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HOUSE OF REPRESENTATIVES
REPORT
100-1012

BANKRUPTCY AND INTELLECTUAL PROPERTY AMENDMENTS

SEPTEMBER 30, 1988.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. RODINO, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 5348]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 5348) to amend title 11 of the United States Code with respect to the rejection of executory contracts licensing rights to intellectual property, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PROCEDURAL BACKGROUND OF H.R. 5348

On May 23, 1988, Congressman Don Edwards introduced H.R. 4657, legislation to amend the bankruptcy laws with respect to the rejection of executory contracts for the license of intellectual property.

On June 3, 1988, the Subcommittee on Monopolies and Commercial Law held a hearing on H.R. 4657. Testimony was received from James Burger, Esq. of Apple Computer, Inc., on behalf of the Computer and Business Equipment Manufacturers Association; Harry F. Manbeck, Esq. of General Electric Co., on behalf of Intellectual Property Owners, Inc.; Georga A. Hahn, Esq. of Hahn & Hessen, on behalf of the National Bankruptcy Conference; and Thomas M.S. Hemnes, Esq. of Foley, Hoag & Eliot.

On September 22, 1988, the Subcommittee held a mark-up of H.R. 4657. By voice vote, the Subcommittee adopted an amendment in the nature of a substitute to H.R. 4657 offered by Mr. Edwards. This amendment in the nature of a substitute was virtually identical to H.R. 4657, with several clarifications: (a) the definition of intellectual property was amended to clarify the bill's intent to cover

property protected under federal patent and copyright laws, and to include patent applications to the extent they are protected under applicable nonbankruptcy law; (b) the amendment made it clear on its face that a licensor is bound even after rejection of the license agreement to honor provisions in the agreement that give the licensee an exclusive license; and (c) the amendment emphasized that the payments the licensee must make if it elects to retain its rights after rejection are the royalty payments.

On September 23, 1988, Mr. Edwards introduced the Subcommittee-adopted amendment in the nature of a substitute as a clean bill, H.R. 5348.

On September 27, 1988, the Committee on the Judiciary ordered H.R. 5348 favorably reported, by voice vote.

Background and Summary of H.R. 5348

Section 365 and executory contracts

A company that files for bankruptcy may have entered into one or more contractual obligations whose performance has not yet been completed prior to bankruptcy. If the performance of the other party has also not been completed, the contract is considered an "executory contract" under the bankruptcy laws.

A primary purpose of the bankruptcy laws is to afford the debtor a meaningful chance to reorganize and make a fresh start. Thus, it is a long-standing principle of bankruptcy law that a trustee (or the debtor, in a chapter 11 reorganization) for the debtor's estate should not be compelled to accept an executory contract that is burdensome to the estate. Such a contract would drain estate resources at the expense of the debtor and the other creditors.

Section 365 of the Bankruptcy Code (11 U.S.C. 365) codifies this principle. Generally, the trustee, subject to court approval, "may assume or reject any executory contract or unexpired lease of the debtor." In enacting section 365 as part of the Bankruptcy Reform Act of 1978, Congress recognized that there is "no precise definition of what contracts are executory," but said that the definition "generally includes contracts on which performance remains due to some extent on both sides." (H. Rept. 95–595, p. 347).

Many, but not all, courts have adopted the definition of executory contracts offered by Professor Vern Countryman:

> a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.

Countryman, *Executory Contracts in Bankruptcy: Part I,* 57 Minn. L. Rev. 436, 460 (1973). Other courts have simply used the description of executory contracts set forth in the legislative history quoted above (See, e.g., *McCannon* v. *Marston,* 679 F.2d 13, 18 (3rd Cir. 1982)).

Courts generally uphold the trustee's decision to reject an executory contract under section 365 if the decision is found to be within the trustee's sound business judgment. *See In re Huang,* 9 BCD 972 (Bankr. App. Pan. 9th Cir. 1982). Sometimes a trustee will reject a

contract when it can get more money by entering into a new contract with another party, thus benefitting the estate. Courts differ about whether harm to the other party to the contract is a factor that must be taken into account in evaluating a trustee's decision to reject. When the trustee rejects a contract, the other party cannot compel performance. It can, however, claim damages that result from the trustee's breach. Damages may not make the other party whole, though, because they will usually be paid only at the same pro-rata level as payments made to the general unsecured creditors in the bankruptcy proceeding.

Section 365 generally applies, by its terms, to "any executory contract or unexpired lease of the debtor." (11 U.S.C. 365(a)). Over time, Congress has decided for policy reasons to single out certain kinds of executory contracts or unexpired leases for special treatment in the bankruptcy laws, having decided that the general treatment in section 365 was not fully adequate in these areas. Examples of areas for which section 365 has been amended to provide special treatment include unexpired leases of real property in a shopping center, unexpired leases of residential and non-residential real property, and executory timeshare interests under a timeshare plan. Additionally, section 1113 was added to the Bankruptcy Code to cover rejection of collective bargaining agreements in chapter 11 reorganizations. These special guidelines were added by the 1984 amendments to the bankruptcy laws to protect the non-bankruptcy party to the contract. In the 100th Congress, a new section 1114 was added to the Bankruptcy Code, modeled after section 1113, to provide special treatment for health, life, and disability benefits promised to retired workers by a former employer who subsequently files for bankruptcy.

The intellectual property community now seeks special protection to protect licensees of intellectual property from rejection of a license agreement by a trustee. Prior to H.R. 5348, rejection of an executory contract under which the debtor is a licensor of a right to intellectual property has been property treated by the courts in the same manner as rejection of any other executory contract (other than the different types of executory contracts for which special treatment has already been provided in the bankruptcy laws) to which section 365(a) applies.

The Committee agrees with the testimony presented at the hearing on H.R. 4657 by George A. Hahn on behalf of the National Bankruptcy Conference, that in the long run, section 365 and the treatment of executory contracts and unexpired leases in the bankruptcy laws should be revisited as a whole and fashioned so as to apply consistently in all situations.[1] The Committee believes that continued creation of special interest exceptions to section 365 is not desirable, and intends to revisit and rework section 365 as necessary so that it is, in Mr. Hahn's words, a "total cohesive section.[2]

Having said this, the Committee states that for the issue of the treatment of licenses of intellectual property, it also agrees with

[1] See testimony of George A. Hahn, Esq., *Intellectual Property Contracts in Bankruptcy*, Hearing Before the Subcommittee on Monopolies and Commercial Law on H.R. 4657, 100th Cong. 2d Sess., June 3, 1988, pp. 89-90, 99-100.

[2] Id.

the position advocated by the National Bankruptcy Conference, the Intellectual Property Owners, Inc., and the Computer and Business Equipment Manufacturers Association at the hearing on H.R. 4657, that there is under the present state of the bankruptcy law a potential chilling effect on the licensing of intellectual property. Because of the seriousness of this problem, the need to foster the development in the United States of new technology and new ideas, and the need to maintain the United States' world leadership in the area of new technology development, the Committee is persuaded that the overall interests of the economy are best served by creating another exception to section 365 now. The Committee wishes to emphasize, though, that it views a comprehensive re-working of section 365 as the best way in the long run of dealing with this and other areas for which special exceptions to section 365 have been created or may be sought.

H.R. 5348 does not affect the determination of whether a contract is executory or not. Before the bill can apply to a contract for the license of intellectual property, the contract must first be executory.

H.R. 5348 applies only to an executory contract under which the debtor is a licensor of a right to intellectual property. H.R. 5348 is not meant to apply either directly or by analogy to any other type of executory contract or unexpired lease. Existing section 365 (or sections 1113 or 1114, if applicable) and the case law construing it remains applicable to the other types of executory contracts or unexpired leases.

THE LUBRIZOL CASE

The concern of the intellectual property community was sparked by *Lubrizol Enterprises, Inc.* v. *Richmond Metal Finishers, Inc.*[3] Richmond Metal Finishers ("Richmond") owned a metal coating process technology, and granted Lubrizol Enterprises ("Lubrizol") a nonexclusive license to use this technology. A year after granting this license, Richmond filed for chapter 11 reorganization. Under section 365, Richmond sought to reject its contract with Lubrizol to facilitate sale or licensing of the technology unhindered by restrictive provisions in the agreement with Lubrizol. In other words, Richmond felt it could get more money for its technology by rejecting the Lubrizol agreement and licensing it to another party instead. Lubrizol opposed the rejection because it did not want to lose its contractual right to use the technology.

The Fourth Circuit first held that the license agreement was executory. Lubrizol owed a continuing duty to Richmond to make royalty payments for the technology for the life of the agreement, to deliver sales reports, and to keep books of account; Richmond, in turn, owed a duty to Lubrizol to notify it of additional licenses granted, to lower Lubrizol's royalty rate if more favorable license rates were granted to others, and to notify Lubrizol of suits involving the technology.

The court then inquired as to whether the rejection was advantageous to the debtor. It followed the business judgment rule and said

[3] 756 F.2d 1043 (4th Cir. 1985), cert. denied, 106 S. Ct. 1285 (1986).

that the debtor's decision to reject on the ground that it could gain a business advantage must be upheld "unless it is shown that the bankrupt's decision was one taken in bad faith or in gross abuse of the bankrupt's retained business discretion." Since the court found no such bad faith or gross abuse, it held that it could not substitute its business judgment for that of the debtor.

Lubrizol argued that the court should also consider the effect on Lubrizol of permitting Richmond to reject the contract. The court recognized that its decision imposed "serious burdens upon contracting parties such as Lubrizol",[4] but said it was constrained by the law from considering the effect of rejection on Lubrizol. The court stated that there can be no doubt:

> that allowing rejection in this and comparable cases could have a general chilling effect upon the willingness of such parties to contract at all with businesses in possible financial difficulty. But under bankruptcy law such equitable considerations may not be indulged by courts in respect of the type of contract here in issue. *Congress has plainly provided for the rejection of executory contracts, notwithstanding the obvious adverse consequences for contracting parties thereby made inevitable.* (emphasis added) [5]

Not all courts follow the harsh *Lubrizol* rule that the effect of a rejection on the other party to the contract or on the general unsecured creditors as a whole cannot be considered at all.[6] In *In re Huang,*[7] for example, the court applied a flexible test, stating:

> [I]t is proper for the court to refuse to authorize rejection of a lease or executory contract where the party whose contract is to be rejected would be damaged disproportionately to any benefit to be derived by the general creditors of the estate as for example where most of the 'benefit' of rejection of the contract would be captured by a third party at the expense of the unsecured creditors.[8]

The court in *In re Petur* [9] adopted this reasoning in failing to approve a debtor's rejection of a license agreement where rejection would have put the licensee out of business and where the harm to the licensee would have been "grossly disproportionate to any benefit derived by the general creditors."[10]

In *In re Logical Software, Inc.*,[11] decided after the Supreme Court had denied certiorari in *Lubrizol,* the district court overruled the bankruptcy court's decision to apply the *Lubrizol* standard, and remanded the case with instructions to the bankruptcy court to instead apply the *Huang* and *Petur* tests. The district court directed the bankruptcy court to balance the damage rejection would have

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[4] 756 F.2d at 1048
[5] 756 F.2d at 1048.
[6] See, e.g., *In re Huang,* 9 BCD 972 (Bankr. App. Pan. 9th Cir. 1982); *In re Petur,* 35 B.R. 561 (B. Ct., W.D. Wash. 1983); *In re Logical Software, Inc.,* C.A. No. 87-0042 (D. Mass., June 25, 1987).
[7] Supra at note 6.
[8] 9 BCD at 974.
[9] Supra at note 6.
[10] 35 B.R. at 561.
[11] Supra at note 6.

on the licensee against the benefit of rejection to unsecured creditors' in doing so, the bankruptcy court could consider factors such as the probable size of the licensee's damage claim against the estate if rejection occurs, the debtor's likelihood of successfully reorganizing, and the extent of damage to the licensee's business caused by rejection.

Despite the *Huang, Petur,* and *Logical Software* line of cases, proponents of the legislation argue that the *Lubrizol* case has had a chilling effect on licenses of intellectual property and that businesses are becoming reluctant to rely on licensed technology knowing that the license could be taken away if the licensor files bankruptcy. Licensees sometimes use the licensed technology as the basis for an entire business. As an example, a computer manufacturer may license microchip technology from another company and use it in the computers it manufactures. Proponents of the bill told the Subcommittee at its hearing that the *Lubrizol* decision means that, if the licensor files bankruptcy, the licensor could reject its license agreement with the computer manufacturer and take back its technology, leaving the manufacturer without the technology necessary to make its product. In some fields, the licensee may not be able to obtain adequate substitute technology.

One way to avoid the *Lubrizol* risk is for the intellectual property licensee to purchase the technology outright instead of merely to license it. But this can be too expensive for many potential licensees. Also, the licensor/owner may be unwilling to sell because it would lose control over its invention. Finally, the use of the technology would be restricted to the one entity that owned it instead of permitting multiple licensees to benefit from it.

H.R. 5348

The purpose of the legislation is to promote the development and licensing of intellectual property by providing certainty to licensees in situations where the licensor files bankruptcy and seeks to reject the license agreement as an executory contract. Under H.S. 5348, licensees will have the assurance of being able to continue to use the licensed intellectual property after rejection, while debtors/licensors will still be able to free themselves of burdensome obligations by rejecting license agreements. The uncertainty created by the possibility that a court will follow the *Lubrizol* decision is eliminated.

H.R. 5348 adds a new subsection to section 365 of the Bankruptcy Code to provide special treatment for executory intellectual property licenses. Under new subsection 365(n), the trustee will still be able to reject an executory intellectual property license, but the licensee will retain the right to continue to use the technology after rejection for the duration of the agreement's time period (and for any renewal period provided by the agreement). Under the legislation, any right in the license agreement giving the licensee an exclusive license will still be enforceable by the licensee, but other rights of the licensee cannot be specifically enforced. In this manner, rejection will not deprive the licensee of the use of the intellectual property, as happened in the *Lubrizol* case, but the licensee/debtor will, consistent with the general goal of section 365,

be relieved of the burdens of complying with the rejected agreement.

The debtor/trustee will essentially have no obligation to the licensee after rejection other than to turn over existing technology and permit the licensee to use the technology. Obligations such as that to provide the licensee with continued training in the use of the technology or with updates of the technology will be terminated by rejection.

A licensee that elects to retain its rights after rejection will be required to continue making all royalty payments[12] due under the contract, to the trustee, for the duration of the contract (including any renewal period for which the contract may be extended by the licensee as a matter of right under nonbankruptcy law), but the licensee will lose the right to set off these payments against any monies it claims the debtor owes it.

The legislation imposes upon the licensee the continuing obligation to make royalty payments to the trustee, in the manner called for under the contract, if the licensee wishes to retain its rights under the rejected contract. A licensee that retains its rights under a rejected contract remains bound by the other obligations or duties required under the contract, except for those so directly related to obligations or duties that the licensor has been freed from by rejection as to make it inequitable to bind the licensee to them.

A point was raised during the Subcommittee hearing about ensuring post-rejection protection for confidential material covered by some intellectual property license agreements. The Committee is sensitive to the need to protect confidential material. But, when protection is needed, the Committee believes that existing section 107(b)(1) of the Bankruptcy Code[13] (11 U.S.C. 107(b)(1)) is sufficient to empower courts to afford adequate protection of confidential material. Accordingly, the Committee did not feel it was necessary to add provisions to protect confidentiality to the legislation.

H.R. 5348 does not change the requirement under section 365(a) of the Bankruptcy Code (11 U.S.C. 365(a)) that a trustee's decision to reject an executory intellectual property license agreement is subject to court approval. Though it is certainly not the only time the matter could be raised, a licensor/trustee concerned about protecting confidential information could ask the court to afford such protection under section 107 at the same time the court weighs approval of the trustee's request to reject. The court could then decide whether such protection is warranted.

SECTION-BY-SECTION ANALYSIS

Section 1(a) of the bill provides a definition for use of the term "intellectual property" in the Bankruptcy Code, since H.R. 5348 amends section 365 of the Bankruptcy Code with respect to intellectual property. Intellectual property is defined to include, to the

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[12] See discussion of royalty payments in the Section-by-Section analysis (included in discussion of new Bankruptcy Code subsection 365(n)(2)).

[13] Section 107(b)(1) reads, in pertinent part:

"(b) On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may—

(1) protect an entity with respect to a trade secret or confidential research, development, or commercial information . . ."

extent they each are protected by applicable nonbankruptcy law: a trade secret; an invention, process, design, or plant protected under title 35 of the U.S. Code (the patent laws); a patent application; a plant variety; a work of authorship protected under title 17 of the U.S. Code (the copyright laws); or a mask work protected under chapter 9 of the copyright laws (part of the Semiconductor Chip Protection Act of 1984).

Since it is important that there be consistency in the federal statutes, it is not the Committee's intent to expand, in the bankruptcy laws, the definition of any of the items comprising intellectual property in H.R. 5348 that are defined elsewhere in federal statutes. For instance, "invention" and "process" are defined in 35 U.S.C. 100, "plants" are covered in 35 U.S.C. 161, and "designs" are covered in 35 U.S.C. 171. "Plant variety" is protected under 7 U.S.C. 2401 et seq. "Mask work" is defined by 17 U.S.C. 901, and works of authorship are covered by 17 U.S.C. 101 et seq. To the extent that these items are defined and protected by federal law, they are "intellectual property" under H.R. 5348. To whatever extent a patent application may be protected under applicable nonbankruptcy law, it is intellectual property for purposes of H.R. 5348.

Like the other types of intellectual property listed in H.R. 5348, a trade secret constitutes intellectual property for purposes of H.R. 5348 only to the extent that it is protected by applicable nonbankruptcy law.

Section 1(b) adds a new subsection (n) to section 365 of the Bankruptcy Code (11 U.S.C. 365) to deal with the rejection of executory license agreements by bankrupt licensors.

Under new subsection 365(n)(1), if the trustee rejects an executory license agreement, the licensee is given a choice: (1) under (n)(1)(A), it can treat the contract as breached if the rejection would constitute a breach if the licensor was not in bankruptcy; or (2) under (n)(1)(B), it can retain its rights under the agreement to use the licensed intellectual property for the duration of the contract period and for any extension periods provided for as a matter of right by nonbankruptcy law (which includes lawful renewal periods provided for at the licensee's option in the contract itself).

If the first choice is made, the licensee may assert a claim against the estate for damages caused by the rejection, as a breach of contract under section 365(g) of the Bankruptcy Code.

If the licensee makes the second choice and elects to retain its rights to the property, the rights retained do not include a right to compel specific performance by the licensor of the contract—except for a right, to the extent that it exists in the agreement, to enforce any exclusivity provision of the contract. In this manner, the licensor is relieved of any burdens to take additional affirmative actions under the contract such as a duty to provide training or updates to the licensee. The licensee is protected by being able to retain the ability to use the licensed intellectual property, but the licensor/debtor is not burdened with having to take future affirmative actions—some of which could deplete the bankrupt estate at the expense of the general creditors—while trying to reorganize or make a fresh start. The licensee will still retain a general claim for damages from rejection, as a breach of contract under section 365(g) of

the Bankruptcy Code—though actual damages may be less if the licensee elects to proceed under (n)(1)(B) rather than under (n)(1)(A), since the licensee still retains its rights to the intellectual property under (n)(1)(B).

New subsection 365(n)(2) applies if the licensee elects to retain its rights to use the intellectual property under subsection 365(n)(1) after rejection. The trustee is directed to allow the licensee to exercise the licensee's rights to use the technology. In return, the licensee is required to make the royalty payments due under the contract to the trustee. The licensee can only elect to retain its rights for the entire remaining duration of the contract, or for the entire period for which the contract may be extended as a matter of right. Accordingly, royalty payments must be made, in the manner called for under the contract, for these entire periods if election is made (and if renewal of right is exercised).

It is important that courts, in construing the term "royalty" used in this subsection, and in deciding what payments are royalty payments, look to the substance of the transaction and not the label. The underlying nature of the payments must be considered. For example, payments based on the use of intellectual property or on a percentage of sales of end products that incorporate or are derived from the intellectual property should be treated as royalty payments.

To further relieve the licensor of any potentially burdensome obligations, if the licensee elects to retain its rights to use the licensed property, the licensee is doing so waives any right of setoff against the debtor it may otherwise have relating to the contract under either bankruptcy or non-bankruptcy law, and waives any claim for an administrative expense against the bankruptcy estate under section 503(b) of the Bankruptcy Code.

New subsection 365(n)(3) applies if the licensee elects to retain its rights after rejection. If the licensee retains its rights and requests the trustee in writing to do so, the trustee must provide the licensee with any intellectual property, including such embodiment, that the contract itself, or any supplemental agreement to the contract, provides for the licensee to have; the trustee also cannot interfere with the rights of the licensee to the intellectual property, including such embodiment. If the rights of the licensee include a right to obtain the intellectual property from another entity, the trustee cannot interfere with the right as well.

New subsection 365(n)(4) applies to the period before rejection. Until there is a rejection of a licensee agreement, the trustee must, upon written request by the licensee, perform the contract or, to the extent provided in the contract or any supplementary agreement, provide the property to the licensee. The trustee also is prohibited from interfering with the contractual rights of the licensee to the intellectual property, including any contractual right of the licensee to obtain the property (or such embodiment) from another entity.

Section 2 contains the effective date for the amendments made by H.R. 5348. The effective date is the date of enactment, and the amendments will apply only to bankruptcy cases filed on or after the date of enactment of the legislation.

INFORMATION SUBMITTED PURSUANT TO RULES

FEDERAL ADVISORY COMMITTEE ACT OF 1972

The Committee finds that this legislation does not create any new advisory committee within the meaning of the Federal Advisory Committee Act of 1972.

OVERSIGHT FINDINGS

This Committee exercises oversight responsibilities with respect to the bankruptcy laws of the United States. No findings or recommendations of the Committee on Government Operations were received as referred to in Rule XI, clause 2(l)(3)(D).

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of Rule XI, the Committee estimates that this bill will not have an inflationary impact on prices and costs in the operation of the national economy.

NEW BUDGET AUTHORITY

Pursuant to clause 2(l)(3)(B) of Rule XI, the Committee estimates the bill creates no new budget authority or new or increased tax expenditures.

COST

Pursuant to clause 7 of Rule XIII, the Committee states that it concurs with the estimate submitted by the Congressional Budget Office as set forth below.

BUDGET STATEMENT

Pursuant to clauses 2(l)(3) (B) and (C) of Rule XI, the following estimate was prepared by the Congressional Budget Office and submitted to the Committee:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 27, 1988.

Hon. PETER W. RODINO, JR.,
Chairman, Committee on the Judiciary,
U.S. House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 5348, a bill to amend title 11 of the United States Code with respect to the rejection of executory contracts licensing rights to intellectual property, as ordered reported by the House Committee on the Judiciary, September 27, 1988.

We expect the enactment of the bill would not result in any additional cost to the federal government or to state or local governments. H.R. 5348 would amend the Bankruptcy Code to permit a license of intellectual property to elect to use that property, after a trustee rejects the license agreement, to the extent that the use existed immediately prior to the bankruptcy case.

If you wish further details on this estimate we will be pleased to provide them. The CBO staff contact is Douglas Criscitello, who can be reached on 226-2850.

Sincerely,

JAMES L. BLUM,
Acting Director.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE II, UNITED STATES CODE

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CHAPTER 1—GENERAL PROVISIONS

§ 101. Definitions

In this title—

(1) * * *

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(31) "insolvent" means—

(A) with reference to an entity other than a partnership, financial condition such that the sum of entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of—

(i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and

(ii) property that may be exempted from property of the estate under section 522 of this title; and

(B) with reference to a partnership, financial condition such that the sum of such partnership's debts is greater than the aggregate of, at a fair valuation—

(i) all of such partnership's property, exclusive of property of the kind specified in subparagraph (A)(i) of this paragraph; and

(ii) the sum of the excess of the value of each general partner's nonpartnership property, exclusive of property of the kind specified in subparagraph (A) of this paragraph, over such partner's nonpartnership debts;

(32) "intellectual property" means—

(A) trade secret;

(B) invention, process, design, or plant protected under title 35;

(C) patent application;

(D) plant variety;

(E) work of authorship protected under title 17; or

(F) mask work protected under chapter 9 of title 17;
to the extent protected by applicable nonbankruptcy law;

[(32)] *(33)* "judicial lien" means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding;

[(33)] *(34)* "lien" means charge against or interest in property to secure payment of a debt or performance of an obligation;

(35) "mask work" has the meaning given it in section 901(a)(2) of title 17;

[(34)] *(36)* "municipality" means political subdivision or public agency or instrumentality of a State;

[(35)] *(37)* "person" includes individual, partnership, and corporation, but does not include governmental unit, *Provided, however,* That any governmental unit that acquires an asset from a person as a result of operation of a loan guarantee agreement, or as receiver or liquidating agent of a person, will be considered a person for purposes of section 1102 of this title.

[(36)] *(38)* "petition" means petition filed under section 301, 302, 303, or 304 of this title, as the case may be, commencing a case under this title;

[(37)] *(39)* "purchaser" means transferee of a voluntary transfer, and includes immediate or mediate transferee of such a transferee;

[(38)] *(40)* "railroad" means common carrier by railroad engaged in the transportation of individuals or property or owner of trackage facilities leased by such a common carrier;

[(39)] *(41)* "relative" means individual related by affinity or consanguinity within the third degree as determined by the common law, or individual in a step or adoptive relationship within such third degree;

[(40)] *(42)* "repo participant" means an entity that, on any day during the period beginning 90 days before the date of the filing of the petition, has an outstanding repurchase agreement with the debtor;

[(41)] *(43)* "repurchase agreement" (which definition also applies to a reverse repurchase agreement) means an agreement, including related terms, which provides for the transfer of certificates of deposit, eligible bankers' acceptances, or securities that are direct obligations of, or that are fully guaranteed as to principal and interest by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers' acceptances, or securities with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, eligible bankers' acceptances, or securities as described above, at a date certain not later than one year after such transfers or on demand, against the transfer of funds;

[(42)] *(44)* "securities clearing agency" means person that is registered as a clearing agency under section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q–1) or whole business is confined to the performance of functions of a clearing agency with respect to exempted securities, as defined in sec-

tion 3(a)(12) of such Act (15 U.S.C 78c(12)) for the purposes of such section 17A;

[(43)] *(45)* "security"—

(A) includes—

(i) note;

(ii) stock;

(iii) treasury stock;

(iv) bond;

(v) debenture;

(vi) collateral trust certificate;

(vii) pre-organization certificate or subscription;

(viii) transferable share;

(ix) voting-trust certificate;

(x) certificate of deposit;

(xi) certificate of deposit for security;

(xii) investment contract or certificate of interest or participation in a profit-sharing agreement or in an oil, gas, or mineral royalty or lease, if such contract or interest is required to be the subject of a registration statement filed with the Securities and Exchange Commission under the provisions of the Securities Act of 1933 (15 U.S.C. 77a et seq.), or is exempt under section 3(b) of such Act (15 U.S.C. 77c(b)) from the requirement to file such a statement;

(xiii) interest of a limited partner in a limited partnership;

(xiv) other claim or interest commonly known as "security"; and

(xv) certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase or sell, a security; but

(B) does not include—

(i) currency, check, draft, bill of exchange, or bank letter of credit;

(ii) leverage transaction, as defined in section 761(13) of this title;

(iii) commodity futures contract or forward contract;

(iv) option, warrant, or right to subscribe to or purchase or sell a commodity futures contract;

(v) option to purchase or sell a commodity;

(vi) contract or certificate of a kind specified in subparagraph (A)(xii) of this paragraph that is not required to be the subject of a registration statement filed with the Securities and Exchange Commission and is not exempt under section 3(b) of the Securities Act of 1933 (15 U.S.C. 77c(b)) from the requirement to file such a statement; or

(vii) debt or evidence of indebtedness for goods sold and delivered or services rendered;

[(44)] *(46)* "security agreement" means agreement that creates or provides for a security interest;

[(45)] *(47)* "security interest" means lien created by an agreement;

[(46)] *(48)* "State" includes the District of Columbia and Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9 of this title;

[(47)] *(49)* "statutory lien" means lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien os provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute;

[(48)] *(50)* "stockbroker" means person—

(A) with respect to which there is a customer, as defined in section 741(2) of this title; and

(B) that is engaged in the business of effecting transactions in securities—

(i) for the account of others; or

(ii) with members of the general public, from or for such person's own account;

[(49)] *(51)* "timeshare plan" means and shall include that interest purchased in any arrangement, plan, scheme, or similar device, but not including exchange programs, whether by membership, agreement, tenancy in common, sale, lease, deed, rental agreement, license, right to use agreement, or by any other means, whereby a purchaser, in exchange for consideration, receives a right to use accommodations, facilities, or recreational sites, whether improved or unimproved, for a specific period of time less than a full year during any given year, but not necessarily for consecutive years, and which extends for a period of more than three years. A "timeshare interest" is that interest purchased in a timeshare plan which grants the purchaser the right to use and occupy accommodations, facilities, or recreational sites, whether improved or unimproved, pursuant to a timeshare plan.

[(50)] *(52)* "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption; and

[(51)] *(53)* "United States", when used in a geographical sense, includes all locations where the judicial jurisdiction of the United States extends, including territories and possessions of the United States.

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CHAPTER 3—CASE ADMINISTRATION

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Subchapter IV—Administrative Powers

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§ 365. Executory contracts and unexpired leases

(a) * * *

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

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

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

(i) the duration of such contract; and

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

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

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

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

(C) the licensee shall be deemed to waive—

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

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

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

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

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

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

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

(i) perform such contract; or

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

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

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