IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: **YOGAWORKS, INC., et al.,** Debtors.	**Chapter 11** **Case No. 20-12599 (KBO)** **Jointly Administered** **Hearing Date: December 9, 2020 at 3:00 PM** **Sale Objection Date: December 8, 2020** **Cure Objection Date: November 30, 2020** **Docket Nos. 76 & 141**

ORACLE'S LIMITED OBJECTION TO AND RESERVATION OF RIGHTS REGARDING (1) DEBTORS' MOTION FOR ENTRY OF AN ORDER: (A) AUTHORIZING SALE OF SUBSTANTIALLY ALL OF DEBTORS' ASSETS PURSUANT TO SUCCESSFUL BIDDER(S)' ASSET PURCHASE AGREEMENT, FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES, AND OTHER INTERESTS; AND (B) APPROVING ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND LEASES and (2) 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

Oracle America, Inc., successor in interest to Eloqua ("Oracle"), a creditor and contract counter-party in the above-captioned jointly administered Chapter 11 cases, submits this limited objection to 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 Related to Assumption and Assignment of Certain Executory Contracts and Leases; and (E) Granting Related Relief; and (II)(A) Authorizing Sale of Substantially All of Debtors' Assets Pursuant to Successful Bidder(s)' Asset Purchase Agreement, Free and Clear of Liens, Claims, Encumbrances, and Other Interests; and (B) Approving Assumption and Assignment of*

Certain Executory Contracts and Leases [D.E. No. 76] ("Sale Motion"); and (2) *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* ("Assumption Notice"), filed by YogaWorks, Inc., *et al.* ("Debtors").

I. INTRODUCTION

1. 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 for several reasons.

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.

b) Second, the Assumption Notice does not provide a complete description of the Oracle contracts which the Debtors seek to assume and assign. As a result, Oracle is unable to identify with certainty the agreements 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) could potentially include the unauthorized shared use of Oracle's licenses, in a manner which is not permitted by Oracle's agreements. Oracle objects to any unauthorized shared use of its licenses which may be 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 cases on October 14, 2020 and an order directing joint administration was entered shortly thereafter. The Debtors continue to operate as debtors in possession.

5. On October 23, 2020, the Debtors filed the Sale Motion, which seeks Court authority to sell substantially all of the Debtors' assets.

6. The stalking horse bidder is Yogaworks Investment Fund, LLC (the "Stalking Horse").

7. An Asset Purchase Agreement between the Debtors and the Stalking Horse ("APA") is attached as Exhibit "5" to the Sale Motion.

8. The APA appears to grant both the Stalking Horse and the Debtors access to certain information for up to five years after the Closing Date.

9. The relevant language is as follows:

> Post-Closing Books and Records, Personnel and Services. Until the later of (i) five (5) years after the Closing Date or (ii) the date of entry of a final decree closing each Bankruptcy Case (or such longer period as may be required by any Governmental Authority or ongoing claim), (x) Buyer shall, at its own expense, preserve and not dispose of or destroy any of the Records, files, or other information received from Sellers, and (y) Buyer shall allow Sellers, or any trust established under a chapter 11 plan of Sellers or otherwise or any other successor of a Seller (each a "Successor"), and any of their Representatives and auditors reasonable access during normal business hours, upon reasonable advance notice, to all employees and any files, books, Records, and other materials, for purposes relating to the Bankruptcy Cases, the winddown of the operations of Sellers, the marketing and sale of the Excluded Assets, reconciling claims filed in the Bankruptcy Cases, prosecuting or defending any Claims or insurance claims, the filing of tax returns, or any other reasonable purposes (collectively, the "Winddown Requirements"), and any Seller or Successor and such Representatives and auditors shall have the right to make copies of any such files, books, Records, and other materials at such Person's expense. Until the closing of the Bankruptcy Cases or the liquidation and winding up of Sellers' estates, Sellers shall preserve and keep the records relating to the Business that were not part of the Assets and shall make such records and Sellers' personnel available to Buyer as may be reasonably required by Buyer in connection with, among other things, any insurance claims by, Actions or Tax audits against, or governmental investigations of, Buyer or any of its Affiliates or in order to enable Buyer to comply with its obligations under this Agreement and each other Transaction Document. In the event any Party desires to destroy any such records during or after the time during which they must be maintained pursuant to this Section, such Party shall seek, on written notice to the other Party, and obtain an Order of the Bankruptcy Court; *provided, however,* that such party shall not seek such order within two (2) years after the Closing Date and such order

> will provide that the other Party shall have the right at its option and its expense to take possession of the records within one hundred eighty (180) days after the date of such order.

APA@ 8.8.

10. The scope of the information to be accessed by the Debtors is unclear, as well as the platform by which such access may be allowed.

11. Until Oracle receives additional information regarding the potential usage, and the method for accessing the information, Oracle is unable to determine how its contracts will be impacted by the post-Closing provisions of the APA.

12. On November 10, 2020, an Order [D.E. No. 141] was entered approving certain bid procedures and procedures for assumption and assignment of executory contracts ("Bid Procedures Order').

13. The Bid Procedures Order sets forth the following deadlines (a) December 4 @ 5:00 p.m. (EST) is the bid deadline; (b) December 7 @ 10:00 a.m. (EST) is the date and time of the auction; (c) December 8 @ noon (EST), is the deadline to file an objection to the Sale Motion.

14. This timeline not only provides contract counterparties with almost no opportunity to evaluate the purchaser's acceptability (if it proves to be someone other than the Stalking Horse), but also requires that objections to the Sale Motion be filed almost immediately after the auction is held.

15. If someone other than the Stalking Horse is the winning bidder, this precludes interested parties from reviewing any additional or amended sale or purchaser related documents, including the resultant APA.

16. On November 12, 2020, the Debtors served on contract counterparties, the Assumption Notice.

17. It identifies the following Oracle agreements ("Oracle Agreements") which may be assumed and assigned, along with stated corresponding cure amounts:

Contract/Lease Counterparty	**Contract or Lease Type**	**Potential Cure**
CLOUDPRO ERP LLC	Oracle Admin.	$1,875.00
Oracle America, Inc.	Email service provider (Eloqua)	$12,749.69
Oracle America, Inc.	ERP Accounting system (Fusion)	$12,383.64

III. ARGUMENT

A. The 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.

18. 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.

19. Federal law makes non-exclusive copyright licenses non-assignable absent consent of the licensor. *See In re Catapult Entertainment, Inc.*, 165 F.3d 747 (9th Cir. 1999), *cert. dismissed*, 528 U.S. 924 (1999) (patent law renders non-exclusive patent licenses personal and non-assignable under Bankruptcy Code § 365(c)(1)); *In re Sunterra Corp.*, 361 F.3d 257, 271 (4th Cir. 2004) (holding that a debtor was statutorily barred by § 365(c)(1) from assuming a computer software license where contract counterparty did not consent to the assumption); *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."); *In re Rupari Holding Corp.*, 573 B.R. 111, 119 (Bankr. D. Del. 2017) (holding that the debtor could not assume and assign a trademark license without the consent of the non-debtor licensor).

20. Oracle's agreements are, or pertain to, non-exclusive licenses of copyrighted software.

21. Therefore, pursuant to Bankruptcy Code section 365, the Debtors may not assume and assign the Oracle Agreements without Oracle's consent.

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

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

23. The Debtors' Assumption Notice very generally describes the Oracle Agreements the Debtors seek to assume and assign. No governing master agreement or support renewal is identified. It is impermissible for the Debtors to segregate the underlying Oracle license agreement from the corresponding support agreement and master agreement for purposes of assumption and assignment, if that is the Debtors' intention. *See, e.g., In re Interstate Bakeries Corporation*, 751 F.3d 955, 963 (8th Cir. 2014); *In re Buffets Holdings*, 387 B.R. 115 (Bankr. D. Del. 2008). An executory contract must be assumed in its entirety and "[c]orrespondingly, all of the contracts that comprise an integrated agreement must either be assumed or rejected, since they all make up one contract." *In re Taylor-Wharton Int'l LLC*, 2010 WL 4862723, at *3 (Bankr. D. Del. Nov. 23, 2010) (citing *In re Exide Tech.*, 340 B.R. 222, 228 (Bankr. D. Del. 2006)).

24. Under California law,[1] made applicable by the Oracle Agreements, "[s]everal contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." Cal. Civ. Code § 1642.

25. Because the support agreements and master agreements relate to the underlying license agreements as part of substantially the same transaction, they constitute integrated contracts which may not be separately assumed and assigned.

26. 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.

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

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

29. Oracle reserves its right to be heard on this issue until after the Oracle Agreements the Debtors seek to assume and assign are identified with greater specificity.

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

30. 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).

[1] *In re Hawker Beechcraft, Inc.*, No. 12-11873 (SMB), 2013 WL 2663193, at *3 (Bankr. S.D.N.Y. June 13, 2013) ("State law governs the question whether an agreement is divisible or indivisible for the purposes of assumption and rejection under Bankruptcy Code § 365.")

31. The Debtors have identified a cure amount associated with each of the Oracle Agreements identified by the Assumption Notice.

32. 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.

33. Therefore, Oracle reserves its right to be heard regarding the cure amount until 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.

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

35. The Sale Motion is subject to overbid and Oracle is in the process of determining whether the Stalking Horse will be an acceptable customer. However, the Stalking Horse may not be the successful buyer.

36. If necessary, an auction will be held on December 7, 2020, after the deadline for Oracle to object to the Assumption Notice.

37. To satisfy Bankruptcy Code section 365(b), Oracle requests that the Debtors provide the following information about the ultimate purchaser: (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.

38. 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.

39. 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 Stalking Horse/Eventual Purchaser.

40. The APA contemplates that undisclosed transitional or shared services will be provided between the Debtors and the Stalking Horse.

41. The Debtors have not provided any additional information, precluding Oracle from determining either the scope of the proposed shared use, or whether its contracts will be affected.

42. Simultaneous use of, and access to, Oracle's licensed software exceeds the scope of the permitted uses under the Oracle Agreements, and would potentially result in an unauthorized "splitting" of the licenses between the Debtors and the purchaser.

43. Oracle objects to the extent that any transitional use or shared use arrangement purports to grant to both the Debtors and purchaser(s) the right to shared use of the Oracle licenses beyond the license terms.

44. Oracle reserves all rights regarding any transitional use, including under any APA, or any TSA, pending Oracle's review and an 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

45. For the reasons set forth above, Oracle respectfully requests that the Court deny the Debtors' request for authority to assume and assign, transfer or share use of the Oracle Agreements.

46. Oracle reserves its right to be heard on all issues set forth herein.

Dated: November 30, 2020
Wilmington, Delaware

MARGOLIS EDELSTEIN

By: /s/ James E. Huggett

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CERTIFICATE OF SERVICE

I, James E. Huggett, hereby certify that on November 30, 2020, I served a copy of *Oracle's Limited Objection To And Reservation Of Rights Regarding (1) Debtors' Motion For Entry Of An Order: (A) Authorizing Sale Of Substantially All Of Debtors' Assets Pursuant To Successful Bidder(S)' Asset Purchase Agreement, Free And Clear Of Liens, Claims, Encumbrances, And Other Interests; And (B) Approving Assumption And Assignment Of Certain Executory Contracts And Leases And (2) 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* on the parties listed on the attached Service List via electronic mail, where available.

/s/ James E. Huggett
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