

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

)	Chapter 11
In re:)	
)	Case No. 19-11973 (MFW)
SUGARFINA, INC., et al.,)	
)	Jointly Administered
)	
Debtors.)	Hearing Date: October 24, 2019
)	Hearing Time: 10:30 AM
)	Objection Date: September 16, 2019
)	
)	Docket Nos. 62, 257 and 268
)	

ORACLE'S LIMITED OBJECTION AND RESERVATION OF RIGHTS

Oracle America, Inc., successor in interest to Bronto Software, LLC and NetSuite, Inc. (“Oracle”), a creditor and contract counter-party in the above-captioned jointly administered Chapter 11 cases, submits this limited objection and reservation of rights regarding: (1) *Debtors’ Motion For Entry Of An Order: (I) (A) Approving Bidding Procedures And Protections In Connection With A Sale Of Substantially All Of Debtors’ Assets Free And Clear Of Liens, Claims, Encumbrances, And Interests; (B) Scheduling An Auction And Sale Hearing; (C) Approving The Form And Manner Of Notice Thereof; (D) Approving Procedures For The Assumption And Assignment Of Contracts And Leases; And (E) Granting Related Relief And (II) (A) Authorizing And Approving The Sale Of Substantially All The Debtors’ Assets Free And Clear Of All Liens, Claims, Interests, And Encumbrances; (B) Authorizing And Approving The Assumption And Assignment Of Certain Contracts And Leases; And (C) Granting Related Relief* [Dkt. No. 62] (“Sale Motion”); and (2) *Amended Notice Of Assumption And Cure Cost With Respect To Executory Contracts Or Unexpired Leases Potentially To Be Assumed And Assigned In Connection With Sale Of Debtors’ Assets* [Dkt. No. 257] (“Assumption Notice”), filed by Sugarfina, Inc., *et al.* (“Debtors”).

I. INTRODUCTION

1. By the Sale Motion and the Assumption Notice, the Debtors seek Bankruptcy Court authority to, among other things, assume and assign certain executory contracts between the Debtors and Oracle.

2. Oracle objects to the proposed assumption and assignment on multiple grounds.

(a) First, the targeted Oracle agreements are, or pertain to, one or more licenses of intellectual property, which are not assignable absent Oracle's consent pursuant to both the underlying license agreements and applicable law. Oracle objects to the Debtors' request for a judicial determination that any anti-assignment provision in contracts to be assumed and assigned is unenforceable and void.

(b) Second, the Assumption Notice does not provide a complete description of the Oracle contract the Debtors seek to assume and assign. As a result, Oracle is unable to identify with certainty the agreement at issue, or confirm whether the Debtors' proposed cure is accurate.

(c) Third, the Sale Motion does not provide Oracle with sufficient information to determine whether the ultimate purchaser/assignee is capable of performing under the terms of the contracts the Debtors seek to assume and assign.

(d) Finally, the APA (defined below) indicates that both the Debtors and the eventual purchaser may enter into a transition services agreement in connection with the proposed sale. Oracle objects to any unauthorized shared use of its licenses contemplated by the Debtors.

3. Accordingly, Oracle requests that the Court deny the Debtors' request for authority to assume and assign, transfer, or share use of any Oracle agreement without Oracle's consent.

II. FACTUAL BACKGROUND

4. The Debtors filed the above captioned case on September 6, 2019 and an order directing joint administration was entered shortly thereafter. The Debtors continue to operate as debtors in possession.

5. On September 10, 2019, the Debtors filed the Sale Motion, which seeks Court authority to sell substantially all of the Debtors' assets.

6. On October 6, 2019, the Debtors filed the *Notice of Filing Asset Purchase Agreement* [Dkt. No. 214] (“Notice”).

7. The Asset Purchase Agreement attached as Exhibit “A” to the Notice (the “APA”) is between the Debtors and the stalking horse bidder, Sugarfina Acquisition, LLC (“Stalking Horse”).

8. On October 14, 2019, the Debtors filed the Assumption Notice. Exhibit “A” to the Assumption Notice identifies four Oracle agreements the Debtors seek to assume and assign to the Stalking Horse in connection with the APA (collectively, the “Oracle Agreements”).

9. The Debtors identify a \$0.00 cure cost in connection with three of the Oracle Agreements and a \$24,331.25 cure cost in connection with the fourth, as follows:

Contract/Lease Counterparty	Contract or Lease	Cure Cost
Bronto Software, LLC	Estimate/Order Form	\$0.00
Bronto Software, LLC	Bronto Subscription Services Agreement	\$0.00
Oracle America, Inc.	Estimate/Order Form	\$24,331.25
Oracle America, Inc.	Fixed Price Statement of Work	\$0.00

10. The APA also contemplates that the Debtors and the successful buyer will enter into a transition services agreement (“TSA”).

11. On the sale close date, the buyer is obligated to “deliver to [Debtors] a transition services agreement, in customary form reasonably agreed to among Buyer and [Debtors] prior to the Bid Deadline, duly executed by Buyer (the ‘Transition Services Agreement’).” APA § 2.5(a)(i)(I).

12. A copy of the TSA has not been filed with the Court. Thus, Oracle is unable to determine whether and how the TSA impacts its contracts.

13. Oracle reserves all rights regarding any transitional use contemplated by Debtors and Purchaser and any TSA ultimately executed.

III. ARGUMENT

A. Debtors May Not Assume And Assign The Oracle Agreements Absent Oracle's Consent Because The Agreements Pertain To One Or More Licenses Of Intellectual Property.

14. Section 365(c) 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.

15. Federal law makes non-exclusive patent and copyright 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, In Re Access Beyond Technologies, Inc.*, 237 B.R. 32, 48-49 (Bankr. D. Del 1999) (*Citing In Re: West Elec., Inc.*) 852 F. 2d 79 (3d Cir. 1988); *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)); *See Also, In Re Trump Entm't Resorts, Inc.*, 526 B.R. 116, 126 (Bankr. D. Del. 2015) ("Non-Exclusive patent and copyright licenses create only personal and not property rights in the licensed intellectual property and so are not assignable.")).

16. Oracle's agreements are, or pertain to, non-exclusive licenses of copyrighted software. Therefore, pursuant to Bankruptcy Code section 365, the Debtors may not assume and assign the Oracle Agreements without Oracle's consent.

17. For the reasons discussed herein, Oracle does not consent to the Debtors' proposed assumption and assignment at this time.

18. The Sale Motion requests a blanket determination by the Court that any anti-assignment provision in contracts to be assumed and assigned is unenforceable and void, as follows:

“Thus, the Debtors request that any anti-assignment provisions be deemed not to restrict, limit, or prohibit the assumption, assignment, and sale of the Assumed Contracts, and be unenforceable anti-assignment provisions within the meaning of section 365(f) of the Bankruptcy Code.”

Sale Motion ¶ 81.

19. Oracle objects to the Debtors’ requested finding because, as discussed above, the Oracle Agreements involve the non-exclusive license of copyrighted software, which are non-assignable absent Oracle’s consent.

20. Because Bankruptcy Code section 365 and applicable law expressly preserve Oracle’s right to consent to any assignment of its license agreements, the Debtors may not unilaterally nullify the anti-assignment provisions in the Oracle Agreements.

21. Accordingly, Oracle requests that the Court deny the Debtors’ request to the extent such would allow the Debtors to assume and assign, or transfer, the Oracle Agreements without Oracle’s consent.

B. The Debtors Have Not Adequately Identified The Oracle Agreements To Be Assumed and Assigned.

22. The Debtors’ Assumption Notice very generally describes the Oracle contracts the Debtors seek to assume and assign.

23. The general descriptions do contain sufficient information for Oracle to confirm that the Debtors and Oracle agree regarding the specific contracts to be assumed and assigned.

24. To clarify which Oracle contracts Debtors hope to assume and assign, Oracle requests that the Debtors specify the targeted contract's (a) name and date; (b) identification number; (c) any associated support or support renewals; and (d) the governing license agreement.

25. This information will enable Oracle to evaluate whether the Oracle Agreements are assignable, whether they are supported, expired or in default, and, if in payment default, the appropriate cure amount.

26. Additionally, the information will allow Oracle to assess whether Oracle may accept performance from an entity other than the Debtors.

27. Oracle reserves its right to be heard on this issue after the Oracle agreement(s) the Debtors seek to assume and assign are identified with greater specificity.

C. The Debtors May Not Have Provided The Correct Cure Amount.

28. Before assuming and assigning any executory contract, the Debtors must cure (or provide adequate assurance of a prompt cure of) any default under the subject contracts. 11 U.S.C. § 365(b)(1).

29. The Debtors have identified a \$24,331.25 cure amount associated with one of the four Oracle Agreements identified by the Assumption Notice.

30. However, the Debtors have failed to describe the Oracle Agreements they seek to assume and assign with sufficient particularity for Oracle to identify which agreements are at issue, and thereby confirm the corresponding cure amount.

31. In addition to the cure amount stated in the Assumption Notice, Oracle's records reflect that additional sums will come due prior to the anticipated sale closing date.

32. Therefore, Oracle reserves its right to be heard regarding the cure amount after the contract or contracts the Debtors seek to assume and assign are identified with enough specificity to allow Oracle to determine the correct cure amount.

D. The Debtors Have Not Provided Adequate Assurance of Future Performance By the Assignee.

33. Before assuming and assigning any executory contract, the Debtors must provide adequate assurance of future performance. 11 U.S.C. § 365(b)(1).

34. Here, the Stalking Horse may not be the successful buyer. Additional prospective purchasers may submit qualified bids by October 18, 2019 and, if necessary, an auction will be held on October 22, 2019 – after the deadline for Oracle to object to the Sale Motion and Assumption Notice.¹

35. To satisfy Bankruptcy Code section 365(b), Oracle requests that the Debtors provide the following information about the purchaser/ultimate assignee: (a) financial bona fides; (b) confirmation that the purchaser is not an Oracle competitor; and (c) confirmation that the ultimate assignee will (i) execute an Oracle Assignment Agreement and related documentation which identifies with specificity the Oracle executory contract(s) to be assigned; and, if appropriate (ii) enter into an Oracle Master License Agreement.

36. Absent these assurances, Oracle cannot determine the proposed assignee's creditworthiness, its suitability as an Oracle customer, or its ability to adequately perform the terms of the Oracle Agreements.

37. Until the information described above is provided, the Debtors have not complied with the requirements of section 365(b)(1)(C).

E. The Oracle Agreements Do Not Authorize Simultaneous Use By The Debtors and the Purchaser.

38. The APA contemplates that undisclosed transitional services will be provided between the Debtors and the ultimate purchaser.

¹ Oracle understands that if the Stalking Horse is not the successful bidder after auction, Oracle may submit its adequate assurance objection at the sale hearing. To avoid duplicate filings, Oracle incorporates its objection to adequate assurance here and reserves its right to be heard on this point when the ultimate purchaser is identified.

39. The Debtors have not provided any additional information, nor has the TSA been filed, precluding Oracle from determining either the scope of the proposed transitional use, or whether its contracts will be affected.

40. Shared access to and use of Oracle's licenses exceeds the scope of the permitted uses under the Oracle Agreements, and may constitute an unauthorized splitting of the respective licenses.

41. Oracle reserves all rights regarding any transitional use, including under the TSA, pending Oracle's review of the TSA and opportunity to assess how it may impact Oracle, including whether the use contemplated thereunder constitutes non-compliance under the terms of the Oracle Agreements.

IV. CONCLUSION

42. For the reasons set forth above, Oracle respectfully requests that the Court deny the Debtors' request for approval of the Sale Motion and the Assumption Notice, solely to the extent each seeks to authorize the Debtors to assume and assign, transfer or share use of any Oracle agreement. Oracle reserves its right to be heard on all issues set forth herein.

Dated: October 21, 2019
Wilmington, Delaware

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