ORDERED.

Dated: July 02, 2021

Caryl E. Delano
Chief United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
www.flmb.uscourts.gov

In re:

AJRANC Insurance Agency, Inc.,

Debtors.
_____/

Case No. 8:20-bk-06493-CED
Chapter 11

Jointly administered

ORDER DENYING DEBTOR'S MOTION TO ASSUME FRANCHISE AGREEMENT WITH GREATFLORIDA INSURANCE HOLDING CORP. (Doc. No. 66)

11 U.S.C. § 365(c)(1) prohibits a debtor from assuming or assigning an executory contract if applicable law excuses the non-debtor party to the contract from accepting performance from or rendering performance to an entity other than the debtor. The issue before the Court is whether § 365(c)(1) precludes a debtor from assuming a non-assignable contract that the debtor wishes to assume, but does not intend to assign. Because it is bound by circuit precedent, this Court finds that Debtor may not assume an executory contract that, under applicable law, is non-assignable.

A. Background

Debtor operates an insurance agency. On March 1, 2017, Debtor and GreatFlorida Insurance Holding Corp. ("GreatFlorida") entered a Franchise Agreement (the "Franchise Agreement") for the use of GreatFlorida's insurance products and services.[1] Under the Franchise Agreement, GreatFlorida granted Debtor a non-exclusive license to use its "Proprietary Marks," defined as the trademarks, service marks, trade names, and logotypes associated with a GreatFlorida insurance agency.[2]

Paragraph 5.3 of the Franchise Agreement states:

> **5.3. Assignment by Franchisee:** With respect to Franchisee's obligations under this Agreement, this Agreement is personal, since Franchisor has entered into this Agreement in reliance on and in consideration of Franchisee's singular personal skills and qualifications, and the trust and confidence that Franchisor reposes in Franchisee. Therefore, except as provided below, *neither Franchisee's interest in this Agreement, its rights or privileges under this Agreement, nor any interest in the Business or the Franchisee (if an entity), may be assigned*, sold, transferred, shared, redeemed, sub-licensed or divided, voluntarily or involuntarily, directly or indirectly, by operation of law or otherwise, in any manner, without first obtaining Franchisor's written consent and without first complying with Franchisor's right of first refusal.[3]

On August 27, 2020, Debtor filed its Chapter 11 petition, and on November 25, 2020, Debtor filed a motion to assume the Franchise Agreement under 11 U.S.C.

[1] Doc. No. 66, pp. 9-54.
[2] Doc. No. 66, pp. 9-10, 12, Franchise Agreement, §§ 1.1.2, 2.1.
[3] Doc. No. 66, p. 19, Franchise Agreement, § 5.3 (emphasis added).

§ 365(a) (the "Motion").[4] Under § 365(a), a trustee or debtor-in-possession, with the court's approval, may assume or reject an executory contract of the debtor.[5] Debtor contends that it seeks only to assume the Franchise Agreement, and does not intend to assign the Franchise Agreement to a third party.[6]

GreatFlorida objects to the Motion on the grounds that § 365(c)(1) prohibits Debtor from assuming the Franchise Agreement for three reasons: (1) the Franchise Agreement includes a non-assignable license to use the Proprietary Marks; (2) the Franchise Agreement expressly prohibits Debtor from assigning its rights under the Franchise Agreement; and (3) GreatFlorida does not consent to the assumption.[7]

B. Discussion

Under § 365(c)(1), a Chapter 11 debtor may not "assume or assign" an executory contract if (1) "applicable law" excuses the other party to the contract from accepting performance from an entity other than the debtor, and (2) the other party does not consent to the assumption or assignment.[8]

The first issue is whether "applicable law" excuses GreatFlorida from accepting performance under the Franchise Agreement from a party other than Debtor. In *In re Trump Entertainment Resorts, Inc.*,[9] the bankruptcy court found that

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[4] Doc. No. 66.
[5] 11 U.S.C. § 365(a).
[6] Doc. No. 98, ¶ 4.
[7] Doc. No. 93.
[8] 11 U.S.C. § 365(c)(1)(A).
[9] 526 B.R. 116 (Bankr. D. Del. 2015).

the substantial weight of authority "holds that under federal trademark law, trademark licenses are not assignable in the absence of express authorization from the licensor."[10] The court also reasoned that a ban on the assignment of trademark licenses serves the purpose of ensuring the quality of the trademark products, which is vitally important to a licensor, and that the parties' license agreement had not "contracted around" this general rule of non-assignability.[11] Accordingly, the court held that the trademark license agreement in *Trump Entertainment* was "not assignable under applicable non-bankruptcy law and is thus not assumable or assignable under Section 365(c)(1)."[12]

Here, the parties agree that the Franchise Agreement includes a license permitting Debtor to use GreatFlorida's Proprietary Marks, including the trademarks, service marks, trade names, and logotypes associated with a GreatFlorida insurance agency. Following the *Trump Entertainment* analysis, the Court concludes that applicable law excuses GreatFlorida from accepting performance of the Franchise Agreement from a party other than Debtor.

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[10] *Id*. at 123.

[11] *Id*. at 124 (quoting *In re XMH Corp*., 647 F.3d 690, 695 (7th Cir. 2011)("[A]s far as we've been able to determine, the universal rule is that trademark licenses are not assignable in the absence of a clause expressly authorizing assignment.") (citing *Miller v. Glenn Miller Productions., Inc.*, 454 F.3d 975, 988, 992–93 (9th Cir. 2006), *In re N.C.P. Marketing Group, Inc.*, 337 B.R. 230, 235-37 (D. Nev. 2005), and 3 *McCarthy on Trademarks* § 18:43 (4th ed. 2010)).

[12] *In re Trump Entertainment Resorts*, 526 B.R. at 127.

The second issue before the Court is whether Debtor should be permitted to assume the Franchise Agreement under § 365(c) because Debtor only seeks to assume—and not to assign—the Franchise Agreement.

In *N.C.P. Marketing Group, Inc. v. BG Star Productions, Inc.*,[13] the Supreme Court recognized the circuit split of authority on this issue. In some circuits, a debtor may only assume an executory contract if the debtor has the hypothetical authority to assign the contract (the "hypothetical test"), while other circuits permit a debtor to assume an executory contract if the debtor does not intend to assign it (the "actual test"). In an order denying certiorari, the Supreme Court referred to the Eleventh Circuit Court of Appeals' ruling in *In re James Cable Partners, L.P.*,[14] as indicating that the Eleventh Circuit is among the circuit courts of appeal that "prefer" the hypothetical test.[15]

In *James Cable,* on facts very similar to those presented here, the debtor moved to assume a cable television franchise agreement over the objection of the franchisor, the City of Jamestown. The court stated that the first condition of § 365(c) presents a "hypothetical question." However, the court found that the City had failed to proffer any Tennessee law that would excuse it from accepting performance from a third

[13] 556 U.S. 1145, 129 S. Ct. 1577, 173 L. Ed. 2d 1028 (2009).
[14] 27 F.3d 534 (11th Cir. 1994).
[15] *N.C.P. Marketing Group, Inc. v. BG Star Productions, Inc.*, 556 U.S. at 1145.

party. Thus the court concluded that the § 365(c)(1) exception did not apply and the debtor could assume the cable franchise agreement.[16]

In *In re Taylor Investment Partners II, LLC*,[17] the bankruptcy court addressed the precedential effect of *James Cable* in a case where the debtor and a franchisor agreed that applicable trademark law barred the debtor from assigning the parties' franchise agreements. Because the agreements were not assignable, the franchisor argued that § 365(c) barred the debtor from assuming the agreements without the franchisor's consent, and that the court was bound to the "hypothetical test" by the Eleventh Circuit's decision in *James Cable*.[18] The debtor argued that the Eleventh Circuit's discussion of the hypothetical test was dicta because "applicable law" did not excuse the City in that case from accepting performance from a third party.[19] The court rejected the debtor's argument, determined that *James Cable* set binding precedent under § 365(c), and found that debtors may not assume a franchise agreement if (1) applicable law would excuse the franchisor from accepting performance from a party other than the debtor, and (2) the franchisor does not consent to a debtor's assumption of the franchise agreement.[20]

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[16] *In re James Cable Partners*, 27 F.3d at 538.
[17] 533 B.R. 837 (Bankr. N.D. Ga. 2015).
[18] *In re Taylor Investment Partners*, 533 B.R. at 839, 841.
[19] *Id*. at 842.
[20] *Id*. at 842-43.

C. Conclusion

For the reasons explained in *In re Trump Entertainment Resorts*, the Court concludes that under non-bankruptcy law, Debtor may not assign the Franchise Agreement. And because the Eleventh Circuit Court of Appeals follows the "hypothetical test" under § 365(c)(1), which permits a debtor to assume an executory contract only if the debtor also has the right to assign the contract, Debtor may not assume the Franchise Agreement.

Accordingly, it is

ORDERED that *Debtor's Motion to Assume Franchise Agreement with GreatFlorida Insurance Holding Corp*. is **DENIED.**

Attorney Scott A. Stichter is directed to serve a copy of this Order on interested parties who do not receive service by CM/ECF and file a proof of service within three days of entry of this Order.