

1 of quality control. I mean, quality control is  
2 obviously in the licensee's interest as much as  
3 the licensor's, because the licensee wants to  
4 maintain the validity of the mark just as much  
5 as the licensor. And the licensee is selling  
6 goods, and it doesn't want them to get a  
7 reputation for poor quality.

8 JUSTICE GORSUCH: Can I ask you to  
9 address the mootness question in this case?

10 MS. SPINELLI: Of course.

11 JUSTICE GORSUCH: So as I understand  
12 it -- let's put the exclusive distribution  
13 rights off the table. The -- the court below  
14 said they're forfeited. Assume for the moment  
15 that I'm going to -- I'm not going to  
16 un-forfeit them. So we just have the license  
17 arrangement.

18 And as I understand it, your client  
19 wasn't under any orders not to use the license,  
20 the trademark, and so what -- on what theory  
21 are you injured and -- and what damages might  
22 you have?

23 MS. SPINELLI: Mission was injured  
24 because it was wrongly prevented from using the  
25 trademark on its goods post-rejection. The

1 bankruptcy court --

2 JUSTICE SOTOMAYOR: But, wait a  
3 minute, it had stopped -- it had said two years  
4 before, leading up to the agreement, that it  
5 wasn't going to order any goods.

6 MS. SPINELLI: Well, what happened,  
7 Justice Sotomayor, is that, prior to  
8 bankruptcy, Tempnology attempted to terminate  
9 the contract. Mission placed a purchase order.  
10 Tempnology said, we're not going to fill that  
11 order.

12 So it's true that immediately before  
13 the bankruptcy, Mission hadn't been placing  
14 purchase orders because Tempnology was refusing  
15 to fill them. And then, once the rejection  
16 order was put in place --

17 JUSTICE SOTOMAYOR: Were you producing  
18 your own goods using their trademark, or were  
19 you just --

20 MS. SPINELLI: No.

21 JUSTICE SOTOMAYOR: -- buying from  
22 them?

23 MS. SPINELLI: Oh, I'm sorry -- no.  
24 At that point, we were purchasing the goods  
25 from Tempnology, which was a requirement under

1 the contract.

2 JUSTICE SOTOMAYOR: So they no longer  
3 had to supply you with goods. So why are we  
4 here? Meaning --

5 MS. SPINELLI: They did have an  
6 obligation --

7 JUSTICE SOTOMAYOR: -- that's a  
8 brief -- they have -- they have -- they have an  
9 obligation and you're open to damages, but  
10 without an -- without you producing the goods,  
11 I thought that brief from the amici said that  
12 you're relieved from supplying goods, the  
13 lessor is relieved from supplying goods.

14 MS. SPINELLI: But, Justice Sotomayor,  
15 we had a right under the agreement, if  
16 Tempnology failed to provide us with goods, to  
17 source those goods elsewhere.

18 May I reserve the remainder of my  
19 time?

20 CHIEF JUSTICE ROBERTS: Yes.

21 MS. SPINELLI: Thank you.

22 CHIEF JUSTICE ROBERTS: Mr. Tripp.

23

24

25

1 ORAL ARGUMENT OF ZACHARY D. TRIPP  
2 FOR THE UNITED STATES, AS AMICUS CURIAE,  
3 IN SUPPORT OF THE PETITIONER

4 MR. TRIPP: Excuse me. Mr. Chief  
5 Justice, and may it please the Court:

6 If I could just pick up on a couple of  
7 the questions about whether trademarks are  
8 different and then say a few words about our  
9 rule, why Respondents are wrong, and what the  
10 United States' interest is here.

11 So I -- I think an important point  
12 about trademarks with the quality control --

13 JUSTICE GORSUCH: I'm not going to  
14 interrupt you again --

15 MR. TRIPP: Yeah.

16 JUSTICE GORSUCH: -- but if you could  
17 add to that excellent list of things to do  
18 discussing mootness.

19 MR. TRIPP: Yeah --

20 JUSTICE GORSUCH: Thank you.

21 MR. TRIPP: -- I'll -- I'll start with  
22 the mootness. The case is not moot. This is,  
23 at bottom, a claim for money damages, and it's  
24 still up in the air whether Petitioner is going  
25 to get a judgment in its favor.

1           Respondent has raised a number of  
2 arguments why on remand Petitioner would lose  
3 even if you rule in their favor here, but  
4 Petitioner disputes all of that, and no court  
5 has resolved those remaining disputes. But --

6           JUSTICE GORSUCH: Well, if we put  
7 aside the exclusive distribution agreement, and  
8 I -- I really don't want to belabor this --

9           MR. TRIPP: Yeah.

10          JUSTICE GORSUCH: -- but I'd like you  
11 to focus specifically on -- on the trademark  
12 license.

13          If there was no order prohibiting  
14 Petitioner from using the trademark at any  
15 point, then where are the damages?

16          MR. TRIPP: But this part of  
17 Respondent's argument I'm -- I'm not sure I  
18 understand because it seems to prove way too  
19 much, because if it's right that you can't get  
20 damages even when there's a bankruptcy court  
21 order, basically declaratory judgment saying  
22 that it would be unlawful for you to use the  
23 mark, then you wouldn't be able to get damages  
24 even under their theory of the case that you  
25 can take away the license in bankruptcy by

1 rejecting it and terminating it; you -- you  
2 would leave the counterparty with nothing,  
3 unless they went back into court and asked for  
4 an injunction against the thing the court just  
5 told it was already illegal.

6 It's a very strange argument, so I'm  
7 not sure I follow that.

8 JUSTICE GORSUCH: The bankruptcy  
9 argument -- well, I'm not sure I follow you.  
10 So one of us is just confused --

11 MR. TRIPP: Yeah.

12 JUSTICE GORSUCH: -- and it may well  
13 be me, but if -- if the bankruptcy court is  
14 simply saying you've rejected it and the  
15 rejection only means that you don't have to  
16 perform and that you breached, does that  
17 prohibit --

18 MR. TRIPP: That wouldn't have  
19 prohibited it. But what the bankruptcy court  
20 here went further and said, the effect of  
21 rejection is to terminate your license, is to  
22 take it away from you. They -- they -- it --  
23 it adopted Respondent's rule, which we're  
24 respectfully saying is wrong.

25 JUSTICE GORSUCH: I see. Okay.

1 MR. TRIPP: And Petitioner --

2 JUSTICE GORSUCH: I under -- I track  
3 you now. Thank you.

4 MR. TRIPP: And so Petitioner is  
5 saying there's -- there's money on the table.

6 JUSTICE SOTOMAYOR: So go back to the  
7 argument you were making. So the court tells  
8 them you can't, you don't have an exclusive  
9 license. That's been waived or forfeited.

10 So what remains of this case?

11 MR. TRIPP: Well, they also --

12 JUSTICE SOTOMAYOR: Because you're  
13 saying under their theory they can't move  
14 forward, they have a non-exclusive license, but  
15 if they're not getting goods, what's their --  
16 why isn't this case moot?

17 MR. TRIPP: Well, at least as I  
18 understand Petitioner's theory, and, of course,  
19 we wouldn't have a position on -- on what's  
20 going to happen on remand. They are saying  
21 there is still money on the table, they could  
22 have gotten, they could have sourced the goods  
23 from somewhere else. And -- and no court has  
24 resolved these remaining claims.

25 And so this is still a very much alive

1 case. And we're really urging the Court just  
2 to answer the trademark question here and to  
3 send it back down. The First Circuit has a  
4 damaging precedent on the books that we think  
5 really just undermines the -- the stability and  
6 value of trademark licenses across the board.

7 I mean, you imagine a situation where  
8 you're a franchisee who's invested millions of  
9 dollars in reliance on the ability, you know,  
10 to -- to -- to put up the name McDonald's and  
11 the -- and the golden arches and all of that.

12 What -- under Respondent's rule, what  
13 they are saying is as soon as the -- the  
14 trademark owner goes into bankruptcy for any  
15 reason, they can pull the rug out from under  
16 every single one of its franchisees and  
17 basically put them to an extortionate choice  
18 between paying a higher royalty payment or  
19 shutting down their business and firing all  
20 their workers.

21 And -- and so we're really urging the  
22 Court just to adopt the Sunbeam rule and to  
23 reverse.

24 And to get back to --

25 JUSTICE BREYER: Do you want -- do you

1 want -- are you -- I mean, the main question  
2 that I have, I think, is the same that Justice  
3 Alito and Justice Kagan had --

4 MR. TRIPP: Yeah. That's where I was  
5 just --

6 JUSTICE BREYER: -- where I think --  
7 well, let me show you. Where I think this  
8 comes from an article by Professor Andrews, and  
9 he says, look, I'm a debtor, you're the  
10 licensee, but say you leased a house. There  
11 are two assets here; one is the house, which  
12 you've leased, and the other is a promise by me  
13 to replace the windows. All right?

14 So, if you can analogize it to that,  
15 you win. Well, the more I think about it, I'm  
16 not sure. Why?

17 A, there are a lot of special  
18 provisions in the trademark law and in  
19 bankruptcy law about houses and leases. B,  
20 it's really a special kind of house. It's like  
21 a house that would collapse unless you keep it  
22 up; maybe like an igloo that you promised to  
23 air condition.

24 You know, you break your promise to  
25 air condition, no more igloo. Now, if you seem

1 to think of it like that, you think, no, there  
2 aren't two rights.

3 MR. TRIPP: Yeah.

4 JUSTICE BREYER: This upkeep business  
5 is an essential part of one right, which is  
6 going to give you the house to live in. So I  
7 -- I -- I -- so I had -- I would like you or  
8 Ms. Spinelli or, you know --

9 MR. TRIPP: Yeah. So --

10 JUSTICE BREYER: -- at some point to  
11 tell me which is the strong -- why is it  
12 stronger --

13 MR. TRIPP: Yeah. It's not really  
14 like that. And I think a key portion of this,  
15 key -- key piece of it is if the trademark  
16 owner stops performing the quality control --

17 JUSTICE BREYER: Yeah.

18 MR. TRIPP: -- and maintaining the  
19 distinctiveness of the mark to consumers, that  
20 does not instantly destroy the mark, right?  
21 That is a process, gradual, it's over time.

22 And then another thing that makes it  
23 different from your igloo example is that, at  
24 the end of the day, the licensee can still use  
25 the mark because the only thing that happens if

1 you stop performing the quality control is  
2 eventually, at the end of the day, after some  
3 period of time, it'll be abandoned and returned  
4 to the public domain.

5 And I -- I really think it's --  
6 actually, it's a lot more like the situation in  
7 our brief, which we talk about, of leasing  
8 somebody a photocopier where you agree to  
9 maintain it over time.

10 It may well be that if you stop the  
11 maintenance on the photocopier, that eventually  
12 the photocopier is going to -- going to  
13 eventually break down. But that doesn't mean  
14 that you can repossess the copier by breaching  
15 your obligation to perform the maintenance,  
16 right? That's, I think, really the heart of  
17 this case.

18 Just to say a couple words about why  
19 Respondents are wrong, they're pressing an  
20 argument in their -- in their briefs that you  
21 should draw a negative inference from (n), that  
22 the exact opposite rule should apply for  
23 trademarks.

24 And I just want to emphasize how  
25 bizarre it would be to read (n) that way. The

1 whole point of (n) was to overrule Lubrizol's  
2 specific result as to patents. And nobody  
3 implicitly ratifies or endorses a court's mode  
4 of reasoning.

5 JUSTICE SOTOMAYOR: Except the report  
6 said exactly the opposite, that they weren't  
7 taking a position.

8 MR. TRIPP: Yeah, so I -- I --

9 JUSTICE SOTOMAYOR: So it can't be  
10 that their entire -- their entire purpose was  
11 to overrule. As I mentioned, they overruled it  
12 in part and didn't in part.

13 MR. TRIPP: Yeah. So --

14 JUSTICE SOTOMAYOR: Because there are  
15 certain contracts they gave the lessees more  
16 rights or the lessors more rights. They  
17 exempted some things from royalty payments or  
18 royalty setoffs. They did a bunch of different  
19 things.

20 MR. TRIPP: So I think that's -- I  
21 think really they overwhelmingly overruled  
22 Lubrizol. That's really the bottom line. And  
23 the differences are really far down in the  
24 details. This is a reticulated scheme that  
25 Congress established for patents that is, I

1 admit, somewhat different than what would apply  
2 under the general background rule, like under  
3 (n)(3) and (n)(4), this is pretty far down in  
4 the weeds, but -- and this is reproduced in our  
5 brief in 14-A and 15-A.

6           It imposes basically an obligation on  
7 the licensor to actually continue performing  
8 some of the obligations under the contract,  
9 notwithstanding the rejection. In (n)(4), it  
10 imposes a duty to continue performing, even  
11 during the period where the trustee's still  
12 trying to figure out whether to assume or  
13 reject it.

14           And so I think really the right lesson  
15 to take away from (n) is the one Justice  
16 Ginsburg was saying, which is that it doesn't  
17 put a thumb on the scale one way or the other.  
18 They just didn't answer the trademark question.  
19 Sometimes an omission is just an omission, as  
20 Judge Easterbrook put it.

21           But -- so then what you have to do is  
22 just resolve this by looking at the background  
23 rule under (a) and (g). And on that, I think  
24 we have just by -- by far the better of the  
25 reading because (g) tells you what happens when

1 you reject a contract, and the answer is that  
2 the rejection constitutes a breach.

3 And I guess just one last point about  
4 (g) which I think is very helpful to our  
5 position. And this is reproduced in -- in the  
6 text at 8-A.

7 I mean, really, Respondents are  
8 effectively reading (n) to be an exception to  
9 the general rule in (g). They are saying that  
10 the general rule in (g) is that you can claw  
11 back somebody's rights, take back past  
12 performance. But, if you look at the text of  
13 (g), it just doesn't say that.

14 It doesn't mention (n). It doesn't  
15 say that it's an exception. And it identifies  
16 these two other provisions, (h)(2) and (i)(2),  
17 as exceptions to the general rule and they have  
18 nothing to do with what we're talking about  
19 here. Those are about situations where you get  
20 an offset rather than a prepetition claim.

21 JUSTICE SOTOMAYOR: I'm sorry, I don't  
22 really understand that argument. It seems as  
23 all of these are exceptions by their nature,  
24 and that goes contrary to the general rule that  
25 if it's an exception, the rule is different

1 than the exception.

2 MR. TRIPP: No, I think what they  
3 really are are codifications of the background  
4 rule to clarify difficult situations that are  
5 raised in --

6 JUSTICE SOTOMAYOR: That's what you  
7 think, but, you know, the greatest problem here  
8 is that rejection is not a contract term. We  
9 don't -- when we talk about contracts, we talk  
10 about repudiating them, terminating them,  
11 avoiding them, a bunch of different language.

12 But bankruptcy is using a very  
13 specialized term, rejection. And your  
14 adversary is right that it's not generally that  
15 we reject a piece of a contract. We generally  
16 reject the entire contract. And so it's not  
17 the rejection of one claim under a contract.

18 So it -- there is some force to their  
19 argument that reading it the way you do is  
20 contrary to its language.

21 MR. TRIPP: If I could answer the  
22 question.

23 CHIEF JUSTICE ROBERTS: Yes.

24 MR. TRIPP: So just, I mean, (g) says  
25 that it constitutes a breach. I've already

1 walked through a couple other things, the  
2 avoidance powers cut back on this, but just one  
3 last one is the history of this language which  
4 we discuss in our brief that it's grounded in  
5 the common law of trusts and receiverships, the  
6 idea that the trustee is not technically a  
7 party to the contract, and it has a choice of  
8 whether to assume or reject it.

9           And the rule back then under the  
10 common law was the same one we're advocating  
11 now, the Learned Hand decision we cite in our  
12 brief drives this home, that the trust -- that  
13 the bankrupt landlord, the trustee, can stop  
14 paying for your heat and hot water, but he  
15 cannot evict you. You keep your rights.

16           And so we're asking the Court to  
17 reverse.

18           CHIEF JUSTICE ROBERTS: Thank you, Mr.  
19 Tripp.

20           Mr. Hallward-Driemeier.

21           ORAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER

22           ON BEHALF OF THE RESPONDENTS

23           MR. HALLWARD-DRIEMEIER: Mr. Chief  
24 Justice, and may it please the Court:

25           I'd like to start with the issue of

1 mootness. And if we take the exclusive  
2 distribution rights off the table, which was  
3 the source of the \$4 million of claims that  
4 Petitioner referred to in their reply at the  
5 petition stage that kept the case from being  
6 moot, we're left only with a non-exclusive  
7 trademark license that has already expired.

8 And any dispute about the rights under  
9 that is moot. As I said, it's already expired,  
10 so we don't have a forward-looking issue. It  
11 would only be a past issue. And as the  
12 questions have indicated, there were -- was no  
13 use of the trademark during the post-rejection  
14 period.

15 JUSTICE SOTOMAYOR: The -- the  
16 bankruptcy court did not stop that  
17 non-exclusive use, correct?

18 MR. HALLWARD-DRIEMEIER: That --  
19 that's right. All that the bankruptcy court  
20 did was, at our request, declare the parties'  
21 rights, what was the meaning of rejection.

22 And the -- the only argument that  
23 Petitioner has that would -- that they have  
24 some basis of claim against my client for the  
25 post-rejection period is that we sought that

1 ruling from the court. But --

2 JUSTICE GORSUCH: Why isn't that  
3 enough to have -- at least have an acorn of  
4 injury for Article III purposes, the  
5 uncertainty created by a declaratory judgment  
6 that effectively you can't use it? It may not  
7 prohibit you from using it, but it sure may  
8 cause you to think twice about doing so. And  
9 there might be damages available.

10 MR. HALLWARD-DRIEMEIER: Your Honor, I  
11 -- I think that would be directly contrary to  
12 the First Amendment and the Noerr-Pennington  
13 doctrine. We have a right to go to court to  
14 ask it to declare the parties' rights, and that  
15 can't be the tortious act that creates damages  
16 on the part of the other side. They have no  
17 claim against us because we took no action  
18 against them to stop them from using the -- the  
19 trademark.

20 Their own words in the First Circuit  
21 reflect this because, by their own words -- and  
22 this is at JA 572 -- they say, "But for the  
23 bankruptcy court decision, Mission would have  
24 continued using Coolcore's trademarks." So it  
25 was only that decision, and our only act is

1 asking the court to make a ruling. And I don't  
2 believe that this Court's precedent would allow  
3 a claim to be based on that.

4 That's our mootness argument. And  
5 with that, I'm happy to proceed to the merits  
6 on the assumption that the Court might reach  
7 them.

8 JUSTICE SOTOMAYOR: Could you answer  
9 the solicitor general's concern that a ruling  
10 in your favor would affect any number of other  
11 contracts, the copier example, the -- the car  
12 example, any of the other, or the McDonald's  
13 franchise?

14 MR. HALLWARD-DRIEMEIER: I'd -- I'd be  
15 happy to, Your Honor, because I think the  
16 photocopier example is actually paradigmatic.  
17 And there is -- we -- we mentioned that there's  
18 another section of the code, Section 542(a),  
19 that -- that provides for a party who's in  
20 possession of property of the estate to return  
21 that property to the estate upon the filing of  
22 the petition.

23 And if the copier is held under a  
24 lease, then the copier is property of the  
25 estate. And that provision would require the

1 -- the party to return the copier to the -- to  
2 the -- to the bankruptcy estate, unless they  
3 assume the contract, which they're going to do  
4 because that's a source of income.

5 So, as a practical matter, they always  
6 assume that. The copier in position under the  
7 contract is worth more than getting back a used  
8 copier, which is not worth very much.

9 But that's what the rule provides.  
10 If, on the other hand, the copier has already  
11 been sold, then it's no longer property of the  
12 estate, and the other party does not have to  
13 return it.

14 And that's exactly what -- the rule  
15 that we advocate for. So under Section 365 --

16 JUSTICE SOTOMAYOR: And the McDonald's  
17 franchise?

18 MR. HALLWARD-DRIEMEIER: The  
19 McDonald's franchise is an interesting  
20 exception because they highlight the million  
21 dollars perhaps or more that's been invested by  
22 the franchisee. That does not distinguish the  
23 franchisee from any of the other creditors of  
24 the bankruptcy estate.

25 A person might have invested millions

1 of dollars as a bondholder in the estate. It  
2 might have been a -- a trade creditor with  
3 millions of dollars of claims.

4 All of those claims are reduced to  
5 often pennies on the dollars because they're  
6 prepetition claims. And that's the same that  
7 Congress provided for counterparties. All the  
8 creditors of the bankruptcy estate have to  
9 bring these claims as prepetition claims.

10 And that's the critical language of  
11 365(g)(1). It says that it constitutes a  
12 breach, but doesn't stop there. It says that  
13 it constitutes a breach as of the day before  
14 the petition. It's a prepetition claim for  
15 breach.

16 And it's the temporal element that's  
17 critical. And that temporal element continues  
18 through the other provisions. 502(g)(1) says  
19 that you must bring your claims on the basis of  
20 rejection and that that claim is as if the  
21 breach had happened before the petition.

22 And when you get to 1114, which is the  
23 discharge provision, it says that those claims  
24 that arose before the plan is confirmed are  
25 discharged, and then it specifically

1 cross-references 502.

2 JUSTICE ALITO: And what do you say  
3 about the -- the example of the lessor and the  
4 lessee?

5 MR. HALLWARD-DRIEMEIER: Well, Your  
6 Honor, ever since the 1934 Act, Congress has  
7 included exceptions that specifically deal with  
8 real estate. And so I would say we'd have to  
9 go to the terms of the specific -- specific  
10 exception in 365(h)(1).

11 Now what's notable is that that  
12 exception -- two things. One, it provides less  
13 rights, not more, but less rights than under  
14 Petitioner's general rule. So instead of being  
15 an exception that -- that protects a -- a  
16 favored class, which is what Congress thought  
17 it was doing, it's instead a statement that --  
18 that puts them in a worse position.

19 The other thing that's interesting  
20 about it is that 365(h)(1) only applies to  
21 lessees where the lease has commenced. So, in  
22 other words, the party whose lease has  
23 commenced, which is the party that would have a  
24 particular claim on Congress's interest, has  
25 lesser rights than a lessee whose lease has not

1 yet commenced. If you've not --

2 JUSTICE GINSBURG: Can we go back and  
3 see -- is there any disagreement between you  
4 and the other side about what would happen  
5 outside bankruptcy? And as we're told, outside  
6 bankruptcy, one party's rejection doesn't  
7 terminate the rights of the opposing party.

8 MR. HALLWARD-DRIEMEIER: That --  
9 that's right, Your Honor. The -- the out --  
10 the non-bankruptcy rule is that the  
11 counterparty has the choice. They can either  
12 treat the contract as having been a total  
13 breach, once -- an anticipatory rejection,  
14 counterparty may treat it as a total breach, or  
15 it may seek to enforce the contract.

16 What Congress did in 365 is --

17 JUSTICE KAGAN: And -- and you don't  
18 think that there's, outside bankruptcy, any  
19 special rule for trademarks? You agree --

20 MR. HALLWARD-DRIEMEIER: I -- I -- no,  
21 no, I do think that there are special -- I  
22 think that trademarks is a special rule. But  
23 what I'm trying to explain is that -- that the  
24 statute does not operate as they presuppose it  
25 does, that the general rule --

1           JUSTICE KAGAN: Well, I just want -- I  
2 want -- I want you to tell me -- and I think  
3 this is consistent with Justice Ginsburg's  
4 question -- outside bankruptcy, what would be  
5 the rule in this context, in the trademark  
6 context?

7           MR. HALLWARD-DRIEMEIER: Well, Your  
8 Honor, I -- I think -- our view is that you  
9 would have a breach of contract claim, but you  
10 would not have an ongoing use of -- of the  
11 trademark because -- precisely because of the  
12 nature of the trademark. The nature of the  
13 trademark is that it is the trademark owner's  
14 reputation.

15           JUSTICE BREYER: All right. It's a  
16 day before bankruptcy. Nobody knows  
17 bankruptcy's going to take place. I am the  
18 holder of a trademark. I have leased it to  
19 you, and you can use it for 10 years, and I  
20 assume certain obligations.

21           And I write you a letter. You say,  
22 ha, ha, ha, I'm not going to do it. Which is a  
23 material breach of the contract. Now you bring  
24 a lawsuit, the day before, and you say: Judge,  
25 you know, I want to keep the leased good, which

1 could be anything, jewels for a costume  
2 company, you know -- I don't know about igloos,  
3 but -- but -- but nonetheless, you say it could  
4 be anything.

5 Okay. What's the law? Can I keep it  
6 or not keep it?

7 MR. HALLWARD-DRIEMEIER: Well, in --  
8 in our view, you -- you can't because --

9 JUSTICE BREYER: Now, when you say "in  
10 -- in -- in your view," I already stop you  
11 because it's amazing to me that there is no  
12 authority that's more on point than this real  
13 estate stuff, which, as you say, is absolutely  
14 filled with writings in the statute.

15 All right, but -- so -- so you say "in  
16 your view," that means you're not certain?

17 MR. HALLWARD-DRIEMEIER: Well, I -- I  
18 don't think that there's -- there's case law  
19 that's clear on this --

20 JUSTICE BREYER: No?

21 MR. HALLWARD-DRIEMEIER: -- but -- but  
22 the notion of the trademark as property, and  
23 McCarthy is very clear --

24 JUSTICE BREYER: No, I'm not talking  
25 about trademarks. Let's -- necessarily, but --

1 but, gee, I mean, that had property law for 500  
2 years and people have breached for 500 years.

3 And --

4 MR. HALLWARD-DRIEMEIER: But not  
5 trademarks, Your Honor, because --

6 JUSTICE BREYER: Well, no, okay,  
7 but there --

8 MR. HALLWARD-DRIEMEIER: Because you  
9 couldn't -- at common law, you couldn't even  
10 license a --

11 JUSTICE BREYER: Okay.

12 MR. HALLWARD-DRIEMEIER: -- a  
13 trademark because it was the person, the  
14 owner's reputation.

15 JUSTICE BREYER: You can't think of  
16 any analogy or anything that would tell us when  
17 you walk in the day before, say nobody knows  
18 about bankruptcy, and you say Breyer has  
19 breached the contract --

20 MR. HALLWARD-DRIEMEIER: I -- I --

21 JUSTICE BREYER: -- but I want to keep  
22 the property.

23 MR. HALLWARD-DRIEMEIER: I think --

24 JUSTICE BREYER: There's just no good  
25 case that would help me?

1           MR. HALLWARD-DRIEMEIER: Well, if  
2 we're talking about something other than --  
3 other than trademark --

4           JUSTICE BREYER: Anything that you  
5 think is analogous.

6           MR. HALLWARD-DRIEMEIER: -- other than  
7 trademark, then you're right, that the -- the  
8 -- the non-bankruptcy law is that the  
9 counterparty gets to choose whether to treat  
10 that anticipatory breach as --

11          JUSTICE BREYER: Okay. If that's --

12          JUSTICE KAGAN: Right. But the  
13 question is whether you have any authority for  
14 the proposition that trademark is different,  
15 whether there's any authority that says if  
16 you're outside bankruptcy and the licensor  
17 breaches, is there any authority for the idea  
18 that the licensee then has to stop using the  
19 mark?

20          MR. HALLWARD-DRIEMEIER: I don't have  
21 a case to --

22          JUSTICE BREYER: No. And then --

23          MR. HALLWARD-DRIEMEIER: -- to that  
24 effect, Your Honor.

25          JUSTICE BREYER: -- you see then --

1 then the argument really turns down to, which  
2 is where I sort of felt after reading the  
3 briefs, well, is this continuous obligation to  
4 keep the trademark going, which is on me, the  
5 breacher, is that enough?

6 And at that point, I become uncertain.  
7 And one of the things cutting against you is  
8 that the licensee can keep up the trademark  
9 himself. I don't know if that's enough. So  
10 have you found anything that would really help  
11 me?

12 MR. HALLWARD-DRIEMEIER: No, but the  
13 licensee cannot keep up the trademark. That's  
14 the problem.

15 JUSTICE BREYER: Right.

16 MR. HALLWARD-DRIEMEIER: The licensee,  
17 under the Lanham Act, the licensee may license  
18 the trademark as a "related party" and it's not  
19 meaning, you know, subsidiary. It means that  
20 it is acting under the control of the trademark  
21 owner.

22 Without that control, the trademark no  
23 longer serves as the source of identifying for  
24 the consumers that it is a genuine article.  
25 That's why trademarks are recognized as

1 property. Of course, historically --

2 CHIEF JUSTICE ROBERTS: So the -- the  
3 licensee -- the licensee can't take any steps  
4 when a third-party is infringing the trademark  
5 regardless of what the licensor thinks?

6 MR. HALLWARD-DRIEMEIER: No. It's --  
7 it's --

8 CHIEF JUSTICE ROBERTS: Because the  
9 licensee is certainly injured by those  
10 infringing activities.

11 MR. HALLWARD-DRIEMEIER: It's -- it's  
12 the licensor who enforces the trademark because  
13 it is the licensor's reputation, and the -- and  
14 the law imposes on the licensor that  
15 responsibility.

16 CHIEF JUSTICE ROBERTS: Well, it may  
17 be the licensor's reputation, but it's the  
18 licensee's income, right? If the -- if the  
19 trademark no longer has value, that certainly  
20 undermines the value that the licensee saw in  
21 the original contract.

22 MR. HALLWARD-DRIEMEIER: Well, it --  
23 it may be, Your Honor, but, again, this is why  
24 McCarthy specifically warns against analogies  
25 of trademark to other forms of property, even

1 those that look very similar, like patents,  
2 because trademarks require a unity of  
3 ownership. All goodwill must accrue to the  
4 trademark owner because --

5 JUSTICE BREYER: All right. That may  
6 be, but there are thousands of McDonald's, I  
7 guess, firms that have leased the word  
8 "McDonald." And if one of -- if somehow super  
9 McDonald went bankrupt, couldn't those trustees  
10 say the people in this neighborhood trust me to  
11 have real McDonald's, and what I'll do is I  
12 will look at every hamburger and I will make  
13 certain that -- that these hamburgers are  
14 exactly the same as they were when McDonald was  
15 still alive or whatever.

16 Now he doesn't have a right to do  
17 that? Because I got the impression in the  
18 other briefs he does.

19 MR. HALLWARD-DRIEMEIER: Your -- Your  
20 -- Your -- Your Honor, once -- once the  
21 trademark owner ceases to control the mark and  
22 enforce the -- the -- the quality --

23 JUSTICE BREYER: Yeah. What happens?

24 MR. HALLWARD-DRIEMEIER: -- then it  
25 becomes an abandoned trademark and it loses its

1 value.

2 JUSTICE BREYER: But what happens to  
3 an abandoned trademark? Can you use an  
4 abandoned trademark?

5 MR. HALLWARD-DRIEMEIER: Well, it's no  
6 longer a trademark. It's no longer --

7 JUSTICE BREYER: No. Can a person --

8 MR. HALLWARD-DRIEMEIER: Yes.

9 JUSTICE BREYER: Can --

10 MR. HALLWARD-DRIEMEIER: Yes.

11 JUSTICE BREYER: He can, okay.

12 MR. HALLWARD-DRIEMEIER: Yes.

13 JUSTICE BREYER: If he can, and here  
14 we're dealing with non-exclusive licenses, why  
15 isn't that his problem?

16 MR. HALLWARD-DRIEMEIER: Well, Your  
17 Honor, again, the -- the -- the rule, the  
18 general rule under the 365(g) is that all  
19 claims for breach of the contract have to be  
20 brought pre-petition. And that's because a  
21 pre-petition claim is pennies on the dollar. A  
22 post-petition claim is dollars for dollar.

23 If you allow the counterparty to  
24 choose, do I want pre-petition pennies or do I  
25 want post-petition dollars, they're always

1 going to choose dollars. And that would  
2 frustrate Congress's purpose of ensuring that  
3 all claims are brought, resolved, and  
4 discharged as part of the bankruptcy.

5 And that's why Congress knew that it  
6 had to provide all of the exceptions to the  
7 rule under --

8 JUSTICE KAGAN: Okay. But that's your  
9 -- that's your bigger argument, which is not a  
10 trademark argument. Your -- that's an argument  
11 about everything, right, which is that we  
12 should not read (g) to say that, you know, what  
13 (g) says, honestly, (g) says constitutes a  
14 breach. That suggests that you just look to  
15 the effects of a breach under non-bankruptcy  
16 law. Why -- why doesn't (g) say that?

17 MR. HALLWARD-DRIEMEIER: What (g) says  
18 is that it constitutes a breach pre-bankruptcy.  
19 So the question is, what are the claims that  
20 have to be brought? Are they all claims? Is  
21 it a total breach and you have to bring the  
22 full value of claims, or there is some rights  
23 that -- that continue?

24 If Congress thought that some rights  
25 would continue --

1 JUSTICE KAGAN: But what -- but what  
2 you're saying, Mr. Hallward-Driemeier, is that  
3 -- is that what (g) tells you is that you can  
4 unwind the entire deal. And that's not the  
5 effect of a breach outside of bankruptcy in --  
6 in -- certainly in the usual context.

7 MR. HALLWARD-DRIEMEIER: It -- it can  
8 be. But -- but the --

9 JUSTICE KAGAN: Well --

10 MR. HALLWARD-DRIEMEIER: --  
11 non-bankruptcy rule gives that choice to the  
12 counterparty. And Congress flipped that in  
13 365. It's only in the exceptions that the  
14 counterparty has the choice.

15 JUSTICE KAGAN: Well, what language  
16 are you pointing to in 36 -- 365(g) that says  
17 anything other than we look to see what happens  
18 when you breach?

19 MR. HALLWARD-DRIEMEIER: It -- the  
20 principal language is that it's a pre-petition  
21 breach. And then you have to trace it through  
22 -- and I realize the Bankruptcy Code is very  
23 convoluted, but you have to trace it through  
24 502(g)(1).

25 JUSTICE KAGAN: Well, I think we can

1 understand it.

2 (Laughter.)

3 MR. HALLWARD-DRIEMEIER: I'm sure you  
4 can, but just to explain why it's going to take  
5 me some steps. 502(g)(1) says that a claim  
6 that arises from rejection must be brought,  
7 administered, and is discharged under the  
8 general rule as if it had arisen  
9 pre-bankruptcy.

10 And then the discharge statute, 1114,  
11 also refers to 502(g). It says that all claims  
12 that arose pre-confirmation are discharged.

13 And then it specifically references  
14 the claims specified in 502(g). Why? Because  
15 what 502(g) does is make clear that all claims  
16 based on the breach that is the rejection are  
17 deemed pre-petition breach.

18 If Congress thought that some of those  
19 claims would be brought for pennies but other  
20 claims could be brought for full dollars,  
21 Congress would have told us where that line  
22 was, and it didn't.

23 What instead Congress did is it  
24 provided the general rule that the -- the --  
25 instead of the counterparty getting the choice

1 to treat it as a total breach, if terminated,  
2 or sue to enforce, the debtor, the trustee gets  
3 that choice. I'm going to treat it as a total  
4 breach, terminate it.

5 And then what the exceptions do in  
6 each of them is it gives the counterparty a  
7 choice. So now it's the exception. Now, as in  
8 non-bankruptcy law, the counterparty gets the  
9 choice to treat it as terminated; that's the  
10 general rule when Congress enacted (n), they  
11 said that's the general rule, what would apply,  
12 apart from the exception, or accept these  
13 rights. But the rights that are accepted are a  
14 subset of rights that would exist under  
15 non-bankruptcy law.

16 And -- and I'll point you to (n) in  
17 particular, because (n) makes clear that the  
18 following rights that the patentee -- that the  
19 licensee would not -- would have under  
20 non-bankruptcy law are not available to it,  
21 okay?

22 The right to specific performance.  
23 The right to updates in the -- in the software  
24 or the patent. The right to setoff that would  
25 be available under non-bankruptcy law. The

1 right to an administrative claim.

2 All of those rights that a party would  
3 have under non-bankruptcy law the counterparty  
4 does not have if they elect the rights that  
5 Congress has provided them under (n).

6 So the idea that Congress adopted this  
7 very detailed exception that goes on for pages  
8 to provide for patentees' licenses, rather,  
9 patent licensees, because they were a favored  
10 party, and that in the end those are fewer and  
11 lesser than the rights of trademark owners or  
12 that patent licensees would have had --

13 JUSTICE GINSBURG: How do you --

14 MR. HALLWARD-DRIEMEIER: -- had there  
15 been no exception at all.

16 JUSTICE GINSBURG: -- how do you  
17 explain that the scholars in this field, the  
18 bankruptcy field, disagree with your  
19 interpretation and they say Lubrizol was wrong  
20 and Sunbeam was right?

21 MR. HALLWARD-DRIEMEIER: Well, Your  
22 Honor, it's not a uniform view. We've pointed  
23 to articles that agree with us. The Peter  
24 Menell argue agrees that upon the rejection of  
25 a trademark license, the licensee's right to

1 use is terminated, and instead they have a  
2 claim for pre-bankruptcy pennies on the dollar.

3 And, of course, the Wilton article  
4 says the same. Mr. Wilton is my co-counsel, so  
5 I understand you may discount that, but the --

6 (Laughter.)

7 MR. HALLWARD-DRIEMEIER: But -- but it  
8 is absolutely not true that the views are  
9 unanimous in one -- in one respect.

10 Among the amici that the other side  
11 have are the INTA and other organizations that  
12 have gone to Congress many times to ask  
13 Congress to adopt an exception similar to (n)  
14 for trademark licensees, and Congress has  
15 refused to do so.

16 So now they're asking this Court to do  
17 what they have failed to obtain from Congress.  
18 But note when they went to Congress to ask them  
19 to adopt an exception, they understood that it  
20 had to be nuanced. It had to balance the  
21 parties' respective rights.

22 It had to, for example, provide that  
23 you had to continue to conform to trademark  
24 standards, and, for example, that you have to  
25 continue to pay your share of advertising fees.

1 All of these are things that are  
2 different because of trademark, because of the  
3 duty of control, because of the need to  
4 maintain consistency. And Congress could do  
5 that in a statute, that's what was proposed,  
6 Congress has declined to do so. And it's --

7 JUSTICE BREYER: Let me -- let me be  
8 sure I'm not missing something. Forget  
9 bankruptcy. Think of contract law over the  
10 course of the centuries, right?

11 Now, as I started out, A breaches a  
12 provision. The ordinary rule is B can keep the  
13 property that he's got if he wants. Isn't that  
14 the ordinary rule?

15 But then there are lots -- there  
16 should be lots of not ordinary cases. There  
17 should be lots of cases where, maybe not like  
18 igloos, but the property is severely injured,  
19 disappears, dah-dah-dah, unless the breacher  
20 keeps it up.

21 And in those non-bankruptcy cases,  
22 what happens? Does he -- does he -- does --  
23 does he -- what happens?

24 MR. HALLWARD-DRIEMEIER: Well, Your  
25 Honor, previously I said that I was not aware

1 of a case that specifically held that breach by  
2 a licensor ends the licensee's right to use the  
3 mark. My colleagues have --

4 JUSTICE BREYER: Yeah.

5 MR. HALLWARD-DRIEMEIER: -- have  
6 reminded me of the Seventh Circuit's decision  
7 in Gorenstein Enterprises v. Quality Care-USA,  
8 874 F.2d 431, which holds that it does end the  
9 licensee's right to use the mark.

10 Again, I think that's because of the  
11 nature of trademark, that it represents the --  
12 the owner's reputation, the unitary theory of  
13 ownership, which is unique to trademark, and  
14 the fact that without that control there is no  
15 related party to -- to use the -- the -- the  
16 mark and, therefore, it ceases to be effective.

17 JUSTICE ALITO: So this is --

18 MR. HALLWARD-DRIEMEIER: But --

19 JUSTICE ALITO: -- a special rule --  
20 we're outside of bankruptcy -- this is a  
21 special rule for trademarks? It's different  
22 from the rule that would apply outside  
23 bankruptcy for, let's say, leased property?  
24 And it's -- the reason why there's a different  
25 rule is because of the duty of the -- the

1       licensor to maintain the quality control?

2               MR. HALLWARD-DRIEMEIER: Right, right.

3       There's --

4               JUSTICE KAGAN: I thought you were

5       saying exactly the opposite,

6       Mr. Hallward-Driemeier. I mean, you said this

7       is consistent with the rule for photocopiers.

8               MR. HALLWARD-DRIEMEIER: In -- in

9               JUSTICE ALITO: And your entire brief

10      --

11              MR. HALLWARD-DRIEMEIER: --

12      bankruptcy, in bankruptcy, that's right. I

13      thought Justice Alito's question --

14              JUSTICE ALITO: Yeah. No, this is --

15              MR. HALLWARD-DRIEMEIER: -- had to do

16      with non-bankruptcy.

17              JUSTICE ALITO: -- outside bankruptcy.

18      So I -- I don't -- I don't understand why there

19      would be a special rule for trademark, outside

20      bankruptcy, that would be -- it would be

21      predicated on the licensor's failure to

22      exercise the quality control.

23              And so because -- because the licensor

24      doesn't want to do that, the licensor in -- in

25      breach of the contract gets a more favorable

1 result. It doesn't seem to make any sense.

2 MR. HALLWARD-DRIEMEIER: Well, Your --  
3 Your Honor, it -- again, I think it's because  
4 of the unique nature of the trademark as being  
5 only -- you can only have a valid license of  
6 the trademark if there is that control. That's  
7 specified by the Lanham Act. It's -- and --  
8 and so if you don't have that control, then you  
9 no longer have a valid lease --

10 JUSTICE SOTOMAYOR: I'm sorry --

11 MR. HALLWARD-DRIEMEIER: -- and so --

12 JUSTICE SOTOMAYOR: -- but I don't  
13 know why that doesn't control non-bankruptcy  
14 rights.

15 MR. HALLWARD-DRIEMEIER: We -- if --  
16 if --

17 JUSTICE SOTOMAYOR: Your point would  
18 seem to control both, but it doesn't seem to.  
19 You're saying bankruptcy gives you more rights.

20 MR. HALLWARD-DRIEMEIER: Well, what --  
21 what we're saying is that there -- we think  
22 that with trademarks, especially, you can't  
23 continue to exercise the trademark license  
24 after rejection and that -- because of the  
25 unique character of trademarks.

1           But under our view, it's true  
2 generally as well, because if you have a lease  
3 of a photocopier, it -- it -- the -- the  
4 general rule of 365(g) is that if you -- if you  
5 reject a -- a lease of a photocopier, that  
6 lease now is -- is effectively terminated. It  
7 has been reduced to a claim for prepetition  
8 damages.

9           And 542(a) would tell us that the  
10 possessor of the photocopier has to return it  
11 to the estate, unless the -- the lease is  
12 assumed, which it normally is, because it's  
13 more beneficial.

14           So the general rule is that these  
15 types of ongoing relationships are terminated,  
16 they're reduced to a claim for pre-bankruptcy  
17 damages, breach of contract damages that are  
18 paid pennies on the dollar, and that it's not  
19 up to the counterparty to decide they don't  
20 want pennies on the dollar, they would rather  
21 have dollars for dollar, because if that were  
22 the case, then no counterparty would bring a  
23 claim for pre-bankruptcy breach. They would  
24 all wait and try to enforce, seek specific  
25 performance --

1 JUSTICE SOTOMAYOR: Do you have any  
2 argument that would limit a ruling in your  
3 favor just to trademark law? Because it seems  
4 to me that you're asking us to do exactly what  
5 the other side wants us to do, to announce a  
6 general interpretation of this provision that  
7 basically says these types of contracts  
8 actually do survive --

9 MR. HALLWARD-DRIEMEIER: Well --

10 JUSTICE SOTOMAYOR: -- lessees have  
11 the right to terminate, in part, and keep other  
12 rights alive.

13 MR. HALLWARD-DRIEMEIER: Well, Your --  
14 Your Honor --

15 JUSTICE SOTOMAYOR: You -- I thought  
16 when I read your briefs that you had an  
17 argument as to why we should limit our ruling  
18 to trademark law. But there's no way to do  
19 that, even under your interpretation.

20 MR. HALLWARD-DRIEMEIER: No -- no,  
21 Your Honor. I -- I think that -- that there  
22 is.

23 First of all, all we're asking the  
24 Court to do is adhere to its ruling in  
25 Bildisco, which said that the effect of

1 rejection is that the contract is no longer an  
2 enforceable contract. That's -- that's our  
3 rule.

4 This Court decided it in Bildisco.  
5 They -- it was in the NLRA context, but the  
6 first part of the opinion is all about how --  
7 why, you know, collective bargaining agreements  
8 are subject to 365(a) and (g), just like any  
9 other contract.

10 And so when the Court said --

11 JUSTICE SOTOMAYOR: That's somewhat  
12 different because that requires actual  
13 affirmative obligations by the employers.

14 MR. HALLWARD-DRIEMEIER: Well, Your  
15 Honor --

16 JUSTICE SOTOMAYOR: And you're not  
17 arguing the employer has to -- the trademark  
18 owner has to continue his rights.

19 MR. HALLWARD-DRIEMEIER: One -- one of  
20 the rights that was -- was deemed one that had  
21 to be brought as a prepetition claim in  
22 Bildisco was a -- a -- a claim based upon the  
23 loss of seniority rights. Seniority rights is  
24 form of property right that would be protected  
25 certainly by the Due Process Clause.

1           And yet, that claim for the value of  
2 the seniority rights had to be brought as a  
3 prepetition claim. It couldn't just be  
4 enforced against the employer anymore. It had  
5 -- it was reduced to a claim for prepetition  
6 damages.

7           And that's the rule that we're  
8 articulating. But even if 365 didn't work the  
9 way we say, even if the general rule of 365(g)  
10 is that non-bankruptcy law provides such that  
11 the exceptions become superfluous and -- and  
12 actually give the favored parties fewer rights  
13 than the general rule would provide, which is  
14 of course contrary to everything this Court has  
15 ever said about exceptions, which they're  
16 called, "exceptions" in 365(g), we would still  
17 have an argument --

18           JUSTICE KAGAN: But -- so could I --

19           MR. HALLWARD-DRIEMEIER: -- that  
20 trademark is different.

21           JUSTICE KAGAN: -- understand the sort  
22 of nature of the argument? I mean, you have  
23 your general argument, and the way that goes is  
24 Ms. Spinelli says the effect of rejection is  
25 breach, and you say the effect of rejection is

1 rescission. And that's the basic argument,  
2 where, you know, honestly, Ms. Spinelli has  
3 this language that says it constitutes a  
4 breach. So -- but --

5 MR. HALLWARD-DRIEMEIER: Prepetition  
6 breach.

7 JUSTICE KAGAN: So -- but then you  
8 say, even if Ms. Spinelli is right on that and  
9 we just look to what it means to breach outside  
10 non -- outside bankruptcy law, then you say we  
11 have a special rule for trademarks because  
12 trademarks are different outside bankruptcy  
13 law, and you point us to a single Seventh  
14 Circuit case, is that correct?

15 MR. HALLWARD-DRIEMEIER: And -- and --  
16 and the nature of -- of the trademark. And  
17 McCarthy explains the -- the rule of unitary  
18 ownership, that it's a different type of  
19 property, that the property is really just the  
20 property interest in the owner's reputation,  
21 and the fact that the whole notion of -- of  
22 licensing, which was a new advent in trademark,  
23 was because the licensee is treated as a  
24 related party because it is operating under the  
25 control.

1           So it is in the nature of the -- it is  
2           in the nature of trademark that it is subject  
3           to that control. And without that control, it  
4           ceases to exist.

5           But I want to point the Court to the  
6           specific language of this trademark license  
7           which I think really brings home the point.  
8           This trademark license -- and this is at JA  
9           237 -- says that it grants to Mission a  
10          non-exclusive, non-transferable, limited  
11          license for the duration of the term to use its  
12          mark for the limited purposes of performing its  
13          obligations, exercising its rights under the  
14          agreement, subject to written trademark  
15          guidelines of the -- of Coolcore and the right  
16          of Coolcore to review and approve.

17          In other words, all it was was a  
18          contract right. It's not a property right in  
19          the license. There can't be because of the  
20          rule of unitary ownership. All it was was a  
21          contract right to use the trademark subject to  
22          Coolcore's control.

23          And if that control goes away because  
24          you can't enforce that, that's one of the --  
25          one of the, you know, prospective performance

1 obligations of Coolcore in a rejected contract,  
2 you can't enforce that, then that control goes  
3 away, and with the control goes the license.

4 Thank you very much.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 Three minutes, Ms. Spinelli.

8 REBUTTAL ARGUMENT OF DANIELLE SPINELLI  
9 ON BEHALF OF THE PETITIONER

10 MS. SPINELLI: Thank you. I have  
11 three points that I'll try to make quickly.

12 First, the Gorenstein case that  
13 counsel referred to does not hold that a  
14 trademark licensor can unilaterally terminate a  
15 license by ceasing to exercise quality control.  
16 That was a case in which the licensee defaulted  
17 on the agreement for other reasons and then  
18 tried to continue using the trademark  
19 afterwards. Obviously, that can't be done.

20 So there's no authority for the  
21 proposition that general contract principles  
22 don't apply to trademark licenses.

23 Second, this is not about whether the  
24 debtor can abandon the trademark and get rid of  
25 its monitoring obligations. It's about whether

1 the estate can take back the rights in the  
2 license and resell them to somebody else and  
3 distribute the proceeds among creditors, and it  
4 can't.

5 Rejection is not avoidance. There are  
6 separate avoidance procedures in the code.  
7 Rejection doesn't let the estate claw back  
8 interests in the debtor's assets that the  
9 debtor conveyed before bankruptcy.

10 JUSTICE SOTOMAYOR: Could you --

11 MS. SPINELLI: So, just --

12 JUSTICE SOTOMAYOR: -- answer just one  
13 question for me? If you continue using the  
14 mark, do the damages that you incur after the  
15 filing of the bankruptcy -- are they  
16 prepetition debt or post-petition debt? Are  
17 you going to get a priority for the damages  
18 that accrue after you declare bankruptcy --  
19 after bankruptcy had been declared?

20 MS. SPINELLI: In this case, Mission  
21 has an administrative claim stemming from the  
22 wrongful deprivation of its right to use the  
23 trademark post-rejection. The estate -- it's a  
24 claim against the estate that arose  
25 post-petition, which is an administrative --

1 JUSTICE SOTOMAYOR: So --

2 MS. SPINELLI: -- claim.

3 JUSTICE SOTOMAYOR: -- you're going to  
4 get more rights than (n) gives other  
5 intellectual --

6 MS. SPINELLI: Yes.

7 JUSTICE SOTOMAYOR: -- property.

8 MS. SPINELLI: And let me explain why  
9 that's exactly what should happen. Prior to  
10 bankruptcy -- and this is just like a lease,  
11 Justice Breyer -- prior to bankruptcy, the  
12 debtor conveyed the licensee an interest in its  
13 intellectual property. We don't have to call  
14 that a property right. It doesn't matter what  
15 we call it. But it's a stick in the bundle of  
16 sticks, just the same way that a lease grants  
17 the tenant a leasehold interest in the  
18 landlord's real property. And McCarthy makes  
19 this exact analogy.

20 Once the license has been granted, the  
21 licensor no longer has that stick. And it's  
22 uncontested that the licensor can transfer only  
23 what it has. Respondent doesn't dispute that,  
24 outside bankruptcy, if the licensor sold the  
25 intellectual property, the buyer would take

1 subject to the license.

2 And we do have authority for this.  
3 It's in the blue brief. And because of that,  
4 the licensor's creditors also cannot access the  
5 value of the license for their claims against  
6 the debtor.

7 JUSTICE BREYER: Real quick question.  
8 But -- and, look, outside bankruptcy or in  
9 general, you lease, the lessor leases a  
10 trademark to the lessee. Lessor doesn't keep  
11 it up, doesn't quality-control.

12 Does that stick, which is now in the  
13 hands of the lessee, dissolve, disappear --

14 MS. SPINELLI: No.

15 JUSTICE BREYER: -- gone?

16 MS. SPINELLI: No, it does not. May  
17 I --

18 CHIEF JUSTICE ROBERTS: Sure.

19 MS. SPINELLI: -- respond, Justice  
20 Roberts?

21 No, it doesn't. It -- it continues to  
22 exist. The -- ceasing quality control does not  
23 immediately dissolve the license. And because,  
24 outside bankruptcy, the debtor doesn't have the  
25 right to transfer the license to a buyer or to

1 its creditors, that is also true in bankruptcy.

2 One of the most fundamental principles  
3 of bankruptcy is that the estate can't have any  
4 greater rights to property than the debtor  
5 itself had at the time of filing. The -- the  
6 debtor's IP comes into the bankruptcy estate,  
7 subject to the license, so the value of the  
8 license is not available to creditors. It  
9 belongs to the licensee. And nothing about  
10 rejection enables the estate to take that  
11 license back.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel. The case is submitted.

15 (Whereupon, at 11:13 a.m., the case  
16 was submitted.)

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## Official - Subject to Final Review

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