

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

SCHOOL SPECIALTY, INC., *et al.*,¹

Debtors.

Chapter 11

Case No. 13-10125 (KJC)

(Jointly Administered)

Related Docket. No. 902

**OBJECTION OF FRANKLIN COVEY CO. TO DEBTORS'
NOTICE OF ASSUMPTION OF LICENSE AGREEMENT**

Franklin Covey Co., by and through its undersigned counsel, respectfully submits this objection (the “Objection”) to the Debtors’ potential assumption of that certain license agreement (the “License Agreement”) between Franklin Covey Co., on the one hand, and Debtor Premier Agendas, Inc., and non-Debtor Premier School Agendas Ltd. Agenda Scolaire Premier Ltee, on the other. In support of the Objection, Franklin Covey Co. respectfully states as follows:

BACKGROUND

1. In November 2001, Franklin Covey Co. entered into a License Agreement with Premier Agendas, Inc. and Premier School Agendas Ltd. Agenda Scolaire Premier Ltee.
2. The License Agreement granted a non-exclusive license to Premier Agendas, Inc. and Premier School Agendas Ltd. Agenda Scolaire Premier Ltee to use for certain purposes certain copyrights, trademarks and service marks set forth in the License Agreement relating to

¹ The Debtors in these Chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: School Specialty, Inc. (1239); Bird-In-Hand Woodworks, Inc. (8811); Califone International, Inc. (3578); Childcraft Education Corp. (9818); ClassroomDirect.com, LLC (2425); Delta Education, LLC (8764); Frey Scientific, Inc. (3771); Premier Agendas, Inc. (1380); Sax Arts & Crafts, Inc. (6436); and Sportime, LLC (6939).



the contents of the popular books *The 7 Habits of Highly Effective People*, *The 7 Habits of Highly Effective Teens*, *The 7 Habits of Highly Effective Families*, and *What Matters Most*.

3. On January 28, 2013, each of the above-captioned Debtors, including Premier Agendas, Inc., filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. However, Premier School Agendas Ltd. Agenda Scolaire Premier Ltee is not a Debtor in the above-captioned proceedings.

4. On April 25, 2013, this Court entered that certain *Order: (A) Conditionally Approving Disclosure Statement; (B) Fixing Voting Record Date; (C) Approving Solicitation Materials and Procedures for Distribution Thereof; (D) Approving Forms of Ballots and Establishing Procedures for Voting on Plan Tabulating Votes; (E) Scheduling Hearing and Approving Notice and Procedures for Filing Objections to (I) Confirmation of the Plan, and (II) Proposed Cure Amounts Related to Contracts and Leases Assumed Under the Plan; and (F) Granting Related Relief* [Docket No. 902], which authorized the Debtors to send assumption notices with respect to contracts and leases.

BASIS FOR OBJECTION

5. Franklin Covey Co. objects to the assumption of the License Agreement because the agreement grants a non-exclusive license with respect to certain copyrights, trademarks and service marks that cannot be assumed without Franklin Covey Co.'s consent. The Debtors have not sought Franklin Covey Co.'s consent to the assume the contract, and Franklin Covey Co. has not and does not consent to the assumption of the License Agreement.

6. Section 365(c) of the Bankruptcy Code provides that a trustee or debtor in possession "may not assume *or* assign any executory contract" without the non-debtor party's

consent if “applicable law” would excuse the non-debtor party from accepting performance from an entity other than the debtor.

7. The plain language of the statute is written in the disjunctive, and Courts have held that assumption and assignment represent “two conceptually distinct events.” *In re Catapult Entm’t*, 165 F.3d 747, 752 (9th Cir. 1999). Accordingly, several appellate courts, including the Third Circuit Court of Appeals, have adopted the so-called “hypothetical test.” Under the “hypothetical test,” if under “applicable law,” the non-debtor could refuse performance from “an entity other than the debtor or the debtor in possession,” then the debtor may not assume the agreement. *See In re West Elecs., Inc.*, 852 F.2d 79, 83 (1988) (holding contract incapable of assumption by debtor because applicable law allowed counterparty to refuse performance from or to an entity other than the debtor).

8. Copyright and trademark law—which constitute “applicable law” under the circumstances—render the License Agreement non-assumable without Franklin Covey Co.’s consent. *See, e.g., In re Catapult Entm’t*, 165 F.3d at 750 (federal patent law); *In re Sunterra Corp.*, 361 F. 3d 257, 271 (4th Cir. 2004) (copyright law); *In re Kazi Foods of Michigan, Inc.*, 473 B.R. 887, 889 (Bankr. E.D. Mich. 2011) (trademark law).

9. Nothing in the License Agreement alters this result. While the License Agreement contains a provision addressing assignment of the License Agreement under certain circumstances, no provision of the agreement addresses assumption of the contract in bankruptcy. The License Agreement generally prohibits assignment, but it does provide that “Premier may assign its rights and obligations hereunder to an entity that acquires the Business by way of merger, stock purchase, or the purchase of substantially all of Premier’s assets.”

10. In analyzing similar assignment language in a license agreement, the Fourth Circuit Court of Appeals expressly found that such language **does not** constitute consent to assumption of the license by a debtor in possession. See *In re Sunterra Corp.*, 361 F. 3d 257, 271 (4th Cir. 2004). Specifically, in that case, the Fourth Circuit concluded,

“[The licensor] consented to [the debtor]’s assignment of the License to a successor in interest under certain circumstances. The Transfer Provision, however, does not apply to assumption of the Agreement by a Chapter 11 debtor in possession. Because the terms assumption and assignment describe “two conceptually distinct events,” *In re Catapult*, 165 F.3d at 752, and because the Transfer Provision pertains to an assignment rather than an assumption, [the licensor] did not consent to [the debtor]’s assumption of the Agreement. Without [the licensor]’s consent, [the debtor] was precluded from assuming the Agreement.”

Id.

11. Because Franklin Covey Co. has not and will not consent to the assumption of the License Agreement, the Objection should be sustained.

RESERVATION OF RIGHTS

12. Franklin Covey Co. reserves all of its rights, claims, defenses, and remedies with respect to the License Agreement or other contracts with any of the Debtors or their non-Debtor affiliates, including, without limitation, the right to amend, modify, or supplement this Objection, to request adequate assurances of further performance, to seek discovery, or to raise any additional objections. By filing this Objection, Franklin Covey Co. further specifically reserves its right to seek termination of the License Agreement, including, without limitation, with respect to non-Debtor Premier School Agendas Ltd. Agenda Scolaire Premier Ltee.

WHEREFORE, for the foregoing reasons, Frankly Covey Co. respectfully requests that the Court (i) sustain this Objection; (ii) deny the Debtors' request to assume the License Agreement; and (iii) grant such other and further relief as is just and proper.

Dated: May 15, 2013
New York, New York

JONES DAY

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