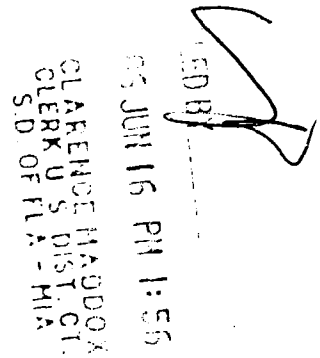
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 06CV80446-CIVIL-GOLD



IN RE:

WELLINGTON VISION, INC.,

Appellant

v.

PEARLE VISION, INC.

Appellee.

_____/

June 16, 2006

INITIAL BRIEF OF APPELLANT

Respectfully submitted,

109381

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was serviced by U.S. mail on June 16, 2006 on Genovese Joblove & Battista, PA, Attorney Craig Rieders, for Appellee, 100 SE 2nd Avenue, Suite 4400, Miami, FL 3313.

109381

SUSAN D. LASKY, ESQ.

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE**

UNITED STATES CODE **PAGE**

TABLE OF AUTHORITIES

RULES OF PROCEDURE

STATEMENT OF JURISDICTION

The Court has jurisdiction of this appeal pursuant to 11U.S. C. § 158(a) and 28 U.S.C. § 1334. Appellate jurisdiction is premised upon 28 U.S.C. § 1291 which requires an appeal to be from a final judgment.

STATEMENT OF THE ISSUES

1. Whether the Bankruptcy Court properly granted the Motion for Relief From Stay filed by Pearle Vision, Inc.

2. Whether the Bankruptcy Court properly denied the Debtor's Motion to Extend Time to Assume or Reject the Sublease between Pearle Vision, Inc. and the Debtor.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS

1. On June 14, 2005, (the "Petition Date") Wellington Vision, Inc., the Debtor herein, filed a voluntary petition under chapter 11, title 11 of the United States Code. (D.N. 1)

THE STAY MOTION

2. On or about July 21, 2005, Pearle Vision, Inc. ("PVI") sought to lift the stay imposed by Bankruptcy Code Section 362 (a) in order to terminate the Franchise Agreement as set forth below. *See* Motion of Pearle Vision, Inc. for Relief From the Automatic Stay. (D.N. 19)

3. On or about July 28, 2005, Wellington Vision, Inc. filed a Response to the Motion for Relief From Stay. (D.N. 22)

4. On or about August 31, 2005, a hearing was conducted on the Motion for Relief From Stay and Response thereto. (D.N. 33).

THE LEASE ASSUMPTION

5. On or about July 28, 2005, Wellington Vision, Inc., the Debtor herein, sought to extend the time to assume or reject the sublease for the business location or the PVI Franchise. *See* Motion of Wellington Vision, Inc. to Extend the Time to Assume or Reject Sublease Between Pearle Vision, Inc. and Debtor. (D.N.25)

6. On or about August 8, 2005, a hearing was conducted on the Motion to Extend the Time to Assume or Reject the Sublease. (D.N. 27). An Order was entered granting the Motion to Extend the Time to Assume or Reject Sublease Between Pearle Vision, Inc. which extended the time to assume or reject the sublease until October 15, 2005 (D.N. 32).

7. On or about October 11, 2005, the Debtor filed a Second Motion to Extend the Time to Assume or Reject Sublease Between Pearle Vision. (D.N. 48). A hearing was scheduled for October 31, 2006.

8. As a result of Hurricane Wilma, the Bankruptcy Court entered an order *sua sponte* rescheduling the hearing of October 31, 2005 until November 21, 2005. (D.N. 50).

9. On or about November 21, 2005, the Bankruptcy Court entered an Order Extending the Deadline to Assume or Reject the Sublease to December 21, 2005. (D.N.51)

THE ORDER

10. On or about December 7, 2005, the Court entered an order setting a status conference on December 27, 2005. (D.N. 58)

11. On or about December 19, 2005, a Third Motion to Extend the Deadline to Assume or Reject the Sublease was filed with the Court. (D.N.62).

12. On or about December 22, 2005, the Court entered an Order Extending the Time to Assume or Reject the Sublease to the date of the status conference which was December 27, 2005 (D.N. 63).

13. On or about January 5, 2006, the Court entered an Order granting PVI the right to exercise all of its rights under applicable nonbankruptcy law; ordering that the Sublease was rejected as of December 27, 2005 and denying the Debtor's Motion to Extend the Time to Assume or Reject the Sublease (D.N. 66).

14. On or about January 13, 2006, Debtor filed a Motion for Reconsideration of the foregoing Order (D.N. 72).

15. On or about March 15, 2006, the Bankruptcy Court entered an Order Denying the Debtor's Motion for Reconsideration (D.N. 108).

16. On March 27, 2006, a Notice of Appeal was filed with respect to the Order entered on January 5, 2006 (D.N. 66) and the Order Denying the Motion for Reconsideration (D.N. 108).

17. On or about March 21, 2006 the case was converted from a chapter 11 reorganization

proceeding to a liquidation under chapter 7. (D.N.113)

B. STATEMENT OF THE FACTS

Debtor is in the business of operating a retail store which sells eye glass frames and related products pursuant to a Franchise Agreement dated April 1, 2002 between Pearl Vision, Inc. (hereinafter "PVI") and Philip C. DeSantis O.D., individually (the "Franchise Agreement"). See Appendix Exhibit A

Attachment C to the Franchise Agreement is a Third Party Dispensing Agreement. Attachment J to the Franchise Agreement is a Sublease between PVI and DeSantis, which is incorporated by reference into the Franchise Agreement (D.N. 19, Exhibit A) See Appendix B. The Sublease and the Third Party Dispensing Agreement are collectively referred to as the "Ancillary Agreements".

Pursuant to an Assignment and Assumption Agreement dated April 8, 2002, Philip C. DeSantis, O.D. assigned all of his right, title and interest in and to the operation of the Franchise Location, which rights are evidenced by the Franchise Agreement and the Ancillary Agreements to Pearle Vision W.G,. Inc., a corporation wholly owned by Philip C. DeSantis (D.N. 19 Exhibit A) See Appendix F.

Pursuant to an Agreement and Consent to Assignment dated April 8, 2002, PVI consented to the transfer of the Franchise Location, Franchise Agreement and the Ancillary Agreements from Phillip DeSantis to Pearle Vision W.G., Inc. (D.N. 19, Exhibit A) See Appendix Exhibit E. See also the Acknowledgment of Terms of Sale Appendix Exhibit D.

The Franchise Agreement was amended effective March 28, 2003 to change the name of the Franchisee to Wellington Vision, Inc. See Amendment to Franchise Agreement (D.N. 19, Exhibit A). See Appendix Exhibit C.

Paragraph ¶ 17 B on page 12 of the Franchise Agreement states in pertinent part:

A. With respect to the Franchisee's obligations hereunder, this Agreement is personal being entered into in reliance upon and in consideration of the singular personal skill and qualifications of Franchisee, and the trust and confidentiality reposed in Franchise by PVI. Therefore, except as hereinafter provided, neither Franchisee's interest in this Agreement, nor any of Franchisee's rights or privileges hereunder, nor the Franchise Business or any interest therein, may be transferred, assigned, sold, shared, redeemed, sublicensed or divided voluntarily or involuntarily, directly or indirectly, by operation of law or otherwise, in any matter, without the prior consent of PVI procured in accordance with the terms and conditions set forth in this Paragraph 17.

B. Franchisee may not sell or otherwise assign or transfer the Franchise Business, the Location, or any interest therein, to a third party without the prior written consent of PVI. PVIs consent to such transfer and sale shall not be unreasonably withheld; provided however, that Franchisee acknowledges and agrees that it shall not be unreasonable for PVI to impose, among other requirements, the following conditions precedent to its consent to any transfer: ..." (emphasis added)

The conditions precedent to the Franchisor's consent are enumerated on pages 12-14 of the Franchise Agreement. As set forth above, the Franchise Agreement was transferred with PVI's consent on a prior occasion from Phillip C. De Santis, O.D. to Pearle Vision, W.G., Inc. (now "Wellington Vision, Inc."). D.N. 19 Exhibit A and Appendix Exhibit A..

PVI sought relief from the automatic stay pursuant to Section 362(d) of the Bankruptcy Code (I) to terminate the Franchise Agreement, and (II) to pursue related relief; including, but not limited to, prohibiting the Debtor from using .. PVI's proprietary rights ...." PVI alleged that "cause" exists due to the Debtor's inability to assume or assign the Franchise Agreement. Approximately four months after conducting a hearing on the Motion for Relief From the Stay,

the Bankruptcy Court entered an Order granting the Motion for Relief From Stay and denied the Motion to Extend the Time to Assume or Reject stating:

> " that under the case law cited by PVI; including, but not limited to, In re Sunterra Corp., 361 Fd 3d 257 (4th Cir. 2004) and In re Catapult, 165 F.3d 349 [STET] that pursuant to 365(c)(1) of the Bankruptcy Code the Debtor herein may not assume or assign the Franchise Agreement without the consent of Pearle Vision, Inc. based on, among other things, the fact that the Debtor has a non-exclusive trademark license with PVI. As a result because the Franchise Agreement is an executory contract, applicable federal trademark law excuses PVI from accepting performance from or rendering performance to an entity other than the Debtor thereby precluding assumption by the Debtor without the consent of PVI as a matter of law..."

The termination of the Franchise Agreement and the Sublease resulted in the conversion of the case to a chapter 7 liquidation. Accordingly, the Debtor lost its business and no creditors were paid.

C. STATEMENT OF THE STANDARD OF REVIEW

Conclusions of law are reviewed *de novo* In re Bilzerian,153 F.3d 1278, 1281 (11th Cir. 1998) (citing In re Bush, 62 F.3d 1319, 1322 (11th Cir 1995). An appellate court reviews a mixed finding of law and fact or a finding of fact which is predicated upon a misunderstanding of a governing rule of law is not protected by the clearly erroneous standard. Bose v. Consumers Union of the United States, Inc., 466 U.S. 485 (1984) *reh'g denied* 467 U.S. 1267.

SUMMARY OF ARGUMENT

In summary, PVI failed to meet the burden of establishing that the Franchise Agreement is a non-exclusive "trademark license" as there was no evidence presented that the PVI "system" described in the Debtor's Franchise Agreement actually included a non-exclusive license to use

specific PVI trademarks. Secondly, the parties to the contract opted out of any "applicable law" prohibiting assignment in paragraph 17 of the Franchise Agreement which describes the circumstances under which PVI will consent to an assignment. The documents before the Court demonstrate that PVI previously provided consent to an assignment from Phillip C. DeSantis to Wellington Vision, Inc. Finally, the plain meaning of Section 365(c) (1) only prohibits assignment or assumption by a trustee, not a debtor or debtor in possession.

The only basis for not extending the time to assume or reject the Sublease was the Court's determination that the stay should be lifted to allow the Franchise Agreement to be terminated. Since the Sublease is an integral part of the Franchise Agreement, the decision not to extend the time to assume or reject the sublease was erroneous.

ARGUMENT

I. THE BANKRUPTCY COURT'S DETERMINATION THAT PEARLE VISION, INC. WAS ENTITLED TO STAY RELIEF AS A MATTER OF LAW WAS CLEARLY ERRONEOUS

The issue before the Bankruptcy Court was whether PVI was entitled to relief from the stay imposed by Section 362(a) for cause pursuant to Section 362 (d) as a matter of law on the ground that Section 365 prevents the Debtor from assuming or assigning the Franchise Agreement. Section 362 (g) provides that the moving party has the burden of proof on all issues with respect to a motion for relief from stay excepting the issue of the debtor's equity in the property. Section 365 sets forth a broad policy favoring assumption and assignment of unexpired leases and executory contracts. In re Quantegy, Inc., 326 B.R. 467, 470 (M.D. Ala 2005) citing In re Sunterra Corp., 361 F.3d 257, 266 (4th Cir. 2004) With limited exceptions, Section 365 (a) allows a trustee to assume or reject any executory contract or unexpired lease of the debtor. Id. Section 365 (f) (1) permits a trustee to assign contract rights to third parties even in the face of a contract provisions or applicable law prohibiting or restricting assignment. Id. Section 365(f)(1)

provides:

> Except as provided in subsection (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or applicable law, that prohibits, restricts or conditions the assignment, the trustee may assign such contract or lease.

Generally both Section 365 (a) and Section 365 (f)(1) operate irrespective of the objections of other parties to the contract. Id.

Section 365 (c)(1) creates a narrow exception to the broad rule. Id. Section 365 (c)(1) prevents a "trustee" from assuming or assigning where both of the following conditions are present:

> (A) applicable law excuses a party other than the debtor to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession whether or not such contract or lease prohibits or restricts assignment of rights and delegate of duties
>
> (B) such party does not consent to assumption or assignment

Section 365 (f)(1) renders any law prohibiting assignment null as it applies to a determination of a trustee to assign a contract, whereas application of Section 365(c)(1)(A) seemingly revives "applicable law" which would prohibit a Trustee's decision to assign an executory contract. See In re Supernatural Foods, 268 B.R. 759, 775 (M.D. La. 2001) In other words, Section 365 (f)(1) "giveth" and Section 365 (c)(1)(a) "taketh away" . In re Quantegy, Inc., 326 B.R. at 470.

If the debtor's actual purpose is to perform or continue performing the contract, the issue becomes whether the word "or" should be read literally or should it be read as the functional equivalent of "and". This is the issue which has divided the Courts. In re Footstar Inc, 323 B.R. 566, 570 (S.D.N.Y. 2005). The majority of courts and one circuit on two separate occasions have applied an actual test in construing the statutory language so as to permit assumption, if the debtor in possession does not actually intend to assign the contract. Id. citing In re Institut Pasteur v. Cambridge Biotech Corp., 104 F.3d at 489 (1st Cir.), cert. denied, 521

U.S. 1120 (1997) and Summit Inv. & Dev. Corp. v Leroux, 69 F.3d 608 (1st Cir. 1995). Courts applying the "actual test" reject an interpretation based on a hypothetical (but not real) intent to assign the contract in contravention of the balance of the statutory provision. Id. These courts emphasize the fact that a literal interpretation of the disjunctive "or" is utterly incongruent with the objectives of the Bankruptcy Code and would lead to the anomalous result that a debtor in possession would be deprived of its valuable but unassignable contract solely because it sought the protection of the Bankruptcy Court, even though it did not intend to assign it. Id.

In the case at bar, the Debtor was not even afforded an opportunity to seek assumption or assignment of the Franchise Agreement. The Bankruptcy Court prematurely rejected the actual test and erroneously chose to apply the "hypothetical test" to allow termination of the Franchise Agreement foreclosing any consideration of the Debtor's actual intentions.

The three Circuits, upon which PVI relies, have interpreted the statutory language in accordance with the plain meaning of the word "or" thereby adopting what has been referred to as the "hypothetical test". Id. at 570 citing In re Sunterra, 361 F.3d 257 (4th Cir 2004); In re Catapult, 165 F.3d 747 (9th Cir. 199); and In re West Elec, Inc., 852 F.2d 79 (3d Cir 1988). The hypothetical test asks whether the nondebtor is excused from accepting performance from a third party, other than the debtor or debtor in possession, by applicable law. Id. If so, then the debtor is not allowed to assume or assign, even if the debtor does not actually intend to assign the contract. Id.

The Eleventh Circuit Court of Appeals discussed the hypothetical test in the case of In re James Cable Partners, L.P., 27 F.3d 534 (11th Cir. 1994), however, the actual holding of the case is that Section 365 (c) (1) is not applicable because "applicable law" did not excuse the City of Jamestown from accepting performance from an entity other than the Debtor. Id at 538. The Eleventh Circuit found that a general prohibition against assignment does not excuse the

acceptance of performance from a third party. Rather, the applicable law must render performance nondelegable. Id. at 538. The classic example of a contract wherein performance cannot be delegated being a contract for personal services. Id.

The threshold question under the hypothetical test then becomes what constitutes "applicable law"? If applicable law does not allow assignment, in the absence of consent, then the Debtor may not assume or assign.

A. Applicable Law Does Not Prohibit Assignment In This Case .

Even if the Bankruptcy Court in this case properly adopted of the hypothetical test, the issue remains whether the applicable law would preclude assignment. The Franchise Agreement contemplates the operation of a retail store by a corporate entity which sells eyeglass frames through multiple employees. Accordingly, this is not the classic type of personal service contract under which performance cannot be delegated. However, PVI asserts that the Franchise Agreement is a nonexclusive license to use a trademark, and therefore the Lanham Trademark Act, 15 U.S.C. § 1127 and Federal trademark law prevent assignment to a third party in the absence of PVI's consent.

The introductory recitals to the Franchise Agreement, on page 1, refer to a distinctive optical retail system (the "System") which includes proprietary rights in certain valuable trade names, service marks, trademarks, logos, emblems and indicia of origin which are collectively defined as the "Marks". Paragraph 1 of the Franchise Agreement, also on page 1, grants the nontransferable, nonexclusive right, license and privilege to use the "Pearle Vision System" solely in connection with the operation of the Franchise Business at the Franchise Location. Paragraph 1 of the Franchise Agreement goes on to state that the Franchisee agrees to use the Marks, which may or may not include trademarks, designated by PVI in the manner prescribed by PVI. PVI argues that this section of the Franchise Agreement grants the Franchisee a

nonexclusive license in PVI's trademarks. Paragraph 40 on page 26 provides that the Franchisee (the Debtor) understands that the limited license to utilize the Marks applies only to such marks as are designated by PVI ... in writing. The Franchisee also agrees that it will not represent in any manner that it has acquired any ownership or equitable rights in any of the Marks by virtue of the limited license granted hereunder. Paragraph 40 D on page 26 goes on to state that if it becomes advisable at any time, in the discretion of PVI to discontinue use of any mark and/or to adopt or use one or more additional or substituted Marks then Franchisee shall comply with such instruction by PVI.

For a trademark license to exist there must be evidence that the trademark owner intended to grant a license in its trademark. In re Travelot, 286 B.R. 447, 455 (S.D. Ga. 2002) In Travelot , the Debtor In Possession filed its Chapter 11 Petition and an Emergency Motion to Assume Executory Agreement and Cure Default under a contract with Cable News Network ("CNN") thirty minutes before CNN sent a Notice of Termination. In Travelot the bankruptcy court found that the agreement failed to use the word "grant" with respect to any provision related to the right of Travelot in the CNN marks. The absence of any "grant" of a license rendered the agreement woefully and fatally obscure. Id. at 459

The provisions contained in the PVI Franchise Agreement are also woefully short of an express grant of a trademark license to the Debtor for different reasons. This Franchise Agreement simply describes a "System" which includes proprietary rights in various marks, trademarks, logos emblems and indicia of origin which are collectively defined as "Marks". As set forth above, the grant of the non exclusive right to use a "System" does not necessarily include any trademarks because this Franchise Agreement gives PVI complete discretion to designate any combination of marks, trademarks, logos, emblems and indicia of origin and does not have to include any trademarks at all in the "System". If PVI doesn't want the Franchisee to

use its trademarks, then trademarks can be excluded from the "System". The mere "possibility" of being given the right to use a PVI trademark as part of a "system" falls woefully short of an express grant of a trademark license. In the absence of any evidence that trademarks are actually included in the PVI System, the Lanham Trademark Act, 15 U.S.C. § 1127 and Federal Trademark Law are inapplicable.

B. Applicable Law Does Not Prohibit Assignment Because the Franchise Agreement Allows for Assignment Under Certain Circumstances

Other Courts have reconciled the conflicting language in Section 365 by finding that a Debtor may assign a contract in a manner consistent with the agreement itself. In re Quantegy, 326 B.R. 476 (M.D. Ala. 2005) See also In re Supernatural Foods, Inc., 268 B.R. 759, 806 (M.D. La.2001) For example, language in an agreement that allows assignment if substantially all of the Debtor's assets are sold is deemed to be the equivalent of consent. Even in the Sunterra case, the Fourth Circuit Court of Appeal remanded the case back to the Bankruptcy Court for reconsideration of a similar provision which allowed assignment. In re Sunterra, 361 F.3d 257(4th Cir.. 2004) Section 365 (c) (1) should not be applied to prohibit assignment, if the parties have opted out of the generally applicable law prohibiting assignment as long as the contractual assignability is enforceable under applicable non bankruptcy law. In re Supernatural Foods, Inc., 268 B.R. 759, 806 (M.D. 2001).

In this case the Paragraph 17 of the Franchise Agreement contemplates transfer, with consent. However, the Franchise Agreement continues to state that consent cannot be unreasonably withheld. Indeed, the evidence demonstrates that this Franchise Agreement was previously assigned from Dr. DeSantis, personally to Wellington Vision, Inc. Accordingly, paragraph 17 is not a prohibition to transfer, but simply a restriction on the Franchisee's right to transfer which allows the Franchise to be transferred if specific conditions are satisfied.. These conditions establish a situation under which predetermined consent is given, *i.e.*, transfer to an

individual or entity which agrees to accept all conditions set forth in the Franchise Agreement. See Id. at 804.

Clauses against assignment are not favored under the law and both Section 365(c) (1) and Section 365 (f) reflect that sentiment. See In re: Quantegy, Inc., 326 B.R. 467, 470(M.D. Ala. 2005). Furthermore, there is no need to determine if applicable law operates in the absence of consent, since applicable law does not allow PVI to act unreasonably. PVI cannot unreasonably withhold its consent to a transfer in a manner that is inconsistent with the Franchise Agreement. PVI's counsel asserts that PVI "does not want the debtor to operate for a number of reasons" See Transcript of Hearing on August 31, 2006 page 24, lines 1-4. Appendix G. However, no evidence was presented that PVI had legitimate reasons to withhold its consent. PVI had the burden of proof in this matter and did not demonstrate that it had a valid reason consistent with the terms of the Franchise Agreement to withhold its consent. In the absence of such evidence, e PVI is acting unreasonably which is contrary to the Franchise Agreement and applicable law. See Appendix G. To do so, would give rise to a material breach of the Franchise Agreement by PVI.

Conceptually, then, Section 365 (c)(1) should only relate to applicable law prohibiting the enforcement of an assignment regardless of language in a contract that restricts or conditions the right of assignment. In other words, Section 365 (c)(1) does not apply if the parties have opted out of the generally applicable law prohibiting assignment pursuant to their contract, as is the case here. . See Supernatural Foods, Inc., 268 B.R. 759, 805 (M.D. 2001). See also In re James Cable Partners, L.P., 27 F.3d 534 (11th Cir. 1994), determining that "applicable law" does not include general prohibitions against assignment.

C. The Plain Meaning of Section 365 (c)(1) Does Not Prohibit Assumption by the Debtor or the Debtor In Possession

Most recently, in a case arising in the Southern District of New York, the Bankruptcy

Court noted that it is not necessary to adopt either the actual or the hypothetical test since Section 365 can and should be construed in accordance with its plain meaning without construing "or" to mean"and". In re Footstar, Inc. 323 B.R. 566 (S.D. N.Y. 2005) Section 365 (c)(1) states that the "trustee" may not assume or assign. Id. at 570 The statute does not say that a debtor or debtor in possession may not assume or assign. Nowhere does the Bankruptcy code define the term "trustee" to be synonymous with the term "debtor" or "debtor in possession". Id.

Section 1107 (a) defines the rights, powers and duties of the debtor in possession. Id. at 572. Section 1107(a) grants the debtor in possession all rights and powers of a "trustee ". Id. Under this grant the debtor in possession has the right to assume contracts. The critical language in Section 1107 for purposes of this dispute is the prefatory clause "subject to any limitations on a trustee..." Consistent with this clause many decisions have held that various limitations on the powers of a chapter 11 trustee apply to debtor's in possession. In each of these cases, the application is a matter of simple logic and common sense. However, there is no basis to distinguish between the debtor and trustee with respect to the statutory limitation in Section 365 (c)(1) . Id.

The question presented in this case is whether the limitation in Section 365 (c)(1) as applied to the "debtor in possession" as opposed to the "trustee" prohibits assumption. Section 365 (c)(1) is quite logical if one construes trustee in accordance with its plain meaning to mean "trustee" not "debtor in possession". Id. at 573. The basic objective of Section 365 (c)(1) is a vindication of the right under applicable law of a contract counterparty to refuse to accept performance from an entity other than the debtor or debtor in possession. Id. at 573-574 A trustee is an entirely different entity from the debtor or the debtor in possession. Id at 574 Since a de facto assignment to a trustee is in derogation of the basic objective of the statute, it makes perfect sense to say a trustee may not assume or assign a contract. Id.

On the other hand it makes no sense to read "trustee" to mean "debtor in possession" where a debtor seeks to assume a contract, such as in the case at bar and nothing in the context of the statutory provision or the plain meaning canon, justifies such a reading. Indeed, where a debtor seeks to assume but not assign a contract, to read the statute to say that "the debtor in possession may not assume ...any contract if ... applicable law excuses [the counterparty}...from accepting performance from an entity other than the debtor in possession..." would render the provision a virtual oxymoron, since mere assumption (without assignment) would not compel the counterparty to accept performance from "an entity other than" the debtor in possession. Id.

The same analysis compels the conclusion that the constraint on assumption without assignment imposed on the trustee under Section 365(c)(1) -- by reason of the fact that a trustee is an "entity other than" the "debtor" or "debtor in possession"-- by its own terms cannot apply to a debtor in possession, which obviously is not an entity other than the "debtor in possession". Id. The objective of Section365(c)(1) which is to protect the contract counterparty from unlawful assignment of the contract is simply not implicated when the debtor in possession seeks to assume and not assign, the contract. Id. at 574

The foregoing analysis comports with the "plain meaning" of all the words used in Section 365(c)(1) and gives full effect to the provisions and objectives of Chapter 11, which are designed to foster and not frustrate, the reorganization process and the economic well being of debtor's in possession. And it avoids the perverse and anomalous result of the hypothetical test under which the debtor may lose the benefit of a nonassignable contract which is vital to its economic future solely because it filed for bankruptcy. Id. Accordingly, the determination by the Bankruptcy Court in this case that stay relief should be granted as "a matter of law" based upon adoption of the hypothetical test was clear error because the plain meaning of Section 365 permits assumption.

II. THE BANKRUPTCY COURT IMPROPERLY DENIED THE DEBTOR'S MOTION TO EXTEND THE TIME TO ASSUME OR REJECT THE SUBLEASE BETWEEN PEARLE VISION, INC. AND THE DEBTOR.

The Debtor's Sublease was an integral part of its Franchise Agreement. The Franchise Agreement is a right to operate a store at a particular location. The only basis for not extending the time to assume or reject the sublease was the Court's decision that PVI could have relief from the Stay to Terminate the Franchise as a matter of law. For all of the foregoing reasons, the determination that PVI Was entitled to Stay Relief as a matter of law was clearly erroneous rendering the denial of the Motion to Extend Time to Assume or Reject the Sublease clearly erroneous.

III. THE BANKRUPTCY COURT'S DENIAL OF THE MOTION FOR RECONSIDERATION WAS CLEARLY ERRONEOUS

Under Federal Rule of Civil Procedure 59(e), a court may grant a motion to alter or amend an order or judgment and under Federal Rule of Civil Procedure 60 (b), the Court may relieve a party from a final judgment, order or proceeding if the Movant presents (1) newly discovered evidence that was not available at the time of trial, or (2) evidence in the record that clearly establishes a manifest error of law or fact. In this case, the Debtor lost its entire business operation, the Debtor's employees lost their jobs, not a single creditor was paid and PVI asserts that it incurred additional damage. To grant stay relief as a matter of law based upon the application of a "hypothetical test" in the absence of any evidence of a trademark license was a manifest error of fact and law. Furthermore, to ignore the plain meaning of the word "trustee" in this case was a manifest error of law.

CONCLUSION

Section 365 (c)(1) states that the "trustee" may not assume or assign. The statute does not say that a debtor or debtor in possession may not assume or assign. Nowhere does the Bankruptcy code define the term "trustee" to be synonymous with the term "debtor" or "debtor in possession". Interpreting the word "trustee" to mean "trustee" comports with the "plain meaning" of all the words used in Section 365(c)(1) and gives full effect to the provisions and objectives of Chapter 11, which are designed to foster and not frustrate, the reorganization process and the economic well being of debtor's in possession. The foregoing application of Section 365 (c)(1) avoids the perverse and anomalous result of the hypothetical test under which the debtor may lose the benefit of a nonassignable contract which is vital to its economic future solely because it filed for bankruptcy. Accordingly, the determination by the Bankruptcy Court that stay relief should be granted as a matter of law based upon the hypothetical test was clearly an error because the plain meaning of Section 365 permits assumption. For the foregoing reasons, the decision of the Bankruptcy Court should be reversed.

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