Supreme Court, U.S.
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No. 12-431

In The
Supreme Court of the United States

SUNBEAM PRODUCTS, INC., doing business as JARDEN CONSUMER SOLUTIONS,

Petitioner,

v.

CHICAGO AMERICAN MANUFACTURING, LLC,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 11 U.S.C. § 365, does a licensee retain the ability to use a debtor's trademarks after the corresponding intellectual-property license is rejected in bankruptcy?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Sunbeam Products, Inc., d/b/a Jarden Consumer Solutions ("JCS"), represents that (a) JCS is a wholly-owned subsidiary of Sunbeam Americas Holdings, LLC, which is wholly-owned by Jarden Corporation, a public corporation; and (b) no other publicly held company owns 10% or more of the stock of JCS.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Sunbeam Products, Inc., d/b/a Jarden Consumer Solutions ("Jarden"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The bankruptcy court's opinion is published at 459 B.R. 306 (Bankr. N.D. Ill. 2011) and is reproduced in the appendix at App. 14-110. The district court's order certifying the matter for direct appeal under 28 U.S.C. § 158(d)(2)(A) is reproduced at App. 11-13. The Seventh Circuit's opinion is published at 686 F.3d 372 (7th Cir. 2012) and is reproduced at App. 1-10.

JURISDICTION

The Seventh Circuit filed its decision on July 9, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

1. Section 365(a)[1] provides:

> Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor. 11 U.S.C. § 365(a).

2. Section 365(g) provides:

> Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease –
>
> (1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or
>
> (2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title –
>
> (A) if before such rejection the case has not been converted under section

---

[1] Unless expressly indicated otherwise, all "Section" references are to the Bankruptcy Code, Title 11 of the United States Code.

1112, 1208, or 1307 of this title, at the time of such rejection; or

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

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

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

3. Section 365(n) provides:

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

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

(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under

any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for –

(i) the duration of such contract; and

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

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

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

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

(C) the licensee shall be deemed to waive –

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

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

4. Section 101(35A) provides:

The term "intellectual property" means –

(A) trade secret;

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

(C) patent application;

(D) plant variety;

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

(F) mask work protected under chapter 9 of title 17.

STATEMENT OF THE CASE

The trademark rights at issue in this case originally belonged to a company known as Lakewood Engineering & Manufacturing Company. Beginning in 1946, and for the next 60 years, Lakewood was an extremely successful fan company. Its fans could be found at major retailers such as Wal-Mart and Sears. With annual revenues of $80 million, Lakewood earned a strong reputation for quality box fans. To effectively exploit and protect that reputation, Lakewood registered its "Lakewood" trademark

(Registration No. 949,246), referred to herein as the "Lakewood Trademark."

In the summer of 2008, Lakewood was losing approximately $500,000 each month manufacturing box fans. It therefore made a strategic decision to outsource the manufacturing of certain of its products, including box fans. Lakewood eventually selected Chicago American Manufacturing, LLC ("CAM") to manufacture its box fans. The parties agreed that Lakewood would supply the motor and cord set at no cost to CAM, while CAM would provide all other raw materials and all of the labor. Lakewood would then purchase the packaged box fans from CAM to ship to its customers. Each and every one of those fans bore the Lakewood Trademark.

Unfortunately for Lakewood, it continued to struggle to keep up with its substantial bank debt. Eventually, in February 2009, four creditors filed an involuntary bankruptcy petition against Lakewood. The next month, Lakewood became a debtor in the United States Bankruptcy Court for the Northern District of Illinois under the supervision of a Chapter 7 trustee. Pursuant to Section 704, which governs "Duties of Trustee," the trustee was thereupon required to "collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest." 11 U.S.C. § 704(a)(1).

Consistent with that statutory duty, the bankruptcy trustee undertook two major actions in the bankruptcy case. *First*, the trustee filed a motion to reject Lakewood's executory supply contract with CAM as authorized by Section 365(a). CAM appeared at the hearing on the motion and did not object. The bankruptcy court thereafter entered the rejection order. *Second*, the trustee filed a motion to sell Lakewood's assets to the highest bidder as authorized by Section 363(b). The highest bidder was Jarden (the petitioner herein), which offered $6.225 million for Lakewood's assets. The bankruptcy court thereafter approved the sale of substantially all of Lakewood's assets, *including the Lakewood Trademark*, to Jarden.

Although the bankruptcy court had approved rejection of CAM's agreement with Lakewood, CAM continued to sell fans using the Lakewood Trademark. The bankruptcy trustee, along with one of Lakewood's secured creditors, therefore sued CAM for trademark violations. After the sale of Lakewood's assets (including the Lakewood Trademark) to Jarden, Jarden substituted in for the secured creditor. The parties alleged that CAM was unlawfully using the Lakewood Trademark and that its manufacturing practices would seriously undermine the integrity and value of the Lakewood brand.

After a six-day trial, the bankruptcy court entered findings of fact and conclusions of law finding in favor of CAM. The bankruptcy court found that CAM's license to use the Lakewood Trademark

survived rejection of Lakewood's supply contract with CAM. App. 108-09. The bankruptcy court recognized that a bankruptcy trustee can lawfully reject an executory contract under Section 365(a). App. 87-90. It also recognized that Congress has expressly authorized licensees of patents, copyrights, and trade secrets to continue using those intellectual property rights after rejection, but did *not* include trademarks in that same statutory provision (11 U.S.C. § 365(n)). App. 93-94. The bankruptcy court nevertheless extended this clearly defined statutory right to trademarks "on equitable grounds." App. 103.

Jarden thereafter filed a notice of appeal and sought – and obtained – certification from the district court to appeal directly to the Seventh Circuit. The Seventh Circuit authorized the direct appeal, and affirmed on alternative grounds. The Seventh Circuit squarely rejected the bankruptcy court's reliance on equity – stating "What the Bankruptcy Code provides, a judge cannot override by declaring that enforcement would be inequitable" (App. 5 (internal quotation marks omitted)) – but went on to hold that the rejection provision in Section 365(a) does not provide a means to terminate a licensee's existing right to use a licensed trademark. App. 7.

In so holding, the Seventh Circuit expressly recognized that its opinion "creates a conflict among the circuits." App. 10. The panel therefore noted in its opinion that it had circulated a copy of its opinion to all active judges under Seventh Circuit Rule 40(a)

and that "[n]o judge favored a hearing *en banc*." *Id.* This timely petition followed.

REASONS FOR GRANTING THE PETITION

I. THERE IS A RECOGNIZED INTER-CIRCUIT CONFLICT REGARDING WHETHER A LICENSEE RETAINS THE ABILITY TO USE A DEBTOR'S TRADEMARKS AFTER THE CORRESPONDING INTELLECTUAL-PROPERTY LICENSE IS REJECTED IN BANKRUPTCY.

At issue in this case is whether, under 11 U.S.C. § 365, a licensee retains the ability to use a debtor's trademarks after the corresponding intellectual-property license is rejected in bankruptcy. As described below, several courts have considered this issue and have reached conflicting conclusions, thus satisfying the "conflict" prong of Supreme Court Rule 10(a).

The Fourth Circuit was the first appellate court to squarely address this issue in a published opinion: *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985). In that case, Richmond Metal Finishers granted Lubrizol Enterprises the right to use Richmond's patented metal coating process technology. Shortly thereafter, Richmond filed for bankruptcy protection, and the trustee sought to rescind that license by rejecting it under Section 365. The Fourth Circuit upheld that rejection

and squarely held that it "deprive[d] Lubrizol of all rights" under the license. *Id.* at 1048. The court explained:

> Under 11 U.S.C. § 365(g), Lubrizol would be entitled to treat rejection as a breach and seek a money damages remedy; however, it could not seek to retain its contract rights in the technology by specific performance even if that remedy would ordinarily be available upon breach of this type of contract.

Id. Thus, in the Fourth Circuit, a licensee *does not* retain the ability to use a debtor's intellectual property after the corresponding license is rejected in bankruptcy.

Although the Third Circuit has not decided this issue in a majority opinion, Third Circuit Judge Thomas Ambro addressed the issue in his concurring opinion in *In re Exide Technologies*, 607 F.3d 957 (3d Cir. 2010). Contrary to the Fourth Circuit in *Lubrizol*, Judge Ambro concluded that courts should use their "equitable powers" to prevent licensors from taking back trademark rights that they bargained away. *Id.* at 967. The panel majority, in contrast, avoided the issue by concluding that the corresponding intellectual-property license was not executory and therefore could not be rejected under Section 365. *Id.* at 961. Thus, under the only Third Circuit guidance available (Judge Ambro's concurrence in *Exide Technologies*), licensees can – as a matter of *equity* – retain the

ability to use a debtor's trademarks after the corresponding intellectual-property license is rejected in bankruptcy.

In this case, in turn, the Seventh Circuit (per Easterbrook, J.) reached a result directly in conflict with both *Lubrizol* and Judge Ambro's opinion in *Exide Technologies*. Addressing the same issue that the Fourth Circuit addressed in *Lubrizol*, the Seventh Circuit squarely held that "[w]hat § 365(g) does by classifying rejection as breach is establish that in bankruptcy, as outside of it, the other party's rights remain in place." App. 8. Thus, in the Seventh Circuit, unlike the Fourth Circuit, a licensee *does* retain the ability to use a debtor's trademarks after the corresponding intellectual-property license is rejected in bankruptcy. The Seventh Circuit also disagreed with Judge Ambro's reliance on equitable principles in *Exide Technologies*, stating: "What the Bankruptcy Code provides, a judge cannot override by declaring that enforcement would be inequitable." App. 5 (internal quotation marks omitted). As noted previously, the Seventh Circuit expressly recognized that its decision "creates a conflict among the circuits." App. 10. The panel therefore circulated a copy of the opinion to all active judges and noted that "[n]o judge favored a hearing *en banc*." *Id.*

Finally, numerous bankruptcy courts have likewise reached conflicting results on this issue. For example, in *In re Matusalem*, 158 B.R. 514, 521-22 (Bankr. S.D. Fla. 1993), the court suggested that rejection of a trademark license would not deprive a

licensee of its right to use the licensed mark. In contrast, the courts in *In re Centura Software Corp.*, 281 B.R. 660 (Bankr. N.D. Cal. 2002), and *In re HQ Global Holdings Inc.*, 290 B.R. 507 (Bankr. D. Del. 2003), reached the opposite result and held instead that rejection in bankruptcy terminates a licensee's rights.

II. THIS MATTER RAISES IMPORTANT ISSUES THAT MERIT THIS COURT'S REVIEW.

As set forth above, there is a clear and acknowledged inter-circuit conflict regarding whether a licensee retains the ability to use a debtor's trademarks after the corresponding intellectual-property license is rejected in bankruptcy. In addition, there is likewise a conflict among the lower courts as to whether equitable principles are applicable in such circumstances. For these reasons, the "conflict" prong of Supreme Court Rule 10(a) is plainly satisfied. The matter also raises important questions of federal law, which similarly merit this Court's review. That is so for at least the following reasons.

First, the Seventh Circuit's opinion threatens to undermine the integrity of trademark rights. Under the Seventh Circuit's opinion, a licensee can continue to use a debtor's registered trademark after the corresponding intellectual-property license is rejected in bankruptcy. Upon rejection, the debtor or trustee would have no contractual or legal right to collect royalties or police the use of the trademark for such matters as the quality of the products using the

trademark. As a result, a licensee can subsequently affix the trademark to products without fear of liability, thus weakening the inherent value of the trademark and harming consumers who rely on the trademark.

Second, the existing inter-circuit conflict creates substantial uncertainty regarding what rights a purchaser in bankruptcy is acquiring from the bankruptcy estate. Here, for example, Jarden assumed that it was acquiring the exclusive right to use the Lakewood Trademark. Under *Lubrizol*, that assumption was manifestly correct. But under the Seventh Circuit's opinion, purchasers like Jarden must share the trademark rights with a prior licensee where no privity of contract exists between the purchaser of the mark and the licensee, thus freeing the licensee to use the trademark in any way it sees fit without a policing of the mark as described above (often referred to as a "naked license"). In other circuits, potential buyers will be unable to predict the outcome with any reasonable degree of certainty, causing them to bid less for a debtor's assets.

Third, the Seventh Circuit's opinion also fundamentally undermines the ability of bankruptcy trustees to "maximize the proceeds of collection and to distribute those proceeds as expeditiously as possible" as required by Section 704(a)(1). *In re C. Keffas & Son Florist, Inc.*, 240 B.R. 466, 474-75 (Bankr. E.D.N.Y. 1999). In some instances, like the one presented here, the trustee will conclude that the most effective manner in which to satisfy this statutory duty is to reject a trademark license so that the value

of the trademark can be monetized for the benefit of creditors. The Fourth Circuit's opinion in *Lubrizol* allows trustees to do exactly that. The Seventh Circuit's opinion in this matter, like Judge Ambro's concurring opinion in *Exide*, significantly interferes with that statutory mandate.

Fourth, the Seventh Circuit's opinion also undermines a fundamental purpose of Section 365(a), which is to relieve the debtor or trustee from burdensome obligations. *See, e.g., In re Old Carco LLC*, 424 B.R. 633, 639 (Bankr. S.D.N.Y. 2010) ("By rejecting a contract or lease, a debtor is granted the opportunity to be relieved of burdensome obligations."). As interpreted by the Fourth Circuit in *Lubrizol*, Section 365(a) permits a debtor or trustee to reject an executory contract that includes the right to use a trademark and thereby focus on financial rehabilitation and payment of creditors. In contrast, under the Seventh Circuit's holding in this case (as well as Judge Ambro's opinion in *Exide Technologies*), a debtor or trustee cannot terminate a licensee's right to continue to use a trademark by rejecting an executory contract. The debtor or trustee therefore cannot eliminate a licensor's obligation to police a licensee's use of a trademark. This means that a trustee in the Seventh Circuit would have to employ quality auditors, accountants, and others to police the use of the trademark by the licensee so as to safeguard, monetize, and maximize the assets of the estate. Clearly, these are burdensome obligations that should be relieved by rejection.

Finally, the unresolved inter-circuit conflict also creates significant uncertainty regarding the rights and obligations of bankruptcy trustees. If a bankruptcy petition is filed in the Fourth or Seventh Circuit, the trustee would presumably know the impact of rejection of an executory contract that includes the right to use a trademark. In other circuits, the trustee would not know what rights remain with the licensee if he or she rejected such a contract, nor would the trustee know whether that outcome would be upheld on appellate review. The answer should be clear, and it should not turn (as it currently does) on which circuit's law applies. For this reason too, as well as those in Section III below, the matter raises important questions of federal law that merit this Court's review.

III. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING BOTH THIS INTER-CIRCUIT CONFLICT AS WELL AS FOR ADDRESSING THE LEGAL SIGNIF-CANCE OF LEGISLATIVE SILENCE.

This case presents an ideal vehicle for addressing the existing inter-circuit conflict. The case presents a fully developed factual record, which allows the Court to assess the question presented in a specific, non-abstract setting. The bankruptcy court, after a six-day trial, entered detailed findings of fact and conclusions of law finding in favor of CAM "on equitable grounds." App. 103. The Seventh Circuit, in turn, addressed the question presented as a matter of law and squarely held, based on the plain language of the

Bankruptcy Code, that a licensee can continue to use a debtor's trademarks after the corresponding intellectual-property license is rejected in bankruptcy. That is precisely the question of law that has divided the lower courts.

Equally important, the case also presents an exceptional vehicle to address the legal significance of legislative silence. After the Fourth Circuit issued its opinion in *Lubrizol*, Congress responded by amending Section 365 to add Section 365(n), which allows a licensee to continue to use a debtor's "intellectual property" after the corresponding intellectual-property license is rejected in bankruptcy. 11 U.S.C. § 365(n). Significantly, Congress defined "intellectual property" to include patents, copyrights, and trade secrets but *not* trademark rights. 11 U.S.C. § 101(35A). Thus, Congress legislatively overruled the Fourth Circuit's holding in *Lubrizol* as applied to patents, copyrights, and trade secrets, but not as applied to trademark rights.

The Court has addressed this particular issue – the legal significance of legislative silence – in numerous cases, including the following:

- In *United States v. Wells*, 519 U.S. 482, 496 (1997), Justice Souter warned that it is "treacherous to find in congressional silence alone the adoption of a controlling rule of law."
- In *Boumediene v. Bush*, 553 U.S. 723, 788 (2008), Justice Kennedy noted that the Detainee Treatment Act "does not explicitly empower the Court of Appeals

to order the applicant in a DTA review proceeding released" and then held: "Yet, for present purposes, we can assume congressional silence permits a constitutionally required remedy."

- In *Credit Suisse Securities (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1421 (2012), Justice Scalia noted that "Congress' silence, while permitting an inference that Congress intended to apply ordinary background tort principles, cannot show that it intended to apply an unusual modification of those rules" (internal quotation marks and citation omitted).

- In *Musick, Peeler & Garrett v. Employers Insurance of Wausau*, 508 U.S. 286, 305-06 (1993), Justice Thomas wrote in dissent that "[c]ourts should not treat legislative and administrative silence as a tacit license to accomplish what Congress and the SEC are unable or unwilling to do."

This case presents an exceptional vehicle to provide needed guidance to lower courts regarding what meaning, if any, can be given to Congress' decision to address certain legal issues (here, patents, copyrights, and trade secrets) while leaving other – closely related – issues (here, trademark rights) untouched.

Finally, given the dramatic rise in bankruptcy filings following the 2008 financial crisis and ensuing economic recession, this is an especially appropriate time to resolve the question presented. According to

statistics compiled by the Administrative Office of the U.S. Courts, over 1.3 million bankruptcies were filed during the year ending June 30, 2012.[2] The question presented here may arise in many of those matters, which are currently pending in courts across the country. By accepting review at this time, the Court can conclusively decide the question presented and provide needed guidance to the lower courts on these important issues.

CONCLUSION

For each of these reasons, this Court should grant a writ of certiorari to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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[2] Administrative Office of the U.S. Courts, U.S. Bankruptcy Courts – Bankruptcy Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending June 30, 2011 and 2012, http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2012/0612_f.pdf.