

Amish R. Doshi (AD5996)
DAY PITNEY LLP
7 Times Square
New York, New York 10036
Telephone: (212) 297-5800
Facsimile: (212) 916-2940
Email: adoshi@daypitney.com

Attorneys for Oracle USA, Inc.

Hearing Date:	TBD
Hearing Time	TBD
Objection Date:	October 12, 2009

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

METALDYNE CORPORATION, *et al.*,

Debtors.

**Case No. 09-13412 (MG)
(Jointly Administered)**

Chapter 11

**ORACLE’S OPPOSITION AND RIGHTS RESERVATION TO DEBTORS’
THIRD NOTICE OF EXECUTORY CONTRACTS AND UNEXPIRED
LEASES TO BE ASSUMED AND ASSIGNED IN CONNECTION WITH THE
SALE OF THE MAJORITY OF THE DEBTORS’ ASSETS (“OPPOSITION”)**

Oracle USA, Inc., successor in interest to Oracle Corporation, Agile Software Corporation (“Agile”), JD Edwards, Inc., Hyperion Solutions, Inc. and Upstream Software Corporation (jointly herein “Oracle”), a creditor and contract counter-party in the above-captioned jointly administered Chapter 11 cases, submits its Opposition to Metaldyne Corporation’s (“Debtors”) Third Notice of Executory Contracts and Unexpired Leases to be Assumed and Assigned in Connection with the Sale of the Majority of the Debtors’ Assets (“Third Notice”) and in support of the Opposition, Oracle submits as follows:

I. INTRODUCTION AND BACKGROUND

1. On August 3, 2009 Oracle filed its Opposition and Reservation of Rights in connection with the Debtors’ motion to sell its Powertrain Group assets (“Powertrain Objection”).

2. Following the Powertrain Objection's filing, the Debtors and Oracle commenced efforts to negotiate a mutually agreeable resolution regarding Oracle's concerns, including those related to the Debtors' and Purchaser's proposed transitional use. These concerns were amplified by the Third Notice filed and served by Debtors on October 2, 2009. The Debtors' and Oracle's negotiations are ongoing, and now are directed towards resolving both the Powertrain Objection and Oracle's concerns stemming from the Third Notice. However, given the Third Notice's immediate objection deadline, Oracle files this Opposition to preserve its rights, should the negotiations unexpectedly conclude unsuccessfully.

3. In connection with the Third Notice, the Debtors now have identified several Oracle agreements which they hope to assume and assign to MD Investors Corporation ("MD Investors"). The cure amount is identified as \$85,581.78 regarding certain contracts between Agile and Debtor. No other cure is stated. This cure amount is inaccurate, in that Oracle's records reflect that it is owed not less than \$171,165.47.

4. The Third Notice also contemplates a Transition Services Agreement ("TSA") between the Debtors and MD Investors.

5. Oracle files its Opposition to, and reserves all rights regarding, the TSA and any provision which contemplates the ongoing use of Oracle's software by any entity other than the authorized Debtor entities.

6. Specifically, Oracle objects to the TSA to the extent that the TSA grants both the Debtors and MD Investors rights allowing simultaneous use of, and access to, Oracle's software. This "shared" use exceeds the scope of the Oracle licenses' permitted uses. If allowed, it would result in an unauthorized "splitting" of the licenses between the Debtors and MD Investors. Such a "transition," or split, is not authorized by Oracle's licenses, and no contractual or legal basis exists for this type of proposed use. Therefore, Oracle objects to the proposed transitional use of

the Oracle software as both violative of Oracle's license agreements, and infringing of its intellectual property rights.

7. Furthermore, no specific time limit even is identified for the contemplated transitional services. The Debtors' Third Notice states only that "MD Investors intends to allow Debtors to continue to use software licensed and services provided under certain of the IT Agreements for a limited period of time." No compensation has been offered, no identification of the additional users or locations which may be added as a result of the TSA is identified, no specific time limit is indicated, no estimate is provided on the number of additional users and no details are provided about the scope of use contemplated. This, in short, is unacceptable.

8. Debtors and Debtors' counsel are aware of Oracle's concerns with respect to the TSA, and as previously mentioned, the parties are working toward a resolution to address these concerns. However, since the concerns have not been resolved by the objection deadline, Oracle files this Opposition to preserve its rights as to the Third Notice's overreaching approach.

9. As described below, Debtors may not assume and assign any Oracle agreements without Oracle's consent, as such contracts involve the licensing of patented and/or copyrighted materials, and Oracle does not consent to their assumption and assignment at this time.

10. In order also to ensure adequate assurance of future performance by the ultimate purchaser, Oracle requests that Debtors, at a minimum, provide to Oracle the following information about MD Investors: (a) financial bona fides; and (b) confirmation of its willingness to execute an Oracle Assignment Agreement and related documentation. Without this information, Oracle is unable to determine the buyer's creditworthiness or suitability/ability to adequately perform.

11. For these reasons, Oracle requests that the Court deny, at this time, any contemplated assignment, or provision of access, which could allow the unauthorized use and

transfer of Oracle's software, including the TSA. To the extent the Debtors seek assumption and assignment of any Oracle executory agreements, Debtors also must pay the amounts due and owing and confirm MD Investors ability to perform.

II. ARGUMENT

A. The Debtors May Not Assume And Assign or Transfer Any Oracle Agreement, As It Pertains To A License Of Intellectual Property And Oracle Does Not Consent To The Proposed Assignment At This Time.

12. Section 365(c)(1) of the Bankruptcy Code provides, in relevant part:

The trustee may not assume or assign any executory contract ... of the debtor ... 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 ..., 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.

13. Federal law makes non-exclusive patent licenses non-assignable absent consent of the licensor. In re Catapult Entertainment, Inc., 165 F.3d 747 (9th Cir. 1999), cert. dismissed, 528 U.S. 924 (1999). See also, In re ANC Rental Corporation, Inc., 277 B.R. 226, 235 (Bankr. D. Del. 2002); In re Golden Books Family Entertainment, Inc., 269 B.R. 311, 316 (Bankr. D. Del. 2001).

14. Oracle's license agreements involve the licensing of non-exclusive, patented software. At this time, Oracle does not consent to any proposed assignment, rendering the license agreements non-assignable. Accordingly, any intended assumption and assignment or transfer, even if "transitional," should be denied with respect to the Oracle agreements.

B. The Sale Motion Should Be Denied With Respect To The Oracle Agreements.

15. Section 365(b) of the Bankruptcy Code sets forth specific prerequisites that must be met before a trustee/debtor can assume and assign an executory contract, including (a) curing (or providing adequate assurance of a prompt cure of) any defaults under the subject contracts,

and (b) providing adequate assurance of future performance under the contract. Absent the foregoing, the executory contracts may not be assumed, or assumed and assigned.

16. At this time, Oracle cannot determine whether MD Investors: (a) is capable of providing adequate assurance of future performance; (b) will cure the defaulted sums owed; and/or (c) is willing to enter into a standard form of Oracle Assignment Agreement, and related documentation, reflecting the terms, post-assignment, of the parties' relationship.

17. Until at least the information identified above is provided, Oracle is unable to determine whether Debtors have complied, or will comply, with the protections of section 365(b)(1)(C).

C. The Third Notice Should Be Denied With Respect to the Oracle Agreements Because It Fails to Provide for Payment of Appropriate Amounts Required Prior to Pursuit of Any Assignment, Including A "Transitional" One.

18. Oracle's records reflect that it is owed not less than \$171,165.47. If assumption and assignment is contemplated, the Debtors cannot assign the license agreement until the arrearages are tendered, for Oracle will not consent to the assignment. At this time, Oracle does not have adequate assurance that the Debtors intend to pay any amounts owed, and for this reason also would withhold its consent to any assignment of the Oracle agreements. *See* 11 U.S.C. § 365(b)(1)(A).

19. Absent payment of the appropriate cure amounts to Oracle, the Oracle agreements may not be assumed, assumed and assigned or otherwise transferred, even on a "transitional basis."

III. CONCLUSION

20. For the reasons set forth above, Debtors are prohibited from assuming and assigning or transferring any Oracle agreements in the absence of obtaining Oracle's consent and paying the appropriate cure amount pursuant to section 365(c) and applicable case law. Oracle

believes that its Opposition may be resolved consensually, but until an agreement is reached and documented, Oracle files this Opposition to preserve its right to be heard on the concerns raised by the Third Notice.

Dated: October 12, 2009
New York, New York

DAY PITNEY LLP

By: /s/ Amish R. Doshi
Amish R. Doshi (AD5996)
7 Times Square
New York, New York 10036
Telephone: (212) 297-5800
Facsimile: (212) 916-2940
E-mail: adoshi@daypitney.com

Shawn M. Christianson (CSB #114707)
BUCHALTER NEMER P.C.
333 Market Street, 25th Floor
San Francisco, California 94105-2126
Telephone: (415) 227-0900
Facsimile: (415) 227-0770

and

Deborah Miller (CSB #95527)
Peggy Bruggman (CSB #184176)
ORACLE USA, INC.
500 Oracle Parkway
Redwood City, California 94065
Telephone: (650) 506-5200
Facsimile: (650) 506-7114

Attorneys for Oracle USA, Inc.