IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:

MESEARCH MEDIA TECHNOLOGIES, LIMITED, *Debtor,*	:	Case No. 24-21982-JCM Chapter 11 Related to Doc. Nos. 124, 142, 143
CRIVELLA HOLDINGS LIMITED, *Movant,*	:	
v.	:	
MESEARCH MEDIA TECHNOLOGIES, LIMITED, *Respondent.*	:	

MEMORANDUM OPINION

The above-captioned case arose as an Involuntary Chapter 11 filed by Petitioning Creditors RMS Funding Company, LLC, Game Creek Holdings, LLC, and Trib Total Medial, LLC on August 13, 2024. At the outset of the case, Crivella Holdings Limited ("Crivella") contested the validity of the involuntary petition and the necessity of a Chapter 11 Trustee being appointed in this case. *See Objection of Arthur R. Crivella to Emergency Motion to Appoint an Interim and Permanent Chapter 11 Trustee for MeSearch Media Technologies Limited (A) During the "Gap" Period and (B) on a Permanent Basis* ("Crivella's Trustee Objection") (Doc. 15). According to *Crivella's Trustee Objection*, Mr. Arthur Crivella is the majority shareholder of the Debtor, and Game Creek Holdings, LLC is the 48% shareholder. After a mediation was conducted, the Parties were able to agree to a *Consent Order Resolving Involuntary Petition [Doc. No. 1] and Answer [Doc. No. 29 and 31]* (Doc. 44) allowing the Order for Relief to be entered and a *Consent Order Resolving Emergency Motion to Appoint an Interim and Permanent Chapter 11 Trustee for MeSearch Media Technologies Limited (A) During the "Gap" Period and (B) on a Permanent*

Basis [Doc. No. 4] (Doc. 45) agreeing to the appointment of a Chapter 11 Trustee. Unfortunately, this moment of harmony was cut short when Crivella filed the ***Motion of Crivella Holdings, Limited for Relief from the Automatic Stay or, in the alternative, for Adequate Protection Pursuant to Section 362(D) of the United States Bankruptcy Code*** ("Motion") (Doc. 124).

For the sake of deciding the *Motion,* the Parties requested the Court divide resolution of the *Motion* into two distinct issues, as one issue could be decided solely on the Parties' respective legal arguments and the other required discovery and an evidentiary hearing. The first issue ("Issue I"), that has been fully briefed by the Parties and that will be discussed and decided herein, is whether cause exists to grant relief from stay since, according to Crivella, under 11 U.S.C. § 365(c) the patent license agreement cannot be assumed or assigned. The second issue ("Issue II") is whether cause exists under § 362(d) to grant relief from stay based on a lack of adequate protection due to Crivella's allegations that the Debtor has been or is reverse engineering the Crivella Software which would constitute a lack of adequate protection warranting relief from the automatic stay to "terminate the MeSearch License Agreement and/or exercise any rights it has against the Debtor in state court." *See Motion* ¶ 37 (Doc. 124). As described further below, Crivella has now withdrawn its *Motion* as to Issue II, which the Court will grant, with prejudice. Therefore, this Memorandum Opinion addresses Issue I, the sole remaining issue in the *Motion,* which for the reasons set forth below, will be denied.

I. JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(a) and 1334. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(G) as it pertains to a motion seeking relief from the automatic stay.

II. PROCEDURAL HISTORY

Crivella Holdings filed its *Motion* on November 14, 2024. On December 2, 2024, the Chapter 11 Trustee filed a *Response to Motion of Crivella Holdings, Limited for Relief from the Automatic Stay or, in the alternative, for Adequate Protection Pursuant to Section 362(d) of the United States Bankruptcy Code* (Doc. 142) and the Petitioning Creditors filed a *Response in Opposition to Crivella Holdings, Limited's Motion for Relief from the Automatic Stay or, in the alternative, for Adequate Protection Pursuant to 362(D) of the United States Bankruptcy Code* (Doc. 143). On December 18, 2024, a hearing on the *Motion* was held, and the Parties requested sixty days to conduct discovery as to Issue II, the allegations of reverse engineering and violation of the License. After the December 18th hearing, the Court issued an Order allowing discovery until February 21, 2025.

On January 8, 2025, a hearing was held on Petitioning Creditor Game Creek Holdings, LLC's ("Game Creek") *Disclosure Statement to Accompany Plan of Reorganization Dated November 21, 2024 filed by Plan Proponent, Game Creek Holdings, LLC* (Doc. 135) as well as Game Creek's *Motion for Entry of an Order (I) Approving the Disclosure Statement, (II) Approving the Forms of Ballots and Solicitation Materials, (III) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject the Plan (IV) Establishing the Voting Record Date, (V) Fixing the Date, Time, and Place for the Plan Confirmation Hearing and the Deadline for Filing Objections and (VI) Granting Related Relief* (Doc. 50). At the hearing, Crivella expressed its preference to proceed with briefing of Issue I separately, because in Crivella's opinion, if the Court found in its favor on Issue I, it would eliminate the need for an evidentiary hearing on Issue II. Based on this reasoning, the Parties agreed to brief Issue I, so the Court could render a separate decision as to that issue. Therefore, the Court issued an Order (Doc.

170) setting forth a briefing schedule with oral argument as to Issue I to be held on February 20, 2025. During this time, discovery on Issue II was to proceed concurrently and was still set to end on February 21, 2025.

On January 24, 2025, Crivella filed its *Brief of Crivella Holdings Limited in Support of its Motion for Relief from Stay Pursuant to 362(d) of the United States Bankruptcy Code* ("Crivella Brief") (Doc. 180). On February 12, 2025, the Petitioning Creditors filed *Respondents' Response to Crivella Holdings Limited's Motion for Relief from the Automatic Stay Pursuant to Section 362(d) of the Bankruptcy Code* ("Response Brief") (Doc. 184) and the Chapter 11 Trustee filed a *Joinder to Respondents' Brief in Opposition to Crivella Holdings Limited's Motion for Relief from Stay Pursuant to Section 362(d) of the Bankruptcy Code* ("Trustee's Brief") (Doc. 186) which adopts by reference all arguments set forth in the *Response Brief.*

On February 20, 2025, the Court held oral argument on the *Motion* where the Parties further explained their respective positions set forth in the *Crivella Brief,* the *Response Brief* and the *Trustee's Brief.* At the conclusion of argument, the Court explained to the Parties that based on the facts set forth, the relevant case law and the arguments presented, it intended to deny the *Motion* as to Issue I. Upon receiving the Court's intended ruling, Counsel for Crivella requested to withdraw the *Motion* as to Issue II, so that the Court would issue a final order on the *Motion* which would be immediately appealable to the District Court. At the hearing, the Court granted Crivella's request and informed the Parties that with Crivella's withdrawal of Issue II, a Memorandum Opinion and Order would be entered denying the *Motion* in toto. Since Crivella was given ample opportunity to pursue its allegations as to Issue II yet chose to withdraw the *Motion* as to that issue as soon as discovery expired, the Court will withdraw the *Motion* as to that issue with prejudice, and further motions for relief from stay based on allegations of the Debtor violating the License by reverse engineering the patented technology will not be considered by this Court.

III. BACKGROUND

On July 1, 2019, the Software License Agreement ("License") was executed between Crivella Holdings Limited and Crivella Media Technologies Limited.[1] The License allows the Debtor to use two software patents owned by Crivella and provides that Crivella grants the Licensee "a perpetual, non-transferable, limited-exclusive license for use in the Market Segment, to commercially exploit the Patent Related Software, the Patent Related IP and the Future Patent Related IP (collectively 'Licensed IP'), throughout the world, with the right to provide limited sublicenses to third parties for use in the Market Segment." *License,* p. 3. Section 9.4 of the License goes on to state:

> Assignment of Agreement. This Agreement and the rights granted hereunder shall inure to the benefit of the parties hereto and shall not be assignable by either party, except to a successor in interest or wholly-owned subsidiary of that party, without the written consent of the other, which consent shall not be unreasonably withheld.

A. Crivella's Argument

Crivella's *Motion* argues that, according to Third Circuit case law interpreting 11 U.S.C. § 365(c)(1), cause exists to grant relief from the automatic stay under 11 U.S.C. § 362(d) since, according to Crivella, under applicable federal patent law the License cannot be assigned. *See In re Trump Entertainment Resorts, Inc.,* 526 B.R. 116, 125 (Bankr. D. Del. 2015). Crivella argues the analysis begins on whether the contract can be "assumed or assigned" under § 365(c)(1),

[1] At the February 20, 2025 hearing, Counsel for the Petitioning Creditors confirmed that the prior name of MeSearch Media Technologies Limited was Crivella Media Technologies Limited and a name change was made at or about July of 2019.

and if it cannot, relief from stay should be granted to either terminate the License or proceed with termination of the License in state court. Section 365(c)(1) provides that:

> **(c)** The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if--
> **(1)(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 or delegation of duties; and
>
> **(B)** such party does not consent to such assumption or assignment.

Crivella cites to the Third Circuit's "Hypothetical Test" set forth in *Matter of West Electronics,* 852 F.2d 79, 82-83 (3d Cir. 1988) which determines whether or not a license can be assumed or assigned based upon the following inquiry: whether under applicable nonbankruptcy law the licensor could refuse performance from an entity other than the debtor or the debtor in possession. *Id.* At 83. *West Electronics* involved the question of whether the bankruptcy court should have granted a motion for relief from stay to allow the United States to terminate a contract with West Electronics for the production of AIM-9 missile launcher power supply units to the Air Force. *Id.* at 80. The court stated that the inquiry was

> if non-bankruptcy law provides that the government would have to consent to an assignment of the West contract to a third party, *i.e.,* someone 'other than the debtor or the debtor in possession,' then West, as the debtor in possession, cannot assume that contract. This provision limiting assumption of contracts is applicable to any contract subject to a legal prohibition against assignment.

Id. at 83; citing to *In re Pioneer Ford Sales, Inc.,* 729 F.2d 27 (1st Cir. 1984); *In re Braniff Airways, Inc.,* 700 F.2d 935, 943 (5th Cir. 1983). The Third Circuit held that the bankruptcy court should have granted relief from stay to the United States since the relevant statute prohibited transfer of the contract to another party, and since the contract could not be assigned, it therefore could not be assumed by the debtor. *West Electronics,* 852 F.2d at 83-84.

Crivella analogizes the holding in *West Electronics* to the circumstances here since federal patent law precludes assignment of the License absent express language in the agreement allowing assignment to third parties. *PPG Industries, Inc. v. Guardian Industries, Corp.,* 597 F.2d 1090, 1093 (6th Cir. 1979); *In re Catapault Entertainment, Inc.* 165 F.3d 747, 750 (9th Cir. 1999). The cases cited by Crivella state that patent licenses are generally unassignable under federal patent law unless the licensor has given consent to assignment. *In re CFLC, Inc.,* 89 F.3d 673, 677 (9th Cir. 1996); *In re Access Beyond Technologies,* 237 B.R. 33, 45 (Bankr. D. Del. 1999).

Crivella maintains in its brief that the language found in Section 9.4 of the License is insufficient to circumvent the general prohibition on assignment of patents because it fails to state that the agreement, in addition to being assignable, can be assumed, and therefore, since there is no express language that it can be it assumed, then it cannot be assigned. In support of this proposition Crivella cites to *In re Sunterra Corp.,* 361 F.3d 257, 271 (4th Cir. 2004) which involved an agreement that contained language consenting to assignment to a successor in interest under certain circumstances but did not contain language consenting to assumption of the agreement. Crivella also cites to *In re Catapult Entertainment*, 165 F.3d 747, 752 (9th Cir. 1999) for this argument, however, the Court notes that *Catapult* is devoid of this reasoning and simply holds, similar to *West Electronics,* that the debtor may not assume the contract when federal patent law bars assignment to a hypothetical third party. *Id.* at 750.

Finally, Crivella argues that the reorganized Debtor should not be considered a "successor in interest or wholly owned subsidiary," and the language in Section 9.4 does not overcome the obstacle that, in Crivella's opinion, the License may not be assigned to a hypothetical third party. Crivella cites to *In re Hernandez,* 285 B.R. 435, 440 (Bankr. D. Ariz. 2002) to support this assertion. In *Hernandez,* the license agreement only allowed assignment to a corporation in which the debtor retained a 51% ownership interest. *Id.* The court reasoned that an entity controlled 51% by the debtor could not be a third party for purposes of the hypothetical test. *Id.* The court held that to satisfy the hypothetical test the debtor must show that "federal patent law would require the Licensor to accept performance from, and render performance to, a party different from Hernandez." *Id.;* citing to *Catapult,* 165 F.3d at 752.

B. Petitioning Creditors' Argument

The Petitioning Creditors make two primary arguments in their *Response Brief,* the first being that the License is an exclusive patent license which can be assigned and assumed without Crivella's consent, and the second being that Section 9.4 of the License freely allows assignment to a successor in interest without the other party's consent, thereby satisfying the Hypothetical Test. The Petitioning Creditors argue if the proposed Chapter 11 Plan is confirmed and becomes effective, Game Creek Holdings (or another entity making a higher and better offer) will acquire the equity in the Reorganized Debtor and it will have the legal authority to assume the License.

Turning to the Petitioning Creditors argument that the License is an exclusive license that may be freely assigned by the Debtor, the Petitioning Creditors contend that since the license is exclusive, it may be freely assigned or assumed without Crivella's consent, and therefore § 365(c)(1) is inapplicable. The Petitioning Creditors claim that these licenses are exclusive in the respective market segments, and they cite to a case for the proposition that exclusive licenses are freely assignable without the licensor's consent. *See Moraine Products v. ICI AM, Inc.,* 538 F.2d 134, 141 (7th Cir. 1976).

Although the Debtor is correct that *Moraine* does state that a patentee granted an "absolute exclusive license" has the authority to grant sublicenses, it does not hold it can freely assign the patent license without the consent of the licensor. *Id.* at 141. Furthermore, the court in *Moraine* notes that in that case the parties had a "limited exclusive license" where the applicant must secure the consent of the two parties, the licensor and its immediate licensee. *Id.* It appears the License here may fall somewhere in the middle since the License contains the language that it is a "limited exclusive license." *License,* p. 3, 4, 6. This Court, however, does not need to delve into this issue because either way, the case law is clear that even a grant of an exclusive license does not overcome the general rule in federal patent law that patent licenses are non-assignable absent express language to that effect in the agreement. *See Speedplay, Inc. v. Bebop, Inc.,* 211 F.3d 1245, 1251 (Fed. Cir. 2000) (the exclusive license contained language allowing assignment only with the consent of licensor); *In re Hernandez,* 285 B.R. 435, 440 (Bankr. D. Ariz. 2002) (an exclusive license still needs the consent of the licensor to assign).

This Court considers the focus of the inquiry to rest on the Petitioning Creditors' second argument that the language in the License authorizes assignment. The Petitioning Creditors reason that the parties to the License contracted around the default anti-assignment rule of patent law in Section 9.4 of the License. They state that the language included Section 9.4 shows that both parties to the License intended the License to be freely assignable along with each party's rights under the License to a "successor in interest" without the need for the other party's consent. The Petitioning Creditors argue that the language renders § 365(c) inapplicable. As set forth more fully below, the Court disagrees that the language renders § 365(c) inapplicable, however, the language in Section 9.4 satisfies the Hypothetical Test set forth in *West Electronics,* allowing for the License to be assumed under § 365(c)(1).

The Petitioning Creditors cite to a number of cases that satisfy the Hypothetical Test that they say contain assignment language that is more restrictive than the language allowing assignment to a "successor in interest" found in Section 9.4 of the License in the case at bar. In *In re Physiotherapy Holdings, Inc.*, 538 B.R. 225, 231 (D. Del. 2015), where Huron Consulting Services, LLC ("Huron"), the licensor, argued that the bankruptcy court had been incorrect in determining the license agreement could be assumed under § 365(c)(1). *Id.* at 229. The license agreement at issue in *Physiotherapy Holdings* stated:

> 7.1 In the event of a Change of Status at Client, as described Section 7.1.3 of the Master Agreement, if (i) Huron has a right to terminate this License Agreement but chooses not to exercise that right, or (ii) pursuant to Section 7.1.3.1 Huron has no right to terminate the License Agreement, ***then Licensee shall have the right to assign this License Agreement to the surviving entity***, acquiring entity, lessee or managing party, as such party is described in Section 7.1.3.1 of the Master Agreement, ***without the consent of Huron***.

Id. at 231. The court found that since the licensor did not timely terminate the agreement, the assignment language applied, and since the debtor could hypothetically assign the license agreement, § 365(c)(1) did not prevent the license agreement from being assumed by the debtor. *Id.*

In *In re Quantegy, Inc.*, 326 B.R. 467 (Bankr. M.D. Ala. 2005) Sony Corporation, Inc. ("Sony") objected to the debtor's motion to assume and assign the license agreements, arguing the debtor was precluded from assuming the licenses under § 365(c)(1). The court in *Quantegy* noted that § 365(c)(1) "creates a narrow exception to the broad rule" in § 365(f)(1) that allows a trustee to assign contracts even when the contract contains anti-assignment provisions. *Id.* at 470. The court noted that the applicable law did not excuse Sony's performance when a contract existed that expressly consented to "be bound to a third-party assignee." *Id.* at 471. The court stated that "Sony is not excused by "applicable law" from its self-imposed contractual obligations." *Id.* Sony argued that it did not consent to the assumption or assignment of the agreements, but the court reasoned that Sony's consent was irrelevant if applicable law did not excuse Sony from performance under the license, pointing out that "the debtor is prohibited from assuming and assigning the agreements only if both provisions of section 365(c)(1) are met." *Id.* Since subsection (A) was not met, the court held that withheld consent under "[s]ubsection (B) is a moot point." *Id.* As Crivella attempts to do here, Sony relied on *Sunterra* to argue that contractual consent was "determinative." *Id.* Disagreeing with the reasoning in *Sunterra,* the court noted that § 365 allows the assumption of contracts "over the objection of the other party to the contract if applicable law does not excuse that party's performance." *Id.* As a result of this reasoning, the court in *Quantegy* declined to follow *Sunterra.* *Id.*

C. February 20th Oral Arguments

Oral argument on the *Motion* was held on February 20, 2025, at which time Counsel for Crivella, the Petitioning Creditors, and the Chapter 11 Trustee appeared. Counsel for Crivella restated her case and argued that § 365(c) is implicated in this instance since federal law precludes the assignment of patent technology, including the two patents, owned by Crivella. Crivella further argued that the License is not exclusive because it left Crivella with the right to use and market the patented software technology outside of the market segment. Crivella pointed out that in order to meet the Hypothetical Test the Court must determine that the contract is assignable to a hypothetical third party, and here a successor in interest would have to be considered a hypothetical third party. Crivella argued that in the Fourth Circuit's *Sunterra* case the court determined that a reorganized debtor is not a hypothetical third party, so the contract could not be assumed or assigned.[2]

[2] The court in *Sunterra* made no determination on whether the reorganized debtor would be considered a hypothetical third party and instead acknowledged that language in the agreement consenting to assignment to a successor in

Crivella then pointed to *Physiotherapy Holdings* for the argument that the assignment language in the License is insufficient since it does not contain a reference to assignment occurring "in bankruptcy," and the court must look at what the parties intended to occur in bankruptcy. 538 B.R. 225. Crivella argued that the clause found in the License terminating the License after the debtor remained in bankruptcy for greater than 120 days shows that Crivella did not intend the License to survive bankruptcy, although Crivella then acknowledged that this section of the License is an illegal *ipso facto* clause which is ineffective in bankruptcy.

Crivella also argued that although *Quantegy* declines to follow *Sunterra* and may appear favorable to the Petitioning Creditors' argument, it still follows the Hypothetical Test and holds if applicable law precludes assignment, the agreement cannot be assigned, in spite of the court ultimately concluding that the agreement did allow assignment to a hypothetical third party. Crivella pointed out that in *Quantegy,* the language in the agreement stated it could be assigned to purchasers of an entire business which in that case was considered to be a hypothetical third party. Crivella attempted to distinguish the facts in *Quantegy* from those found in the case at bar by arguing that the proposed buyer here is controlled by the current board member of the Debtor, Joe Lawrence, and therefore the buyer should not be considered a third party.

The Petitioning Creditors agreed that the law in the Third Circuit is settled, and the Hypothetical Test controls but maintain that it is satisfied here. The Petitioning Creditors noted that *Trump* supports their position that the Hypothetical Test applies, but the default rule (limiting assignability) can be "contracted around." The Petitioning Creditors pointed out that other than the *Hernandez* case, every other case has followed the rule that the Parties are free to contract

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interest was relevant, but ultimately, since the agreement did not also include language consenting to assumption of the agreement, the Fourth Circuit determined, on that basis, that the contract could not be assumed. 361 F.3d at 271.

around the default rule.[3] The Petitioning Creditors also relied on *Huron* (referred to herein as *Physiotherapy Holdings*) for the holding that "if a contract is assignable, it is assumable." The Petitioning Creditors argue the *Sunterra* case cited by Crivella is an "outlier." Counsel reasoned that when you look at the contract it is clear from the language of Section 9.4 of the License that it is assignable, and the definition of a "successor in interest" is a third party succeeding to the interest of the original party. The Petitioning Creditors point out that Mr. Lawrence, personally, is not purchasing this Debtor, and he was an officer, not an owner of the Debtor, and his involvement is immaterial to the ultimate determination of whether a successor in interest would be an entity other than the Debtor. The Petitioning Creditors stated that they do not know if they have to address whether the License is exclusive since it is clearly assignable to third parties and therefore assumable. Regardless, the Petitioning Creditors argued that it is exclusive based on the factors set forth in *Moraine* since the licensee can grant sublicenses, they have more rights under the license than the ability to use it without being sued for infringement, and the fact that Crivella cannot issue other licenses of the technology within the market segment.

Counsel for the Chapter 11 Trustee stated that the Trustee's position is that Game Creek's Plan will maximize recovery to the Estate, and if the Plan succeeds, creditors will be paid in full. The key issue of whether the Plan succeeds is whether the license can be assumed and assigned. The Trustee elected to join the *Response Brief* as the Trustee's position is consistent with that of the Petitioning Creditors. The Trustee argues Crivella pre-consented to the assignment to a successor in interest, and the Trustee argues a successor in interest could be any party who

[3] According to the Court's interpretation of *Hernandez,* the court in *Hernandez* agreed that parties could contract around the default rule that patent licenses are generally nonassignable. *See Hernandez,* 285 B.R. at 440-41 ("The court agrees that nothing in federal patent law prevents the assignment of a license where there are 'express words to show an intent to extend the right to an assignee.' *Supernatural Foods,* 268 B.R. at 804–805 (quoting *Oliver v. Rumford Chemical Works,* 109 U.S. 75, at 81–82, 3 S.Ct. 61, 27 L.Ed. 862 (1883)).").

chooses to purchase the Debtor or assume control of the Debtor through the Plan. The Trustee stated that Crivella's "pre-consent" to assignment takes the License out of the Hypothetical Test for determining whether it is assumable, and the Hypothetical Test applies to cases where the status of assignment is unclear. The Trustee argued there is no ambiguity that the License is assignable to a successor in interest.

IV. ANALYSIS

As hinted above, the Court does not give much weight to the Petitioning Creditors' argument that the License granted to the Debtor was exclusive, and therefore, the contract could be freely assigned and § 365(c) does not apply. Deciding that the License is exclusive would require a legal inquiry and analysis that has not been fully vetted by the Parties, and even if it was, the Court does not believe would be determinative to the issue at hand. The Court's research has gleaned that even exclusive patent licenses must still contain express language allowing assignment. *See Hernandez,* 285 B.R. at 438.

The Court is also not completely convinced as to the Trustee's argument that Crivella's pre-consent to assignment takes this consideration outside of the purview of § 365(c) and the Hypothetical Test. Again, in *Hernandez,* the Court found that the pre-consent language was not broad enough to take the contract out of the consideration whether it was assignable according to § 365(c)(1). The Court will not reach the merits of this argument because as explained more fully below, the language in Section 9.4 allows the assignment of the License which ultimately allows it to prevail under the Hypothetical Test. Therefore, the Court does not need to determine if Crivella pre-consented to assignment.[4]

[4] From the Court's review of the limited case law dealing with "pre-consent" to assignment in a contract and whether the "pre-consent" removes the contract from consideration under § 365(c), it appears a factor in determining whether pre-consent was given is if there was consent to assignment without regard to the identity of the assignee. *See In re*

The glaring issue with Crivella's argument is that the License does contain specific language that satisfies the Third Circuit's "Hypothetical Test" and overrides the general prohibition on assignment according to federal patent law. Section 9.4 of the License states:

> Assignment of Agreement. This Agreement and the rights granted hereunder shall inure to the benefit of the parties hereto and shall not be assignable by either party, ***except to a successor in interest*** or wholly-owned subsidiary of that party, without the written consent of the other, which consent shall not be unreasonably withheld. (emphasis added).

Under the Hypothetical Test, the Court must consider whether, under the applicable federal law on patents, Crivella would have to accept performance of the License from a party "other than the Debtor." *See West Electronics,* 852 F.2d at 82-83. The underlying rationale for this requirement was discussed by the *West Electronics* court that provided the following analysis:

> We conclude that assignment of a contract calling for the production of military equipment is precisely what Congress intended to prevent when it prohibited assignments in 41 U.S.C. § 15. Thus, West could not force the government to accept the "personal attention and services" of a third party without its consent. It therefore necessarily follows that under 11 U.S.C. § 365(c)(1) West, as a debtor in possession, cannot assume this contract.

Id. at 83. The facts of the case at bar are distinguishable from *West Electronics* since the language of Section 9.4 of the License clearly states that the License may be assigned to a Successor in Interest without Crivella's further consent. Patents are generally non-assignable absent express language in the license agreement allowing assignment. *Access Beyond Technologies,* 237 B.R. at

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Hernandez, 285 B.R. 435 (Bankr. D. Ariz. 2002); *In re Penta Water Co.,* 2010 WL 4917333 (S.D. Ca. March 22, 2010). Since the language of Section 9.4 of the License does provide limits, "to a successor in interest or wholly owned subsidiary" then the identity of the assignee is at issue and therefore does not appear to satisfy the "pre-consent" test.

45. Here, it is indisputable that the License contains express language allowing assignment to a "Successor in Interest."

The Court next turns to the question of whether a "Successor in Interest" should be considered "an entity other than the debtor" for purposes of § 365(c). One does not have to take a deep dive into case law to know that a Successor in Interest would be any party other than the Debtor.[5] In *Physiotherapy Holdings,* 538 B.R. at 232, a case relied upon by both Parties, the court held that language allowing assignment to a "surviving entity" satisfied § 365(c)(1) and that a "surviving entity" was an "entity other than the debtor." Here, the phrase "Successor in Interest" is even more broad than "surviving entity," and in the bankruptcy setting could include the reorganized Debtor or a purchaser of the Debtor. *See In re TGX Corp.,* 168 B.R. 122, n.15 (Bankr. W.D. La. 1994) ("Recovery in excess of the amount of pre-petition claims against and interests in the debtor's estate would vest in the reorganized debtor as the debtor's successor-in-interest."). Currently, the Chapter 11 Trustee is acting as successor in interest to the Debtor. *See In re PA Co-Man, Inc.* 644 B.R. 553 (W.D. Pa. 2022) (chapter 7 trustee, as successor in interest to the debtor, assigned the estate's potential causes of action to KIND Operations, Inc. ("KIND"), rendering KIND the successor in interest to the chapter 7 trustee's interests). However, the question is not whether a Successor in Interest would include a reorganized Debtor, the question is whether a Successor in Interest can be considered an "entity other than the Debtor." 11 U.S.C. § 365(c)(1)(A). The Court finds that it does since a Successor in Interest is any entity that succeeds

[5] Section 365(c)(1)(A) considers whether "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." (emphasis added).

to the interest of the Debtor, whether that be through purchase, transfer, or any other vehicle, the Debtor may use, whether in or outside of bankruptcy, to assign its interests to a third party.[6]

Crivella principally relies on *Sunterra* to attempt to overcome the language of Section 9.4 of the Agreement allowing assignment, but for the reasons stated in *Quantegy,* the Court finds that reliance on *Sunterra* is misguided. *See Quantegy,* 326 B.R. at 471. In *Sunterra,* although the Fourth Circuit acknowledged that the licensor consented to assignment of the license agreement to a successor in interest under specific circumstances, the court held this provision did not apply to the assumption of the agreement and therefore did not satisfy the Hypothetical Test. 361 F.3d at 271. The court opined that assumption and assignment are distinct, and the agreement must have contained consent to both. *Id.* Since the debtor lacked the licensor's consent to both assignment ***and*** assumption, the court found the debtor could not assume the agreement. *Id.*

This Court finds the holding in *Sunterra* to be inconsistent with the language in § 365(c) and therefore will not follow it. Section 365(c) states that a contract cannot be assumed or assigned if the contracting party would not have to accept performance under the agreement from a party other than the debtor per § 365(c)(1)(A), and the party does not consent to assumption or assignment per § 365(c)(1)(B). This Court reads those sections together to mean that if an agreement contains language that it may be assigned per § 365(c)(1)(A), the inquiry ends there. However, even if the agreement prohibits assignment and under applicable law § 365(c)(1)(A) precludes assignment, the parties may still choose to consent to the assignment and may do so

[6] In the bankruptcy setting, the typical use of the phrase "successor in interest" is in the context of successors to mortgages, such as when a mortgage company acquires another mortgage company. *See In re Covenant at South Hills, Inc.,* 410 B.R. 426 (Bankr. W.D. Pa. 2009). However, the phrase has also been used in many other contexts when a third-party entity acquires the interests of another. *See In re Stevenson,* 1990 WL 163268 (Bankr. W.D. Pa. Oct. 25, 1990)(Trustee was substituted for Plaintiffs as their successor in interest); *In re Lansberry,* 177 B.R. 49, 55 (Bankr. W.D. Pa. 1995) (chapter 7 trustee was successor in interest to debtor's prepetition causes of action).

under § 365(c)(1)(B). The court in *Sunterra* failed to consider that consent to assumption or assignment in § 365(c)(1)(B) would overcome a lack of assignability under § 365(c)(1)(A).

This Court further finds that the *Sunterra* court erroneously held that an agreement must expressly provide for assumption in addition to assignment to satisfy the requirements of the Hypothetical Test and §365(c). The body of relevant case law on this issue only deals with instances where provisions exist consenting to the assignment of the agreement, since contracting parties, unless their lawyers have advanced knowledge of bankruptcy law, would not have the foresight to include language regarding the assumption of a contract in bankruptcy. This Court does not find that § 365(c) requires language consenting to assumption, but rather, to quote the Petitioning Creditors' point made frequently at oral argument, if the License can be assigned, it can be assumed. *See West Electronics,* 852 F.2d at 83 (if the government would have to consent to assignment of the contract, then the debtor in possession could not assume the contract); *Trump,* 526 B.R. at 122 ("limitation on the assumption of executory contracts applies whenever the contract is 'subject to a legal prohibition against assignment' to a third party and the non-debtor party to the contact does not consent to assignment."); *Physiotherapy Holdings,* 538 B.R. at 233 (debtor's contractual right to assign the agreement allowed the debtor to assume the agreement according to the hypothetical test); *Hernandez,* 285 B.R. at 440 (the hypothetical test looks to whether the contract can be assigned, to determine if it can be assumed); *Catapult,* 165 F.3d at 745-55 (if the contract cannot be assigned due to nonbankruptcy law, it cannot be assumed); *Quantegy,* 326 B.R. at 471 (since the license specifically consented to being assigned to a third party, the license could be assumed by the debtor under § 365(c)(1)).

Finally, the Court will address Crivella's argument, raised for the first time at the February 20, 2025 oral argument, that the assignment language in the License needs to indicate that assignment of the contract was intended specifically in the bankruptcy setting. There is nothing in the language of § 365(c)(1)(A) that suggests there must be an inquiry as to whether the language in the executory contract contemplated whether the assignment could occur inside or outside of bankruptcy. Such an inquiry is contrary to § 365(c)(1)(A) which considers whether applicable law excuses the licensor from accepting performance. The courts in both *Trump* and *West Electronics* look to whether applicable nonbankruptcy law allows assignment of the contract without regard to whether the assignment in the bankruptcy setting was specifically sanctioned. *See Trump,* 526 B.R. at 121; *West Electronics,* 852 F.2d at 83. Therefore, the Court finds this argument without merit and holds that the assignment language provided for in Section 9.4 of the License is sufficient to satisfy the requirements of § 365(c).

V. CONCLUSION

The language in Section 9.4 of the License allows assignment of the License to any "successor in interest." Successor in interest is a broad term of art that would include a party other than the debtor or debtor in possession. Therefore, according to the License, Crivella would have to accept performance under the License from any party other than the Debtor that is a successor in interest to the Debtor. This satisfies the Hypothetical Test as set forth in *West Electronics*. Therefore, since the License is capable of being assigned, it can be assumed under 11 U.S.C. § 365(c)(1). Based upon the law and facts of this case, the *Motion* is denied as to Issue I, and due to Crivella's withdrawal of Issue II at the time of the hearing, Issue II is withdrawn with prejudice. The Court will issue an order in accordance with this Memorandum Opinion.

SIGNED
2/28/25 1:04 pm
CLERK
U.S. BANKRUPTCY
COURT - WDPA

BY THE COURT

John C. Melaragno, Judge
United States Bankruptcy Court

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:

MESEARCH MEDIA TECHNOLOGIES, LIMITED, *Debtor,*	:	Case No. 24-21982-JCM Chapter 11
CRIVELLA HOLDINGS LIMITED, *Movant,*	:	Related to Doc. Nos. 124, 142, 143
v.	:	
MESEARCH MEDIA TECHNOLOGIES, LIMITED, *Respondent.*	:	

ORDER

AND NOW, this **28th** day of **February, 2025**, for the reasons stated in the *Memorandum Opinion* entered by the Court contemporaneously herewith, it is hereby **ORDERED, ADJUDGED**, and **DECREED** that the ***Motion of Crivella Holdings, Limited for Relief from the Automatic Stay or, in the Alternative, for Adequate Protection Pursuant to Section 263(D) of the United States Bankruptcy Code*** ("Motion for Relief from Stay") (Doc. 124) is **DENIED** as follows:

1. Issue I of the *Motion for Relief from Stay* is **DENIED.**

2. Issue II of the *Motion for Relief from Stay* is **WITHDRAWN, with prejudice.**

BY THE COURT:

SIGNED
2/28/25 1:06 pm
CLERK
U.S. BANKRUPTCY
COURT - WDPA

John C. Melaragno, Judge
United States Bankruptcy Court