

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

In re) Case No. 24-11015-B-11
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PINNACLE FOODS OF CALIFORNIA LLC,) Docket Control No. KCO-5
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Debtor.)
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**MEMORANDUM ON DEBTOR'S MOTION TO RECONSIDER
ORDER DENYING MOTION TO ASSUME FRANCHISE AGREEMENTS**

Michael J. Berger, Law Offices of Michael J. Berger, Beverly Hills, CA, for Pinnacle Foods of California, LLC, Craig R. Tractenberg, FOX ROTHSCCHILD LLP, for Pinnacle Foods of California LLC, Movant/Debtor.

Glenn D. Moses, VENABLE, LLP, for Popeyes Louisiana Kitchen, Inc., franchisor.

Walter R. Dahl, Subchapter V Trustee.

RENÉ LASTRETO II, Bankruptcy Judge:

INTRODUCTION

The bankruptcy trustee or debtor-in-possession has a powerful tool to assume or assume and assign executory contracts or unexpired leases even if the contract or governing law precludes or conditions assignments. But the tool has limited usefulness in this circuit. If the identity of the non-debtor party to the contract is material, then applicable law permits the non-debtor party to withhold consent to the trustee's or

1 debtor-in-possession's assumption of the contract even though the
2 debtor has no plans to assign the contract.

3 That applicable law, if interpreted as it is in this
4 circuit, can be a roadblock on a formidable path for a debtor who
5 wants to reorganize.

6 A quick service restaurant franchisee here reached that
7 roadblock and chose to crash through by both disputing its
8 existence or claiming it allowed passage anyway. But the wall
9 held when this court denied its motion to assume franchise
10 contracts. Rather than bypassing the roadblock, the franchisee
11 now tries to smash it once again, by asking the court to
12 reconsider its prior ruling. But there is no basis to change the
13 ruling since it is not legal error for a court to apply the
14 controlling law. The court DENIES the motion for
15 reconsideration.

16
17 **I.**

18 **A.**

19 Pinnacle Foods of California, LLC ("Pinnacle") is a
20 franchisee of Popeyes Louisiana Kitchens ("PLK"). Pinnacle
21 operates six Popeyes fast food restaurants - five in Fresno,
22 California and one in Turlock, California. Separate franchise
23 agreements between Pinnacle and PLK for the various restaurants
24 were entered into. Doc. #228.

25 Beset by a number of problems faced by the quick service
26 restaurant industry in California, Pinnacle filed a voluntary
27 Chapter 11 proceeding in April 2024 and elected to proceed under
28 Subchapter V.

1 Pinnacle has proposed a plan, but it has not been pursued.
2 A significant issue about the relationship between Pinnacle and
3 PLK needs resolution. The issue: Whether under 11 U.S.C. § 365
4 of the Bankruptcy Code, Pinnacle can assume PLK's franchise
5 agreements without PLK's consent.¹ In order to resolve the
6 issue, in September 2024, Pinnacle filed a motion to assume the
7 franchise agreements (KCO-4).

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9 **B.**

10 Pinnacle proposed to assume PLK's franchise agreements and
11 provide for a prompt cure of any pre-petition defaults. Pinnacle
12 claimed that its obligation to provide adequate assurance of
13 future performance was based on its ability to reorganize.

14 PLK opposed. From the beginning of the case, PLK has
15 maintained that it would not consent to Pinnacle assuming the
16 franchise agreements. Doc. #245. PLK relied on § 365(c)(1)
17 which, as interpreted by the Ninth Circuit in *Perlman v. Catapult*
18 *Entertainment, Inc. (In Re Catapult Entertainment)* ("Catapult"),
19 excuses PLK from accepting performance from or rendering
20 performance to a hypothetical third party. See 165 F.3d 747 (9th
21 Cir. 1999).

22 PLK goes on to contend that Pinnacle cannot assign franchise
23 agreements without PLK's consent due to provisions of the Lanham
24 Act (15 U.S.C. §§ 1051 *et seq.*) and the California Franchise
25 Relations Act ("the CFRA") (Cal. Bus. & Prof. Code §§ 20000 *et*

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27 ¹ Unless otherwise indicated, all references to code sections will be to the
28 United States Bankruptcy Code (11 U.S.C. § 101 *et seq.*). "Civ. Rule" will be
references to the Federal Rules of Civil Procedures. Citations to "Rule"
shall be to the Federal Rules of Bankruptcy Procedure.

1 seq.), and so Pinnacle is also barred from assuming the franchise
2 agreements. *Id.* This is because the Ninth Circuit, along with
3 the majority of circuit courts that have taken up the issue,
4 apply the "hypothetical test" to determine if a contract can be
5 assumed or assigned under § 365(c)(1).

6 PLK also argued that Pinnacle has committed uncurable non-
7 monetary defaults under the franchise agreements. Pinnacle
8 disputed that there is any non-monetary default at all and
9 contends that it does not need to cure all monetary defaults.

10 In reply to PLK's opposition, Pinnacle relied on arguments
11 that the CFRA contains provisions which defeat PLK's arguments
12 under the hypothetical test. Pinnacle also argued that it is in
13 the process of curing the various monetary defaults. Pinnacle
14 did not substantially discuss the application of the Lanham Act's
15 trademark protections.

16 The court held a hearing on the motion on October 8, 2024.
17 Two days later, it issued a 20-page memorandum on the motion and
18 an order denying the Debtor's motion to assume the franchise
19 agreements. Docs. ##275 - 276.

20 In its decision, the court began by discussing § 365(c)(1)
21 and the two different theories of application of that section:
22 the "hypothetical test" and the "actual test." Under the
23 "hypothetical test," if the debtor merely wishes to assume an
24 executory contract or an unexpired lease and not assign its
25 contract rights to a third party, the counter-party may still
26 withhold its consent and block assumption if there is a
27 hypothetical third party to whom the debtor might assign its
28 contract rights but as to whom the counter-party would be excused

1 from performing for under applicable law. *City of Jamestown v.*
2 *James Cable Partners, L.P. (In re James Cable Partners)*, 27 F.3d
3 534, 537 (11th Cir. 1994)

4 Under the "actual test," the counter-party would only be
5 able to block assumption if there were an actual third party from
6 whom the counter-party would be forced to accept performance
7 other than the debtor with whom the counter-party had contracted,
8 and the counter-party would be excused from performing for under
9 applicable law. *Institut Pasteur v. Cambridge Biotech Corp.*, 104
10 F.3d 489, 493 (1st Cir. 1997). The court noted in its decision
11 that the "applicable law" means any law applicable to the
12 contract other than bankruptcy law. *In Re XMH Corp.*, 647 F.3d
13 690, 695 (7th Cir. 2011).

14 The court then applied the *Catapult* hypothetical test and
15 noted that both the Lanham Act and the provisions of CFRA
16 constitute "applicable law" that would excuse PLK from accepting
17 performance from or giving performance to a "hypothetical third-
18 party."

19 The Lanham Act provides remedies for misuse of the trademark
20 such as the one owned by PLK. The court noted the authorities
21 under the Lanham Act giving the trademark holder the right to
22 assign a trademark but also giving a holder the right and duty to
23 control the quality of goods sold under the mark. 15 U.S.C.
24 § 1060; *N.C.P. Mktg. Group v. Blanks (In Re N.C.P. Mktg. Group)*,
25 337 B.R. 230, 235-37 (D.Nev. 2005), *aff'd N.C.P. Mktg. Group,*
26 *Inc. v. Blanks (In Re N.C.P. Mktg. Group, Inc.)* 279 Fed. Appx.
27 561 (9th Cir. 2008), *cert. den.* 556 U.S. 1145 (2009).

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1 As to the CFRA, the court considered Pinnacle's argument
2 that the CFRA is the only "applicable law" that matters and it
3 encourages assignment. However, the court pointed to provisions
4 of the CFRA giving franchisors authority to withhold consent to
5 franchise transfers if the proposed transferee does not meet
6 franchisor's standards for new or renewing franchisees. Cal.
7 Bus. & Prof. Code § 20028.

8 The court disagreed with Pinnacle's interpretation that CFRA
9 compels PLK to consent. The "hypothetical test" as espoused in
10 *Catapult* looks to whether the applicable law excuses PLK's
11 performance to a hypothetical transferee. The answer is it does.
12 If a hypothetical transferee fails to meet PLK's standards, PLK
13 is excused from performing. That is the only question that the
14 Ninth Circuit requires to be asked. The identity of the
15 transferee is critical in the franchise relationship.

16 Pinnacle did argue that there are cases such as *In Re Van*
17 *Ness Auto Plaza, Inc.* where a franchisor had to justify its lack
18 of consent as reasonable. 120 B.R. 545 (Bankr. N.D. Cal. 1990).
19 But the court in its earlier decision distinguished those cases
20 on several grounds, not the least of which is the fact that the
21 statute involved in the auto franchise cases, Cal. Veh. Code
22 § 11713.3(e), has entirely different provisions than the Lanham
23 Act or the CFRA. The court ultimately ruled that the franchise
24 agreements could not be assumed by Pinnacle absent PLK's consent.

25 Fourteen days after entry of the order, this motion for
26 reconsideration was filed.

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1 C.

2 In the motion to reconsider, Pinnacle reargues two primary
3 contentions the court dealt with in the original Decision.
4 First, Pinnacle argues the trademark protections of the Lanham
5 Act do not apply to franchises that are to be assumed and
6 assigned in bankruptcy in California since the exclusive
7 "applicable law" under § 365(c)(1) is the CFRA. Second, Pinnacle
8 urges that, though *Catapult* is binding authority on this court,
9 application of CFRA here requires this court to determine the
10 reasonableness of PLK's decision not to consent to a transfer in
11 this case.

12 PLK urges that, as a matter of law, Pinnacle's rehash of the
13 previous arguments made in the assumption motion does not support
14 reconsideration under either Civ. Rule 59(e) (Rule 9023) or Civ.
15 Rule 60(b) (Rule 9024). Also, PLK contends that under *Catapult*,
16 as applied by this court, either the Lanham Act or the CFRA would
17 excuse PLK from accepting performance from a non-debtor third
18 party. Thus, under the "hypothetical test," PLK prevails since
19 it can be excused under either law from accepting performance
20 from or performing under the franchise agreements under PLK's
21 existing standards. Further, PLK urges that nothing in § 365(c)
22 or the Bankruptcy Code limits the "applicable law" inquiry to
23 just one law. The Lanham Act protects trademarks nationwide and
24 provides remedies for unauthorized use of a mark. PLK argues
25 that the Lanham Act and the CFRA can and do co-exist.

26 In reply, Pinnacle argues the Lanham Act and CFRA are
27 inconsistent and that the court in its decision gave the
28 franchisor veto power in every case where a trademark is

involved. Pinnacle claims the court erred by not asking why the identity of a "hypothetical transferee" is essential to the contract if the law excuses assignment.

D.

Jurisdiction is conferred upon this court under 28 U.S.C. § 1334(b) and 28 U.S.C. § 157(a). This is a proceeding that this court can hear and finally determine. 28 U.S.C. § 157(b) (2) (A), (M), and (O).

II

A.

Pinnacle rests its motion on Civ. Rule 60(b) arguing that this court's ruling denying the motion to assume was a mistake of law. See *Kemp v. United States*, 596 U.S. 528, 533-34 (2022) ("[A] 'mistake' under Rule 60(b) (1) includes a judge's mistake of law.") Nevertheless, "re-litigation of the legal or factual claims underlying the original judgment is not permitted in a 60(b) motion or an appeal therefrom." *Agostini v. Felton*, 521 U.S.C. 203, 257 (1997). Civ. Rule 60(b) provides for extraordinary relief and may be invoked only upon a showing of exceptional circumstances. *Engleson v. Burlington N.R. Co.*, 972 F.2d 1038, 1044 (9th Cir. 1992). A party must show the court committed a specific error. *Straw v. Bowen*, 866 F.2d 1167, 1172 (9th Cir. 1989). A ruling on this motion is addressed to the sound discretion of the court. *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1257 (9th Cir. 2004).

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1 In a footnote, Pinnacle also claims this motion should be
2 considered a motion to alter or amend a judgment under Civ. Rule
3 59(e) (Rule 9023). A motion for reconsideration should not be
4 granted absent highly unusual circumstances. *Beaver v. Tarsadia*
5 *Hotels*, 29 F.Supp.3d 1294, 1301-2 (S.D. Cal. 2014) *aff'd* 816 F.3d
6 1170 (9th Cir. 2016) (citing *389 Orange St. Partners v. Arnold*,
7 179 F.3d 656, 665 (9th Cir. 1999)). These motions should not be
8 used to ask the court to re-think what the court has already
9 thought through merely because the party disagrees with the
10 court's decision. *Id.*; *Collins v. D. R. Horton, Inc.*, 252
11 F.Supp.2d 936, 938 (D. Ariz. 2003) (citing *U.S. v. Rezzonico*, 32
12 F.Supp.2d 1112, 1116 (D. Ariz. 1998)).

13 Although Civ. Rule 59(e) permits a bankruptcy court to
14 reconsider and amend a previous order, the rule offers an
15 "extraordinary remedy, to be used sparingly in the interest of
16 finality and conservation of judicial resources." *Kona Enters.,*
17 *Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000).
18 "Indeed, a motion for reconsideration should not be granted
19 absent highly unusual circumstances, unless the court is
20 presented with newly discovered evidence, committed clear error,
21 or if there is an intervening change in the controlling law." *Id.*

22 Under either Civ. Rule 60(b)(1) (Rule 9024) or Civ. Rule
23 59(e) (Rule 9023), no mistake of law or "clear error" of law was
24 committed here. As set forth below, Pinnacle's merely rehashes
25 the same arguments that have already been dealt with by the
26 court, and there is nothing in support of Pinnacle's motion
27 establishing that the court's previous ruling was erroneous under
28 controlling Ninth Circuit law.

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1 The application of this subsection has divided the courts
2 into two camps: the "hypothetical test" camp and the "actual
3 test" camp.

4 The "hypothetical test" approaches the assumption question
5 by strictly reading the limitations on a trustee or debtor-in-
6 possession's power to assume under § 365(c)(1). 3 COLLIER ON
7 BANKRUPTCY ¶ 365.07 (16th Edition). If PLK would be excused from
8 accepting performance from or rendering performance to an entity
9 other than Pinnacle under applicable law, then Pinnacle as
10 debtor-in-possession may not assume the contract even though
11 Pinnacle would be the one performing under a franchise agreement.
12 That approach was adopted by the Ninth Circuit in *Catapult*.

13 The "actual test" differs in that the non-debtor party is
14 excused in accepting performance from or rendering performance to
15 an entity other than the debtor-in-possession only if the debtor-
16 in-possession wished to assume and assign the franchise agreement
17 to another entity that actually existed. This approach is
18 adopted in the minority of circuits. See, *Summit Inv. & Dev.*
19 *Corp. v. Leroux (In Re Leroux)*, 69 F.3d 608 (1st Cir. 1995);
20 *Bonneville Power Admin. v. Mirant Corp. (In Re Mirant Corp.)*, 440
21 F.3d 238 (5th Cir. 2006).

22 Thus, in the majority of circuits, a debtor may only assume
23 an executory contract if the debtor has the hypothetical
24 authority to assign the contract (the "hypothetical test"), while
25 other circuits permit a debtor to assume an executory contract if
26 the debtor does not intend to assign it (the "actual test").

27 In *Catapult*, Perlman, a licensor, granted several non-
28 exclusive patent licenses to exploit technologies including

1 patent applications to Catapult, which was in the business of
2 creating an online gaming network. After going through a reverse
3 triangular merger and bankruptcy reorganization, Catapult sought
4 to assume the licenses. The bankruptcy court granted the
5 assumption motion and confirmed the plan. The district court
6 affirmed, and Perlman appealed to the Ninth Circuit.

7 The court of appeals analyzed both the "hypothetical test"
8 and the "actual test" and acknowledged the split among the
9 circuits. The *Catapult* court wrestled with the apparent conflict
10 between § 365(f) and (c)(1). It resolved the conflict by noting
11 that "only if the law prohibits assignment on the rationale that
12 the identity of the contracting party is material to the
13 agreement will subsection (c)(1) rescue it." *Catapult*, 165 F.3d
14 at 752. The *Catapult* court held:

15 Accordingly, we hold that where applicable non-
16 bankruptcy law makes an executory contract non-
17 assignable because the identity of a non-debtor party is
18 material, a debtor-in-possession may not assume the
19 contract absent consent of the non-debtor party.

20 *Id.* at 754.

21 In the decision on Pinnacle's motion to assume the
22 contracts, the court examined the ability of the trademark holder
23 to control the quality of goods sold under the mark. 15 U.S.C.
24 § 1060. The court also cited numerous authorities including
25 *N.C.P. Mktg. Grp. v. Blanks (In re N.C.P. Mktg. Grp.)*, 337 B.R.
26 230 (D. Nev. 2005), *aff'd* 279 Fed. Appx. 561 (9th Cir. 2008),
27 cert. denied, 556 U.S. 1145 (2009) and *Miller v. Glenn Miller*
28 *Production*, 318 F.Supp.2d 923, 928 (C.D. Cal. 2004) and *In Re XMH*
Corp., 647 F.3d 690, 695 (7th Cir., 2011) ("[T]he universal rule
is that trademark licenses are not assignable in the absence of a

1 clause in the contract expressly authorizing the assignment.")
2 *Accord* J. Thomas McCarthy, 4 MCCARTHY ON TRADEMARKS AND UNFAIR
3 COMPETITION, § 1422 (4th Edition 2005) ("Since the licensor-
4 trademark owner has the duty to control the quality of goods sold
5 under its mark, it must have the right to pass upon the abilities
6 of a new potential licensees.") Other courts agree. *See In*
7 *Trump Entertainment Resorts*, 526 B.R. 116, 124, 127 (Bankr. D.
8 Del. 2015); *In Re AJRANC Ins. Agency, Inc.*, 8:20-bk-06493-CED;
9 2021 Bankr. LEXIS 1772 (Bankr. M. D. Fla., July 2, 2021).

10 Pinnacle argues that the Lanham Act is not applicable law
11 and instead urges that the "California amendments" (Doc. #230
12 (Exh. G)) attached to the franchise agreements applies California
13 law with respect to transfers. Pinnacle thus argues that the
14 CFRA is the controlling law notwithstanding federal trademark
15 protection.

16 The "California Amendments" do reference the CFRA regarding
17 transfers, but the contract amendment does not supersede federal
18 law under the Lanham Act.² The franchise agreements also state
19 that Georgia law will control even though the "California
20 Amendments" note that Georgia law may not be enforceable. (Doc.
21 #130 Exh. G.)

22 Pinnacle's argument assumes the Lanham Act eliminates
23 transfer rights. It does not. Trademarks are valuable property
24 rights, and the owner controls the right to control the quality
25 of goods sold with the mark. An owner of a mark controls the
26 transfer because the owner has an interest in the use of the mark

27
28 ² The court noted in its decision that the Lanham Act does not preempt all
franchise law (Doc. #275 fn. 4).

1 and the identity of the mark attached to a product or service.
2 An owner has a right to be sure they are consistent. *N.C.P.*
3 *Mktg. Grp.* 337 B.R. at 236 (affirming a bankruptcy court order
4 compelling a rejection of a non-exclusive trademark license).
5 The *N.C.P.* court approved PLK's rationale here concluding:

6 Because the owner of the trademark has an interest in
7 the party to whom the trademark is assigned so that it
8 can maintain the goodwill, quality, and value of its
9 products and thereby its trademark, trademark rights are
 personal to the assignee and not freely assignable to a
 third party. (Cits. omitted)

10 *Id.*

11 Pinnacle cites *Int'l Franchise Ass'n v. City of Seattle*,
12 which held that a proposed ordinance classifying certain
13 franchisees as large employers and subject to a higher minimum
14 wage did not conflict with the Lanham Act since the act does not
15 preempt such an ordinance. 803 F.3d 389, 410 (9th Cir. 2015)
16 *cert. den.*, 578 U.S. 959 (2016).

17 The Lanham Act protects consumers and owners of trademarks.
18 Pinnacle argues that the CFRA preempts the Lanham Act application
19 in the context of an exception to the general power to assume
20 executory contracts under the Bankruptcy Code. But the issue
21 here is not whether the Lanham Act preempts CFRA and thus gives
22 "veto power" to PLK. The issue is whether PLK as trademark owner
23 must consent to transfer of the mark to a hypothetical third
24 party. And under trademark law, it must, despite Pinnacle's
25 efforts to establish a false dichotomy.

26 In *Int'l Franchise Ass'n*, the Ninth Circuit held the Lanham
27 Act was inapplicable to the issue litigated there: Application
28 of an ordinance affecting the minimum wage to be paid certain

1 employers. *Id.* at 409. Pinnacle argues here that the Lanham Act
2 does conflict with the CFRA so *Int'l Franchise Ass'n* is
3 inapposite.

4 Pinnacle next claims it "defies logic" that the terms of the
5 California Amendments to the franchise agreements incorporate the
6 CFRA and yet the Lanham Act would still apply.

7 To the contrary, Pinnacle's premises are flawed. The first
8 premise is that only one set of laws could apply here. The
9 Lanham Act does not preempt all franchise laws, but that does not
10 mean the Lanham Act and CFRA cannot coexist. Indeed, PLK's
11 contracts incorporate Georgia Law and CFRA. At least two "laws"
12 can apply to the contracts here except, perhaps, where the laws
13 conflict and are irreconcilable. Despite Pinnacle's efforts, the
14 Lanham Act and CFRA are not in irreconcilable conflict here.

15 The second faulty premise is that CFRA's franchise transfer
16 provisions fully supplant the Lanham Act. As has been argued and
17 decided, even under CFRA, PLK can hypothetically be excused from
18 accepting or rendering performance to a proposed assignee if they
19 do not meet PLK's standards. There is no inconsistency as
20 applied here.

21 Pinnacle next encourages the court to engage in a conflict
22 of laws analysis in the application of CFRA and the Lanham Act.
23 Pinnacle cites a California Appeal Court decision *1-800-Got Junk?*
24 *LLC v. Superior Court*, 189 Cal. App. 4th 500 (2010) ("*Got Junk*").
25 Pinnacle appears to argue that, since the CFRA contains more
26 restrictive provisions relating to the consent of a franchisor to
27 an assignment of the franchise contract than under the Lanham
28 Act, conflict of laws principles support the primacy of CFRA over

1 the Lanham Act here. The argument is unsupported. In *Got Junk*,
2 the issues were whether there was a reasonable basis for a
3 contractual choice of law provision in a franchise contract and
4 whether the California public policy precluded application of
5 contractual choice of law. In *Got Junk*, a franchisor terminated
6 the franchise of a southern California franchisee for failure to
7 pay the franchisor for certain jobs performed by the franchisee.
8 After an analysis of Washington law and the CFRA, the court in
9 *Got Junk* held that Washington law provided greater franchisee
10 protection than the CFRA. *Id.* at 512.

11 The California Franchise Relations Act at Business &
12 Professions Code § 20000 et seq. serves to protect
13 California franchisees, typically small business owners,
14 and entrepreneurs from abuses by franchisors in
connection with non-renewal and termination of
franchises.

15 *Got Junk* at 515 (cites omitted).

16 The case here does not implicate either of those policies.
17 PLK has not terminated the franchise nor failed to renew the
18 franchise. Rather, PLK is refusing to consent to assumption and
19 assignment in the context of a reorganization proceeding
20 implicating bankruptcy law as interpreted and applied in this
21 circuit. Nothing in *Got Junk* supports a contention that the
22 legislative intention of the CFRA is offended by restrictions on
23 assumption and assignment of franchise agreements in a bankruptcy
24 case. In fact, nothing in *Got Junk* analyzes the franchisor's
25 consent to transfer at all.

26 Pinnacle argues that CFRA is the only applicable law for
27 purposes of § 365(c). Pinnacle goes on to divine that the
28 leverage "imbalance" this court's decision causes will deter

1 bankruptcy filings due to a risk of franchisor nonconsent. That,
2 unfortunately for debtors, is simply a part of the calculus and
3 risk assessment in franchisees proceeding in bankruptcy cases in
4 this circuit and other "hypothetical test" jurisdictions. The
5 risk is not unlike that taken by debtors amid mass tort exposure
6 in the Ninth Circuit, which has held for thirty years that third
7 party releases are unavailable under a confirmed plan under
8 § 524(e). *Resorts Int'l., Inc. v. Lowenschuss (In Re*
9 *Lowenschuss)*, 67 F.3d 1394, 1401-02 (9th Cir. 1995), *cert. den.*
10 517 U.S. 1243 (1996).

11 In short, both the Lanham Act and CFRA can coexist. Pinnacle
12 has argued that CFRA should apply to a § 365(c)(1) analysis to
13 the exclusion of the Lanham Act. This is a "hypothetical test"
14 jurisdiction. The court is not faced with a proposed sale in
15 this case in either the underlying motion to assume the
16 franchises or this motion for reconsideration. Rather, the
17 question is whether, under the "hypothetical test," does the
18 Lanham Act excuse PLK from accepting performance from or
19 rendering performance to another party other than the debtor or
20 debtor-in-possession. The authorities establish the importance
21 to a trademark owner in controlling the use of the mark. That is
22 true even in a § 365(c)(1) analysis. Under *Catapult*, Pinnacle
23 may not assume without PLK's consent.

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25 **C.**

26 Even if Pinnacle was correct concerning the primacy of CFRA
27 over the Lanham Act - and it is not - PLK is still excused from
28 ///

1 accepting performance from or rendering performance to a third
2 party without consent even under the CFRA.

3 The provisions of the CFRA itself authorize PLK to refuse to
4 consent under the "hypothetical test" since it could refuse to
5 consent to an assignment or transfer to a third party that does
6 not meet PLK's franchisee standards.

7 Cal. Bus. & Prof. Code § 20028 governs the transfer or sale
8 of a franchise. Subdivision (a) provides:

9 It is unlawful for a franchisor to prevent a franchisee
10 from selling or transferring a franchise, all or
11 substantially all of the assets of the franchise
12 business, or a controlling or noncontrolling interest in
13 the franchise business, to another person **provided that**
14 **the person is qualified under the franchisor's then -**
15 **existing standards for the approval of new or new or**
16 **renewing franchisees, the standards to be made available**
17 **to the franchisee...and to be consistently applied to**
18 **similarly situated franchisees operating within the**
19 **franchise brand and the franchisee and the buyer,**
20 **transferee or assignee comply with the transfer**
21 **conditions specified in the franchise agreement.**

22 (emphasis added).

23 So, even under CFRA, PLK can refuse to consent to a transfer
24 if the prospective franchisee does not meet its standards and the
25 franchisee and the buyer fail to comply with the transfer
26 conditions specified in the franchise agreement. Therefore,
27 "hypothetically," PLK has a right to refuse to consent if the
28 there is a hypothetical prospective franchisee that does not meet
its standards. In other words, the "applicable law," as urged by
Pinnacle establishes that PLK can be excused from accepting
performance from or rendering performance to a third party.

Subdivision (b) of Cal. Bus. & Prof. Code § 20028
establishes the need for a franchisor's consent as a condition to
a transfer:

1 Notwithstanding Subdivision (a), a franchisee shall not
2 have the right to sell, transfer, or assign the
3 franchise, all or substantially all of the assets of the
4 franchise business, or a controlling or noncontrolling
5 interest in the franchise business, **without the written**
6 **consent of the franchisor, except that the consent shall**
7 **not be withheld unless the buyer, transferee, or assignee**
8 **does not meet the standards for new or renewing**
9 **franchisees described in subdivision (a) or the**
10 **franchisee and the buyer, transferee or assignee do not**
11 **comply with the transfer conditions specified in the**
12 **franchise agreement.**

13 (emphasis added).

14 Even under the CFRA, written consent from the franchisor is
15 required, but the franchisor is not to withhold consent unless
16 its standards are not met or the parties to the transfer do not
17 comply with conditions specified in the franchise agreement. *Id.*
18 Thus, "applicable law" excuses a franchisor who withholds consent
19 if its standards are not met or the transfer conditions specified
20 in the franchise agreement are not met.

21 These issues were discussed and analyzed in the previous
22 decision.

23 Cal. Bus. & Prof. Code § 20029(b) provides a time limit
24 within which the franchisor, after receipt of all necessary
25 documentation, is to notify the franchisee of an approval or
26 disapproval of a proposed sale, or assignment, or transfer.
27 Unless it is disapproved, the proposed sale, assignment, or
28 transfer is deemed approved. But under subdivision (2) of Cal.
29 Bus. & Prof. § 20029(b) it is provided:

30 In any action in which the franchisor's disapproval of a
31 sale, assignment, or transfer pursuant to this
32 subdivision is an issue, the reasonableness of the
33 franchisor's decision shall be a question of fact
34 requiring consideration of all existing circumstances.

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1 Pinnacle uses this provision to argue that a "reasonableness"
2 inquiry by the court is necessary to determine whether PLK's
3 refusal to consent is justified under CFRA. That argument is a
4 "red herring." There is no sale, assignment, or transfer before
5 the court. All that is before the court is the question of
6 whether "applicable law" permits PLK to refuse to consent to a
7 third party being assigned the franchise agreement. CFRA permits
8 such refusal. That is the only inquiry that is relevant.

9 Undaunted, Pinnacle argues that under a First Circuit
10 decision, *In Re Pioneer Ford Sales*, 729 F.2d 27 (1st Cir. 1984),
11 that a "reasonableness inquiry" is necessary when applying a
12 consistent state law even though that law does provide for
13 consent of the franchisor. This case is inapplicable.

14 First, the court is not bound by nor persuaded by *Pioneer*
15 *Ford Sales* since it is a decision from a circuit that has since
16 adopted the "actual test." *Institut Pasteur*, 104 F.3d at 493.

17 Second, Pinnacle's argument asks the court to apply the
18 "actual test" which *Catapult* rejected. Even before *Catapult* was
19 decided, the Ninth Circuit noted the split of circuit authority
20 on the interplay between §§ 365(c) and 365(f). See *Everex Sys. v.*
21 *Cadtrak Corp. (In Re CFLC, Inc.)*, 89 F.3d 673, 676-77 (9th Cir.,
22 1996) In *Everex*, the circuit held under either circuit's
23 interpretation, a nonexclusive patent license was personal and
24 nondelegable.

25 Third, one cannot ignore that in both *Pioneer Ford* and *In Re*
26 *Van Ness Auto Plaza*, 120 B.R. 545 (Bankr. N.D. Cal. 1990), also
27 cited by Pinnacle, the courts either held the auto manufacturer
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1 was reasonable in denying the assumption or affirmed a lower
2 court's decision that it was.

3 Pinnacle also contends the court should have made factual
4 findings that PLK is being reasonable in withholding consent.
5 That assumes Pinnacle is correct that an "actual test" objective
6 reasonableness analysis should have been applied. That is not
7 the law in the Ninth Circuit, notwithstanding Pinnacle's
8 entreaties to the contrary.

9 The "motor vehicle cases" Pinnacle repeatedly references
10 were not decided under CFRA. In California, as cited in *Van Ness*
11 *Auto Plaza*, 120 B.R. at 547 the "applicable law" was California
12 Vehicle Code § 11713.3(e) which in 1990 provided in part:

13 It is unlawful...for any manufacturer...to do any of the
14 following:

15 (e)

16 To prevent, or attempt to prevent, a dealer
17 from receiving fair and reasonable
18 compensation for the value of the franchised
19 business. There shall be no transfer or
assignment of the dealer's franchise without
the consent of the manufacturer or
distributor, which consent shall not be
unreasonably withheld.

20 The applicable law itself provided for the application of
21 reasonable consent. In fact, in comparing cases involving
22 landlords withholding of consent as to lease assignments, the *Van*
23 *Ness Auto Plaza* court compared the lease scenario to a franchise:

24 First, it is more difficult to determine whether an
25 automobile dealer will be a suitable franchisee than it
26 is to determine whether a lessee will perform under a
27 lease. A lessee's major contractual duty is to pay rent
28 timely. A franchisee's duties are much more complex.
Second, a franchise agreement involves a manufacturer and
dealer in a much closer business relationship than
commonly exists between a lessor and lessee. Thus, the
courts must be somewhat cautious in requiring the

1 manufacturer to enter into such relationship
2 involuntarily.

3 120 B.R. at 548-549.

4 In partial support of its motion, Pinnacle cites another
5 "car dealer case." *Ford Motor Company v. Claremont Acquisition*
6 *Corp. (In Re Claremont Acquisition Corp.)*, 186 B.R. 977 (C.D.
7 Cal. 1995) *aff'd Worthington v. GMC (In Re Claremont Acquisition*
8 *Corp.)*, 113 F.3d 1029 (9th Cir. 1997), superseded by statute on
9 other grounds as stated in *In Re Hathaway*, 401 B.R. 477, 484-5
10 (Bankr. E.D. Wash. 2009). However, *Claremont Acquisition Corp.*
11 is also unpersuasive.

12 First, *Claremont Acquisition Corp.* and *Van Ness Auto Plaza*
13 predate *Catapult* so they are largely irrelevant.

14 Second, there is no discussion or consideration of the CFRA
15 in *Claremont Acquisition Corp.* It only analyzed the application
16 of Cal. Veh. Code § 11713.3(e).

17 Third, in *Claremont Acquisition Corp.*, the bankruptcy court
18 compelled two auto manufacturers to accept involuntarily the
19 assignment of the debtor's franchise agreements to third parties.
20 On appeal, the district court applied Vehicle Code § 11713.3(e)
21 and § 365(c)(1) and found substantial evidence including low
22 customer ratings significant enough not to compel assignment as
23 to one dealer. Also, a significant issue in *Claremont*
24 *Acquisition Corp.* is whether the debtor dealerships "went dark"
25 prepetition, which was a non-curable default. These issues are
26 not before the court on this motion.

27 By the same token, Pinnacle's protestation that the court's
28 decision "eviscerates" Cal. Bus. & Prof. Code § 20029(b)(2)

1 (quoted above) is hyperbole. That provision cannot be viewed in
2 a vacuum. Cal. Bus. & Prof. Codes § 20028(a) and (b) provide two
3 important conditions on transfers. First the proposed assignee
4 must be qualified under the franchisors then existing standards
5 for the approval of new or renewing franchisees and franchisee
6 and the proposed successor must comply with transfer restrictions
7 specified in the transfer agreement.

8 Notwithstanding those conditions, no transfer can occur
9 without the written consent of franchisor, except that consent
10 cannot be withheld unless the buyer, transferee, or assignee does
11 not meet the standards of new or renewing franchisees or does not
12 comply with the transfer conditions in the franchise agreement.
13 *Id.*

14 Applicable law excuses PLK from consenting to a transfer or
15 assignment of a franchise if the proposed transferee or assignee
16 does not meet the standards for new or renewing franchises under
17 CFRA. Under § 365(c)(1) as applied by the Ninth Circuit, the
18 contingency precludes assumption *or* assignment, not assumption
19 *and* assignment. *Catapult*, 165 F.3d at 752-754. Whether actual
20 facts regarding qualification exist or not, the Ninth Circuit
21 focuses on materiality of the identity of the non-debtor party.
22 PLK's standards are material to the franchisor/franchisee
23 relationship for obvious reasons. Thus, PLK's consent is
24 required under the CFRA and here.

25 Nevertheless, Pinnacle maintains that the court's reading of
26 *Catapult* misses a nuance. The *Catapult* court evidently did not
27 mean what it said when it held the plain reading of § 365(c)(1)
28 compelled the result in this case. Instead, Pinnacle maintains

1 that what *Catapult* really stands for is the requirement that the
2 "reasonableness" of PLK's lack of consent must be examined
3 notwithstanding the *Catapult* holding.

4 Supporting this contention, Pinnacle relies on a case cited
5 by the Ninth Circuit in *Catapult*, *In Re Antonelli*, 148 B.R. 443,
6 450 (D. Md. 1992) *Aff'd without opinion*, 4 F.3d 984 (4th Cir.
7 1993). This reliance is unavailing for three reasons.

8 First, it should be noted that the Fourth Circuit has
9 adopted the "hypothetical test" since *Antonelli*. *In Re Sunterra*,
10 361 F.3d 257 (4th Cir. 2004). In fact, *Sunterra* cited *Antonelli*
11 for the proposition that anti-assignment laws predicated on the
12 materiality of the identity of the contracting party activate
13 § 365(c)(1)'s exception to the § 365(f) general directive to
14 ignore anti-assignment provisions and applicable law. *Sunterra*,
15 361 F.3d at 267. The applicable law here makes the identity of
16 the franchisee material. So, assumption or assignment requires
17 PLK's consent.

18 Second, this court discussed the *Antonelli* decision in its
19 memorandum decision. See Doc. #275, pp. 16-18. Pinnacle simply
20 repeats arguments already discussed and analyzed before.

21 Third, Pinnacle completely ignores the *Catapult* court's
22 discussion of *Antonelli* and also *Rieser v. The Dayton Country*
23 *Club Company*, (*In Re Magness*) 972 F.2d 689, 695 (6th Cir. 1992).
24 In *Magness*, the Sixth Circuit affirmed the denial of the
25 trustee's motion to assume and assign a golf club membership in
26 which the club had a detailed process for granting a finite
27 number of golf memberships. The *Magness* court held the interests
28 of the other club members and the personal relationship between

1 members precluded assumption. So, both *Antonelli* and *Magness* are
2 summed up by the Ninth Circuit's holding in *Catapult* that
3 § 365(c)(1)'s reference to "applicable law" refers to a law that
4 prohibits assignment when "identity of the contracting party is
5 material to the agreement." *Catapult*, 165 F.3d at 752. That is
6 when assignment is precluded. Nothing in the Lanham Act or CFRA
7 requires a franchisor to be blinkered when faced with a
8 prospective new party to their franchise agreement. Section
9 365(c)(1) applies to excuse PLK from performing without their
10 consent if a new party is unqualified.

11 Though perhaps superficially appealing, Pinnacle's arguments
12 amount to a challenge to the policy the "hypothetical test"
13 invokes. But the *Catapult* court has the answer: "...Congress is
14 the policy maker, not the courts." *Id.* at page 754.

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1 **CONCLUSION**

2 For the foregoing reasons, the court discerns no clear error
3 of law or highly unusual circumstance justifying reconsideration
4 of its ruling denying Pinnacle's motion to assume franchise
5 agreements under Civ. Rule 59(e) (Rule 9023). Nor, upon
6 reconsideration, is there a mistake of law under Civ. Rule
7 60(b) (1) (Rule 9024). Thus, Pinnacle's motion for reconsideration
8 is **DENIED**.

9 A separate order will issue.³

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11 Dated: December 19, 2024 By the Court

12
13 /s/ René Lastreto II
14 René Lastreto II, Judge
15 United States Bankruptcy Court
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26
27 ³ The foregoing are the court's findings of fact and conclusions of law under
28 Civ. Rule 52 (Rule 7052). Any finding of fact that is construed as a
conclusion of law is adopted as such. Any conclusion of law construed as a
finding of fact is adopted as such.