



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 3A**  
**THE INSOLVENCY SYSTEM OF THE UNITED STATES**

This is the **summative (formal) assessment** for **Module 3A** of this course and is compulsory for all candidates who **selected this module as one of their compulsory modules from Module 3**. Please read instruction 6.1 on the next page very carefully.

If you selected this module as **one of your elective modules**, please read instruction 6.2 on the next page very carefully.

**The mark awarded for this assessment will determine your final mark for Module 3A.** In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

## **INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT**

**Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.**

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment3A]**. An example would be something along the following lines: 202122-514.assessment3A. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 If you selected Module 3A as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2022**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2022. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 3A as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2022** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. If you elect to submit by 1 March 2022, you **may not** submit the assessment again by 31 July 2022 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

**ANSWER ALL THE QUESTIONS**

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**QUESTION 1 (multiple-choice questions) [10 marks in total]**

Commented [H(2): Total marks 9/10

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

**Question 1.1**

Commented [H(3): Correct, 1 mark

ABC Corp is filing for bankruptcy under chapter 11. Which of the following **is not** a party in interest in that proceeding?

- (a) A neighboring land owner who has leased equipment to ABC Corp.
- (b) ABC's government regulator.
- (c) A bank that has loaned money to ABC.
- (d) A local advocacy group.**
- (e) All of the above.

**Question 1.2**

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Which of the following statements regarding executory contracts is **false**?

- (a) Executory contracts are clearly defined by the bankruptcy code.**
- (b) Chapter 11 debtors have greater flexibility than chapter 7 debtors on when they may assume, assign or reject an executory contract.
- (c) In the most common formulation, executory contracts are defined as those where both sides to a contract have material unperformed obligations.
- (d) A court will generally defer to a debtor's business judgment regarding whether to assume or reject an executory contract.
- (e) Under the hypothetical test, a debtor cannot assume an executory contract if the debtor could not also assign the contract.

**Question 1.3**

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In which of the following scenarios does a bankruptcy court have constitutional authority to issue a final order? Assume in each that the counterparty to the dispute has not consented to the bankruptcy court's exercise of jurisdiction.

- (a) A counterclaim against the estate that introduces a question under state law.
- (b) Since the list of core proceedings is non-exhaustive, a bankruptcy court may issue a final determination on any matter that comes before it.

- (c) A creditor's claim against an affiliate of the debtor that has guaranteed the debtor's obligation to the creditor
- (d) A debtor's motion to dismiss an involuntary bankruptcy petition.
- (e) None of the above.

**Question 1.4**

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Which of the following statements about "pre-packs" is **false**?

- (a) A pre-pack cannot be used if the debtor wishes to reject executory contracts.
- (b) Creditors must have sufficient information about the debtor and the plan to make an informed voting decision.
- (c) A pre-pack debtor may spend as little as a single day in bankruptcy.
- (d) The proposed plan of reorganization is submitted to the bankruptcy court together with the voluntary petition.
- (e) Creditors' commitment to vote in favor of the plan may be memorialized in a restructuring support agreement.

**Question 1.5**

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Which of the following statements regarding cramdowns is **true**?

- (a) If one insider creditor approves of the plan of reorganization, all other impaired classes may be crammed down.
- (b) Because cramdowns do not require the consent of all classes, the plan of reorganization may not be fair and equitable to all impaired classes.
- (c) Differential treatment of different classes is permitted if there is a reasonable, good faith basis for doing so and such treatment is required for the plan of reorganization to be successful.
- (d) Class definition is rarely a battleground when a debtor tries to cramdown classes.
- (e) Dissenting creditors are not permitted to challenge the classification of a creditor supporting the cramdown.

**Question 1.6**

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Which of the following statements about the plan exclusivity period is **true**?

- (a) The exclusivity period is 1 year.
- (b) The exclusivity period cannot be extended.
- (c) The exclusivity period cannot be shortened.

(d) During the exclusivity period, only a creditor may propose a plan of reorganization.

(e) During the exclusivity period, only the debtor may propose a plan of reorganization.

**Question 1.7**

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Which of the following statements about chapter 15 is **false**?

(a) The automatic stay applies upon the filing of a petition for recognition.

(b) A debtor cannot be subject to an involuntary chapter 15 proceeding.

(c) A chapter 15 petition must be filed by a foreign representative.

(d) The automatic stay applies only to property within the territorial jurisdiction of the United States.

(e) Recognition may be granted to a foreign proceeding as either foreign main or foreign non-main.

**Question 1.8**

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Which of the following statements about 363 sales is **false**?

(a) A 363 sale permits a debtor to sell an asset free and clear of encumbrances.

(b) A creditor's lien on assets sold in a 363 sale attaches to the proceeds of the sale.

(c) A 363 sale must be conducted as an auction with a stalking horse bidder.

(d) Purchasers may pay a higher price for assets sold in a 363 sale than in an out-of-court transaction.

(e) Sophisticated parties will insist on a 363 sale if there is any question regarding whether the sale is "in the ordinary course of business".

**Question 1.9**

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If a debtor rejects an executory trademark license agreement under which it licenses a trademark to its counterparty, which of the following is **true**?

(a) The counterparty has a claim for damages for breach of contract.

(b) The counterparty must immediately stop using the trademark.

(c) The counterparty can continue using the trademark for the remaining period of the license.

(d) Both (a) and (b).

(e) Both (a) and (c).

**Question 1.10**

Who may serve as a foreign representative to seek recognition of a foreign proceeding under chapter 15?

- (a) The board of directors of the debtor if it is a debtor-in-possession in the foreign proceeding.
- (b) An insolvency professional appointed by a creditor where the foreign proceeding is an involuntary receivership.
- (c) An officer of the debtor if it is a debtor-in-possession in the foreign proceeding.
- (d) An insolvency professional appointed by the court overseeing the foreign proceeding.
- (e) All of the above.

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**QUESTION 2 (direct questions) [10 marks]**

**Commented [H(13)]:** Total marks 8.5/10

**Question 2.1 (2 marks)**

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What is the difference between a voluntary petition for bankruptcy and an involuntary petition for bankruptcy?

Voluntary petition is where the debtor files a petition himself to the Court. It does not require allegation of insolvency. The bankruptcy proceedings can be administrated under any chapter of Bankruptcy Code.

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Involuntary petition is a petition filed by creditors. Creditors need to make allegation that the debtor does not pay his debt. The proceeding is commenced only under chapter 7 or chapter 11.

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**Question 2.2 (2 marks)**

**Commented [H(17)]:** Total marks 1.5/2

What are two potential consequences of a violation of the automatic stay?

Violation of automatic stay can constitute a contempt of court and such transaction could be voided by the Court. Contempt section maybe imposed to the violator, the violator may need to pay attorney fee of the debtors and has to restore the position as if the violated act has not taken effect at the first place. The Court can also impose fine on the violator until the violated act was rectified.

**Commented [H(18)]:** Correct, 1 mark

**Commented [H(19)]:** Partially correct, 1/2 mark, the act is void or voidable depending on the circuit in which the court sits

**Question 2.3 (3 marks)**

**Commented [H(20)]:** Total marks 2/3

In what circumstances is a claim considered "impaired"? When is a holder of an impaired claim not entitled to vote on a proposed plan of reorganization and what happens instead?

An impaired claim is a claim in an impaired class. Under Chapter 11 of Bankruptcy Code, the creditor is impaired if the creditor legal, equitable, and contractual rights will be affected under the proposed plan of reorganization, i.e. their claims cannot be repaid in full.

**Commented [H(21)]:** Correct, 1 mark, though note that should be "or" because any one of those forms of impairment would be sufficient

In case of a creditor files an objection to the plan, he will not have the right to vote and will be classified as a dissenting impaired class. Cramdown maybe applied by the Court to confirm

**Commented [H(22)]:** Correct, 1 mark, though I was looking for creditors who will receive nothing under the plan are deemed to reject and cannot vote

the plan dissenting impaired classes if at least one impaired class votes to accept the plan. Meanwhile, the dissenting creditor will have a chance to let his grievances heard in court. It should be noted that they should not discriminate unfairly and must be fair and equitable to the dissenting classes.

#### Question 2.4 (3 marks)

Answer the following questions about preferences, actual fraudulent conveyances and constructive fraudulent conveyances:

(1) Which cause of action applies only to transfers made on account of antecedent debt?

Preference is the only cause of action for debtor paying a creditor for a pre-existing debt. The transfers made because of antecedent debt showed that the debtor has preference towards a particular creditor which discriminates similarly situated creditors.

(2) Which cause of action requires that the debtor be presumed or proven to have been insolvent at the time of the transfer?

To prove the debtor is insolvent at the time of transfer is one of the elements of preference claims. The debtor is presumed to be insolvent on and during the 90 days before the presentation bankruptcy petition unless the creditor can provide evidences rebutting this assumption.

(3) Which cause of action requires that the debtor be proven to have intended to frustrate creditors' recoveries?

The cause of action is actual fraudulent conveyances required to prove the debtor is intended to hinder, delay or defraud, hence, frustrating the creditors when the debtors were/became indebted. The debtor's intent must be proven by reference to "badges of fraud" in fraudulent transfer law.

#### QUESTION 3 (essay-type questions) [15 marks in total]

##### Question 3.1 (3 marks)

How did *Stern v Marshall* change the law of bankruptcy court jurisdiction and authority to enter a final order?

Pursuant to 1978 Bankruptcy Code, district court can exercise its jurisdiction on bankruptcy proceedings. The code also allowed district court referred bankruptcy proceedings to bankruptcy courts.

Such referral systems divided matters into "core" and "non-core" nature. Bankruptcy judges can hear and issue final order on "core" matters. For "non-core" matter, if it is largely related to the bankruptcy proceedings, the bankruptcy judges can hear the issue but final decision will be made in district court.

Upon the decisions of *Stern v Marshall* in US Supreme Court, it was ruled that bankruptcy court cannot issue final order on "core" proceedings as it invaded jurisdiction of Article III. Subsequently, US Supreme Court issued a guidance on the turmoil created by the *Stern v Marshall* judgement. The guidance laid down the bankruptcy court jurisdiction and authority to enter a final order. The bankruptcy court can i) enter into a final order on motion challenging

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Commented [H(27)]: Total marks 14.5/15

Commented [H(28)]: Total marks 3/3

Commented [H(29)]: Correct, 1 mark

Commented [H(30)]: Correct, 1 mark

the validity of a petition, and, ii) determine core proceedings by issuing report and recommendation for review by district court. With consent of engaged parties, the bankruptcy court may enter a final orders or judgement.

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### Question 3.2 (3 marks)

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What provisions of the Bankruptcy Code may not be invoked by a foreign representative in a chapter 15 proceeding? What are two ways that the foreign representative can obtain equivalent relief?

Chapter 15 excludes the foreign representative the provisions for use of avoidance powers, i.e. powers to avoid acts determinantal to creditors, under the Bankruptcy Code. The exclusions did not bar the foreign representative power of avoidance of preferences and fraudulent conveyances in a pre-petition stage.

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Commented [H(34)]: Partially correct, 1/2 mark, specifically they must be under non-bankruptcy US or foreign law

The foreign representative can initiate a plenary proceeding in avoidance powers under chapter 7 or 11. In case the creditor/debtor has not seek avoidance power prior to engagement of foreign representative, the foreign representative is also entitled to start a proceeding under chapter 15 upon completion of recognition.

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### Question 3.3 (4 marks)

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Describe the differences between interlocutory and final orders and how an appeal may be taken from each. Which courts hear direct appeals from bankruptcy court orders?

Interlocutory order is non-final nature which only resolved partial claims and issues. While a final order is finalized and leaving no issue unresolved.

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Interlocutory order can be appealed only with the leave of appellate court. Final order needed not to have leave but can appeal directly.

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Commented [H(39)]: Correct, 1/2 mark

It should be noted that a constitutional final order is an order can resolve the issues entirely and the parties involved has given consent to the bankruptcy court's jurisdiction.

The bankruptcy court can made constitutionally final order but was interlocutory in nature is not for the purpose appeal. Meanwhile, an order in final nature but without the consent of all parties, i.e., not a final order in constitutional sense, would be for the purpose of appeal.

For appeal of bankruptcy court decision, it will normally hear by district court which the judges will hear all future appeals related to the proceedings. Pursuant to 28 USC s158(b), if the First, Sixth, Eighth, Ninth and Tenth Circuit are elected, the appeals will be heard by a Bankruptcy Appellate Panel conducted by the judges of bankruptcy courts within the circuit. Appeal may also go to court of appeals in rare circumstances, if the bankruptcy court / district court certified that i) no controlling decision for the courts on the issues raised in the appeal, and ii) the appeal expedites the progress of the case significantly.

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Commented [H(41)]: Correct, 1 mark

### Question 3.4 (5 marks)

Commented [H(42)]: Total marks 5/5

What fiduciary duties do directors of Delaware corporations owe and to whom are the duties owed in the ordinary course of business? To whom are duties owed when the corporation is potentially or actually insolvent?

The directors owe a fiduciary duty of loyalty to the best interest of a corporate on a disinterested and independent basis. It also owed a duty of care in making educated decisions.

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Commented [H(44)]: Correct, 1 mark



Unless the directors are proved they are not acted in good faith, diligently and for the best interest of the corporate, the directors are protected by business judgement rule for liabilities arising from bad decision. The directors owe fiduciary duties to the corporate as well as shareholder. The directors do not owe any duty to creditors even in the event potentially or actually insolvent as laid down by Delaware Supreme Court in North Am Catholic Educational Programming Foundation, Inc v Gheewalla.

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Commented [H(46)]: Correct, 1 mark

Commented [H(47)]: Correct, 1 mark

However, in bankruptcy petition under Chapter 11 of Bankruptcy code, the debtor may assume the responsibility to assume duties to safeguard the interests of creditor if no trustee is appointed. In this situation, the interest of equity holders would be set aside. This is particular applicable to non-ordinary course transactions, i.e. 363 sales of property. The debtors owe a fiduciary duty to consider creditors' interests.

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#### QUESTION 4 (fact-based application-type question) [15 marks in total]

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##### Question 4.1 [4 marks]

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Gambling Corporation is incorporated and has a principal place of business in Greece and it operates casinos and betting parlors in many international cities, including Athens, Las Vegas, London and Macau. Gambling Corp's bonds (governed by English law) are due to mature in one (1) year, but it is unable to repay or refinance them. Gambling Corp is considering using an English scheme of arrangement to restructure the bonds.

Discuss whether the English scheme of arrangement could be granted recognition under US chapter 15 as a foreign main or foreign non-main proceeding.

Foreign main proceedings are commenced in the debtor's center of main interests ("COMI"). Proceedings in jurisdiction other than the debtor's COMI can be recognized as foreign non-main proceedings only if the corporation had an establishment in the jurisdiction. List of factors for considerations of COMI was identified in *re Sphinx, Ltd*, they are, location of headquarter, management, primary assets, majority of debtor's creditor affected as well as jurisdiction whose law will apply.

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An analysis of COMI of Gambling Corporation is as follows,

- 1) The headquarter of Gambling Corporation is Greece where it incorporated and principal place of business.
- 2) Management and assets are located in many international countries, such as, Greece, the USA, England and China, which may be deemed as establishments.
- 3) The applicable jurisdiction for scheme of arrangement of bond appear to be in England, and
- 4) The location of Gambling Corporation's creditors affected by the scheme of arrangement was unknown.

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Commented [H(53)]: Correct, 1 mark

As the applicable jurisdiction of scheme of arrangement is in England where Gambling Corporation has an establishment in it. The scheme of arrangement has nothing to do with the principal place of business in Greece. The proceedings may be granted as a foreign non-main proceeding under US chapter 15.

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##### Question 4.2 [5 marks]

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Oil Corporation is incorporated in Delaware and has its principal place of business in Texas. Oil Corp is facing a number of challenges to its business. First, ShipCo, one of its key customers, has filed a breach of contract lawsuit in Texas state court alleging that Oil Corp sold it contaminated oil that caused USD 1 billion in damage to ShipCo's container ships.

Second, the US Department of Justice is investigating whether Oil Corp illegally purchased oil from countries subject to US sanctions. Third, Oil Corp. has missed a payment on its secured loan from USA Bank, and USA Bank is threatening to foreclose on an Oil Corp refinery located in the Philippines. Fourth, because of all these distractions, Oil Corp has forgotten to pay rent on its Houston, Texas office space and its landlord is threatening to evict it. What would be the effect of Oil Corp filing a chapter 11 petition on each of these four situations?

Commencing a proceeding under chapter 11 will allow Oil Corp to continue to operate the ordinary course of business without the interference of trustee. It is a debtor in possession situation, Oil Corp assumes duties to safeguard the interests of creditor. It will also allow Oil Corp to propose a reorganisation plan to keep the business afloat.

First, a worldwide automatic stay of proceedings against Oil Corp. Oil Corp can temporarily prevent ShipCo from continuing/enforcing the court proceedings against the Oil Corp regarding the USD 1 billion damage. It can protect the property of the estate from enforcement of proceedings by ShipCo's pre-petition claim.

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Commented [H(57)]: Correct, 1 mark

Secondly, it should be noted that the automatic stay applies except for regulatory investigations. Therefore, US Department of Justice can continue to investigate unlawful oil purchase.

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Thirdly, the automatic stay has a worldwide effect which can prevent USA Bank to foreclose Oil Corp's refinery located in the Philippines. Oil Corp may continue to operate the refinery as ordinary course of business or sell the refinery by a 363 sale to other Philippines's refinery operator with the consent of USA Bank as well as court approval. In the meantime, USA Bank will have interests on the proceeds and have priority on distribution of the proceeds.

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Fourthly, the lease of office space in Houston is an executory contract. Oil Corp may deem to have assumed the contract if it still occupied the leased premises. On the other hand, Oil Corp can also assign the lease agreement without the consent of the landlord. The landlord cannot evict Oil Corp by effect of automatic stay in case the lease has not expired.

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#### Question 4.3 [6 marks]

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Oil Corp has filed for bankruptcy and is planning to sell its plastic manufacturing business through a 363 sale. The plastic manufacturing business operates under the trademark "Interconnect", which is licensed from Plastic Corp. Oil Corp has invented several patented processes for plastic manufacturing, which it licenses to Plastic Corp. The main manufacturing facility for the plastic business is in Dallas, and Oil Corp has granted a lien on the facility to USA Bank to secure its USD 500 million loan.

Oil Corp thinks it will get the highest return for the plastics manufacturing business if it can (i) assume and assign the trademark license; (ii) reject the patent licenses so the purchaser has the exclusive right to use the patents; and (iii) sell the manufacturing facility free and clear of the USA Bank lien. Can Oil Corp achieve each of these goals without the consent of Plastic Corp and USA Bank? Why or why not?

Before answering to the questions, we have to define executory contracts. As part of the debtor-friendly features of Bankruptcy Code, Oil Corp can assume, reject and assign executory contracts. A contract is executory if there are material unperformed obligations on both sides. As in the time of filing bankruptcy, both the trademark and patents licenses are still unperformed and the failure perform the contract may lead to a material breach excusing performance of the other.

For the i) situation, Oil Corp elects to transfer its rights to a third party. Counter party consent may be necessary for involvement of non-bankruptcy law, i.e., in this case involving federal trademark law. Pursuant to court decision of re Trump Entertainment Resorts, Inc, the Delaware bankruptcy court adopted the "hypothetical test" and concluded that trademark licenses are not assumable or assignable absent licensor consent. Oil Corp has to obtain Plastic Corp consent before assume and assign the trademark license.

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Commented [H(63)]: Correct, 1 mark

For the ii) situation, rejecting the patent licenses will lead to breach of contract giving Plastic Corp an unsecured pre-petition claim in damages under §365(g)1. On the other hand, if Plastic Corp continues to pay as required by the license, section 365(n) permits the licensee to retain certain of its rights even after Oil Corp rejected the license. Rejection of patent license gives sufficient protection to the licensee; thus, consent of Plastic Corp is not necessary.

Commented [H(64)]: Correct, 1 mark

Commented [H(65)]: Correct, 1 mark, it can reject but this will not end the licensees' use of the patents

For the iii) situation, section 363 sales provide sale of assets for non-ordinary course of business free and clear of all liens in a legal or equitable manner. In case, USA Bank interest is in bona fide dispute or where the value of the manufacturing facility exceeds the value of the liens, Oil Corp would need to obtain USA Bank consent. USA Bank interest will be attached to the disposal proceeds and will receive priority in distribution of proceeds. Other than these situation, Oil Corp needs not to obtain USA Bank consent.

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Commented [H(67)]: Correct, 1 mark

**\* End of Assessment \***