



**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 8/10

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

Commented [H(4)]: Correct, 1 mark

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**

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.

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**Question 1.5**

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.

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**Question 1.6**

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.

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(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.

**Commented [H(12):** Incorrect, the correct response is (e)

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

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

**Question 2.1 (2 marks)**

**Commented [H(14):** Total marks 2/2

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

A voluntary petition for bankruptcy is filed by the debtor itself, and there is no requirement for the debtor to be insolvent. An involuntary petition for bankruptcy is filed by the creditor of an eligible debtor, and must state that (a) the debtor is unable to pay its undisputed debts as they fall due; or (b) a custodian, other than a trustee, agent or receiver appointed or authorised to take charge of less than substantially all of the debtor's property for purpose of enforcing a lien against such property, was appointed or took possession within 120 days preceding the filing of the petition.

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**Commented [H(16):** Correct, 1 mark

**Question 2.2 (2 marks)**

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

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

A violation of the automatic stay amounts to a contempt of court, and may result in contempt sanctions such as paying for actual damages incurred including costs and attorney's fees. Further, actions taken in violation of the automatic stay will generally be void (or voidable) and given no legal effect.

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**Commented [H(19):** Correct, 1 mark

**Question 2.3 (3 marks)**

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

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?

A claim is impaired if its legal, equitable and contractual rights are to be modified (including delay in payment or if it will be paid less than the full value of the claim). A class may be unimpaired where, notwithstanding the contractual right for accelerated payment upon occurrence of a default, the plan cures the default, reinstates the maturity of such claim, and compensates the holders of such claim for damages incurred.<sup>1</sup>

**Commented [H(21):** Correct, 1 mark

<sup>1</sup> 11 U.S. Code § 1124

A holder of an impaired claim is not entitled to vote on the plan if it is a class that will receive nothing under the plan. Such class will be deemed to reject the plan. Class of creditors with unimpaired claims will also not be entitled to vote on the plan and are deemed to accept the plan.

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Commented [H(23)]: Correct, 1 mark

If the plan is confirmed by the court and converts to a court order, then it is binding on the debtor and all parties in interests, including the class which did not vote because they received nothing under the plan.<sup>2</sup>

### Question 2.4 (3 marks)

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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?

Preferences

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

Preferences

Commented [H(26)]: Correct, 1 mark

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

Actual fraudulent conveyances

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

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#### Question 3.1 (3 marks)

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

Prior to *Stern v Marshall*, it was thought that bankruptcy courts have jurisdiction to enter a final order for matters in core proceedings. The focus was therefore on whether the proceedings were core or non-core. However, in *Stern v Marshall*, the US Supreme Court held that a bankruptcy court could not issue final orders for matters under Article III US Constitution jurisdiction, even if in core proceedings. In that case, it was unconstitutional for the bankruptcy court to issue a final order in the debtor's counterclaim (which is a core proceeding) as the issues of the counterclaim was a state law claim under Article III jurisdiction.

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Commented [H(31)]: Correct, 1 mark

Post *Stern v Marshall*, the bankruptcy court may determine matters in core proceedings which they do not have constitutional authority by providing proposed findings of fact and conclusions of law for review by the district court, or issue final orders if the parties consent to entry of final orders by the bankruptcy court.<sup>3</sup> This has been implemented in the Bankruptcy Rules.

Commented [H(32)]: Correct, 1/2 mark, also a bankruptcy court can enter a final order on a challenge to a petition

<sup>2</sup> 11 U.S. Code § 1141(a)

<sup>3</sup> Module 3A Guidance Text, pages 17-18

**Question 3.2 (3 marks)**

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?

A foreign representative in a Chapter 15 proceeding cannot invoke avoidance powers under the Bankruptcy Code (see 11 U.S. Code § 1521(a)(7), which expressly exclude reliefs in specific provisions including section 547 on preference and section 548 on fraudulent transfers).

As the reliefs excluded are the powers of avoidance as provided under the Bankruptcy Code, a foreign representative can still seek to avoid transactions under other applicable law (other than the Bankruptcy Code), including foreign law if applicable.

Another way a foreign representative can invoke avoidance powers under the Bankruptcy Code is in plenary bankruptcy proceedings (e.g. Chapter 7 or 11 proceedings), whether already commenced prior to recognition of foreign proceedings or if the foreign representative itself decides to commence such proceedings after recognition of the foreign proceedings.

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Commented [H(35)]: Correct, 1 mark

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**Question 3.3 (4 marks)**

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?

A final order is when a decision has been entered that "end the litigation on the merits and leaves nothing for the court to do but execute the judgment".<sup>4</sup> On the other hand, an interlocutory order is one which does not finally determine a cause of action but only decides some intervening matter pertaining to the cause.<sup>5</sup> A final order is appealable as of right while interlocutory orders may only be appealed where leave to appeal is granted by the appeal court.

Appeals from bankruptcy court orders are generally heard by the district court for the district in which the bankruptcy court sits. However, there are certain circuits (i.e. the First, Sixth, Eighth, Ninth and Tenth Circuits) that have elected to convene a Bankruptcy Appellate Panel (BAP) to hear the bankruptcy appeals in their circuits. Although there is a BAP, the parties in those circuits can still opt to have the bankruptcy appeal heard by the district court.

Thereafter, there is a further right of appeal to the circuit court of appeals.

Subject to acceptance by the Court of Appeal, an appeal may go directly from a bankruptcy court to the court of appeals where the bankruptcy court or the circuit court certifies that the appeal raises a question of law where there is no controlling decision of the circuit of the US Supreme Court or there are conflicting controlling decisions, or that the direct appeal may materially advance the progress of the case.<sup>6</sup>

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Commented [H(38)]: Correct, 1/2 mark

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

Commented [H(40)]: Correct, 1/2 mark

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Commented [H(42)]: Correct, 1 mark

Commented [H(43)]: Correct, 1 mark

**Question 3.4 (5 marks)**

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<sup>4</sup> <https://www.justice.gov/jm/civil-resource-manual-96-who-what-when-where-why-and-how-appeals-bankruptcy-proceedings>

<sup>5</sup> *In re Urban Broadcasting Corp.*, 304 B.R.263, 269 n. 13 (E.D. Va.2004).

<sup>6</sup> Module 3A Guidance Text, page 20.



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?

Under Delaware law, directors owe a fiduciary duty of **loyalty** which essentially requires directors to act in good faith to advance the best interests of the corporation and to refrain from conduct that injures the corporation. Directors also owe a fiduciary duty of **care** which requires directors to make informed business decisions based on material information to the decision. In the ordinary course of business, these duties of loyalty and care are owed by the directors to the **corporation** and its **shareholders**.<sup>7</sup>

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

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Commented [H(48)]: Correct, 1 mark

Under Delaware law, in making business decisions for the corporation, directors are protected by the business judgment rule. The business judgment rule is a rebuttable presumption that directors acted in good faith and on the basis of reasonable information when making business decisions. To rebut the presumption, it must be shown that the majority of the directors were grossly negligent by not being adequately informed, not acting in good faith, or did not honestly believe the decision was in the best interest of the corporation. If the presumption is not rebutted, the directors' judgment will not be second-guessed.

When the corporation is potentially or actually insolvent, the fiduciary duties of loyalty and care are still owed to the corporation and its shareholders. **Creditors** of the corporation have no right to assert claims of breach of fiduciary duties against the corporation's directors.<sup>8</sup>

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

##### 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.

For recognition of the English scheme of arrangement under US Chapter 15, the foreign representative must establish that there is a foreign proceeding pending in respect of Gambling Corporation and that the foreign representative is empowered to act by such foreign proceeding.

A foreign proceeding means "a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation".<sup>9</sup> Based on this, an English scheme of arrangement proceedings to restructure Gambling Corp's bonds would fall within the definition of foreign proceeding as the proceedings would involve reorganisation of the assets and affairs of Gambling Corp under the control or supervision of the English court.

<sup>7</sup> <https://corplaw.delaware.gov/delaware-way-business-judgment/>

<sup>8</sup> *North Am Catholic Educational Programming Foundation, Inc v Gheewalla*, 930 A.2d 92, 103 (Del 2007)

<sup>9</sup> 11 U.S. Code § 101(23)

However, recognition of the proceedings must be as either a foreign main proceeding or a foreign non-main proceeding. A proceeding will be recognised as the foreign main proceeding if the proceedings are in a jurisdiction where the debtor's center of main interests (COMI) is located. The debtor's place of incorporation is presumed to be the COMI unless rebutted.<sup>10</sup> On the facts available in this case, Gambling Corp was incorporated and has its principal place of business in Greece. Gambling Corp's COMI is therefore in Greece, and English scheme of arrangement proceedings in the UK could not be recognised as foreign main proceedings.

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Commented [H(52)]: Correct, 1 mark

For a proceeding to be recognised a foreign non-main proceedings, it must be shown that the debtor had an establishment in the jurisdiction. An establishment is defined as "any place of operations where the debtor carries out a nontransitory economic activity."<sup>11</sup> On the facts, since Gambling Corp has operations for casinos and betting parlors in London, it can be shown that Gambling Corp has an establishment there and the English scheme of arrangement proceedings can be recognised as a foreign non-main proceedings under Chapter 15.

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Commented [H(54)]: Correct, 1 mark

It is to be noted that most US courts will assess COMI or an establishment as at the date of the US petition for recognition (and not the date of commencement of the foreign proceedings).

#### 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?

Upon Oil Corp filing a chapter 11 petition, a worldwide automatic stay of proceedings against Oil Corp or its property will immediately come into effect. The impact on the four situations are set out below:

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##### (1) ShipCo's lawsuit for breach of contract

The automatic stay will stay the continuation of ShipCo's lawsuit proceedings even though it was commenced prior to filing of the petition.<sup>12</sup>

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

On the other hand, the stay does not prevent the debtor, Oil Corp in this case, from filing action in state court against its creditors for breach of contract.

##### (2) US Department of Justice investigations on illegally purchased oil

Regulatory investigations are exempted from the automatic stay. Therefore, the US Department of Justice can continue their investigations as to whether Oil Corp illegally purchased oil from countries subject to US sanctions.

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<sup>10</sup> 11 U.S. Code § 1516(c)

<sup>11</sup> 11 U.S. Code § 1502(2)

<sup>12</sup> 11 U.S. Code § 362(a)(1)

(3) Default of secured loan from USA Bank and threatened foreclosure

The automatic stay will stay any attempts by USA Bank to collect the missed payment for the secured loan. As the automatic stay has worldwide effect, it will also have the effect of staying the threatened foreclosure by USA Bank of the refinery located in the Philippines.

Commented [H(59)]: Correct, 1 mark

(4) Threatened eviction from office space

The automatic stay will prohibit the landlord from commencing any action to evict Oil Corp as well as any attempts to collect the missed rental payments. Assuming the lease of the office space is unexpired, such unexpired lease of the office space shall be deemed rejected and the trustee must immediately surrender the office space if the trustee does not assume or reject the unexpired lease within 210 days from date of order of relief or date of entry of an order confirming a plan, whichever is earlier (subject to any extension of the period).<sup>13</sup>

Commented [H(60)]: Correct, 1 mark

However, if the lease term of the office space had actually expired, then eviction actions by the landlord against Oil Corp would be statutorily exempted from the stay.

The parties affected by the stay can file a motion to lift the automatic stay.

**Question 4.3 [6 marks]**

Commented [H(61)]: Total marks 6/6

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?

(i) Trademark licence granted by Plastic Corp

Counterparty consent is required to assign an executory contract if applicable law excuses the counterparty from accepting performance from or rendering performance to an entity other than the debtor.<sup>14</sup> This would apply to intellectual property licensing law (see *re Trump Entertainment Resorts, Inc*<sup>15</sup> where it was held that federal trademark law generally bans assignment of trademark licenses absent the licensor's consent).

Commented [H(62)]: Correct, 1 mark

Therefore, the trademark licence granted by Plastic Corp to Oil Corp cannot be assumed and assigned to a third party acquirer without Plastic Corp's consent.

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

<sup>13</sup> 11 U.S. Code § 365(d)(4)

<sup>14</sup> 11 U.S. Code § 365(c)

<sup>15</sup> 526 BR 116 (Bankr D Del 2015)

(ii) Reject patents licensed to Plastic Corp

Licenses of patents licensed by the debtor retain their rights under the licenses/contract and the licenses/contract cannot be terminated in relation to sale of the intellectual property without the licensees' consent.<sup>16</sup>

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

Therefore, the patents belonging to Oil Corp and licenses to Plastic Corp cannot be rejected and terminated without Plastic Corp's consent.

Commented [H(65)]: Correct, 1 mark

(iii) Sale of manufacturing facility free of USA Bank lien

A debtor in possession under chapter 11 proceedings may sell estate property in "the ordinary course of business" without court or creditor interference. Ordinary course of business is not defined by statute and will depend on a two-prong test of "vertical dimension" (i.e. hypothetical creditor's expectations) and "horizontal dimension" (i.e. comparable business), but will include small, routine sales of the debtor's inventory.<sup>17</sup> Here, the sale of the manufacturing facility is not a routine sale and may be disputed as a transaction in the ordinary course of business.

As such, the debtor in possession would be better off opting for the 363 sale to sell property free and clear of creditor interests without court approval, if among others, the creditor consents or where the creditor interest is disputed or where value of the property to be sold is greater than the aggregate value of the liens on the property.<sup>18</sup>

On the facts, Oil Corp can sell the manufacturing facility under a 363 sale without USA Bank's lien if the sale value exceeds the USA Bank's lien in the facility (i.e. USA Bank is oversecured). Alternatively, Oil Corp can offer to provide adequate protection to Bank USA (e.g. by cash payments) so as to lower the value of the lien to below the sale value of the manufacturing facility.

Commented [H(66)]: Correct, 1 mark

Otherwise, if the other conditions are not met, USA Bank's consent is required for the sale of the manufacturing facility to be free of USA Bank's lien.

Upon the 363 sale, USA Bank's interest in respect of the lien will then attach to the proceeds from the sale of the manufacturing facility and USA Bank will have priority in distribution of such sale proceeds.

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**\* End of Assessment \***

<sup>16</sup> 11 U.S. Code § 365(n)

<sup>17</sup> Module 3A Guidance Text, page 26 - 27

<sup>18</sup> 11 U.S. Code § 363(f)