

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

_____	)	<b>Chapter 11</b>
In re:	)	
	)	<b>Case No. 20-11177 (KBO)</b>
	)	
<b>AKORN, INC., et al.,</b>	)	<b>Jointly Administered</b>
	)	
	)	<b>Hearing Date: September 1, 2020</b>
	)	<b>Hearing Time: 10:00 AM</b>
Debtors.	)	<b>Objection Date: August 28, 2020</b>
	)	<b>(Extended by Agreement)</b>
_____	)	<b>Docket No. 18</b>

**ORACLE’S LIMITED OBJECTION AND RESERVATION OF  
NOTICE TO CONTRACT PARTIES TO POTENTIALLY ASSUMED  
EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

Oracle America, Inc., (collectively, “Oracle”), creditor and contract counterparty in the above-captioned jointly administered Chapter 11 cases, submit this limited objection and reservation of rights (“Rights Reservation”) regarding the *Notice to Contract Parties to Potentially Assumed Executory Contracts an Unexpired Lease* (“Assumption Notice”) served by Akorn, Inc., et al.. (“Debtors”).

**I. INTRODUCTION**

1. On May 21, 2020, the Debtors filed the *Motion Seeking Entry of an Order (A) Approving Bidding Procedures, (B) Scheduling an Auction and Sale Hearing, (C) Approving the Form and Manner of Notice Thereof, (D) Establishing Procedures for the Assumption and Assignment of Certain Executory Contracts and Leases, and (E) Granting Related Relief* [Docket No. 18] (the “Sale Motion”) with the United States Bankruptcy Court for the District of Delaware (the “Court”) seeking, among other things, entry of an order (the “Sale Order”) authorizing and approving: (a) the sale of the Debtors’ Assets to the “Stalking Horse Bidder,” later identified as Akorn Operating Company, LLC (“AOC”).



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2. On June 15, 2020, the Court entered the *Order (A) Authorizing and Approving Bidding Procedures, (B) Scheduling an Auction and a Sale Hearing, (C) Approving the Form and Manner of Notice Thereof, (D) Establishing Notice and Procedures for the Assumption and Assignment of Certain Executory Contracts and Leases, and (E) Granting Related Relief* [Docket No. 181] (the “Bidding Procedures Order”) authorizing “Bidding Procedures” attached as Exhibit 2 to the Bidding Procedures Order.

3. In connection with the Bidding Procedures, the Debtors served the Assumption Notice seeking Bankruptcy Court authority to assume and assign certain executory contracts between the Debtors and Oracle.

4. While the Debtors and Oracle have worked to resolve Oracle’s concerns with the proposed assumption and assignment, those issues have not yet been fully resolved.

5. As such, Oracle files this Rights Reservation to preserve its rights until those issues are resolved.

6. 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 and as discussed below, at this time Oracle does not consent to the assignment.

7. The Assumption Notice identifies several Oracle contract with a \$35,086.58 cure amount.

8. Since filing the Assumption Notice, Oracle and the Debtors’ have been in communications regarding the proper descriptions of agreements and the correct cure amount. Oracle and the Debtors have come to an agreement with respect to the contracts to be assumed and assigned.

9. However, the cure amount remains an issue as Oracle records indicate that in addition to the proposed cure amount, Oracle is also owed \$15,698.51.

10. Counsel confirmed this invoice was paid by the Debtors. However, at the time of filing this Rights Reservation, Oracle has not been able to verify the payment.

11. In addition, Oracle does not have sufficient information to determine whether AOC is capable of performing under the terms of the contracts which the Debtors seek to assume and assign.

12. Accordingly, Oracle requests that the Court deny the Debtors' request for authority to assume and assign any Oracle agreement without Oracle's consent.

## **II. FACTUAL BACKGROUND**

13. The Debtors filed the above-captioned case on May 20, 2020, and an order directing joint administration was entered shortly thereafter. The Debtors continue to operate as debtors in possession.

14. On May 21, 2020, the Debtors filed their Sale Motion. Pursuant to the Sale Motion, the debtor are requesting approval to sell substantially all of their assets to highest bidder.

15. The Sale Motion identified the AdHoc Group as the stalking horse bidder. The Asset Purchase Agreement ("APA"), attached as Exhibit 1 to the Sale Order filed with the Sale Motion, listed Wilmington Savings Fund Society, FSB, in its capacity as successor administrative agent under the Term Loan Credit Agreement, or any of its predecessors or successors (the "Term Loan Agent") as the recipient of notices to the purchaser. *See* APA, p. 75.

16. On June 22, 2020, the Debtors filed their *Notice of Sale by Auction and Sale Hearing* [Docket No. 210], which referred to the sale of Debtors' assets to "Akorn Holdings Topco." On the same date, the Debtors served on Oracle the Assumption Notice.

17. Exhibit "A" to the Assumption Notice identifies four "Technical Support Services Renewal Order" between Oracle and Akorn, Inc.

18. The Debtors identified a cure amount of \$35,086.58 for one of the agreements.

19. On August 7, 2020, the Debtors filed their *Notice of No Auction* [Dkt. No. 429]. Pursuant to the Notice, the Debtors did not receive any qualified bids by the bid deadline and that no auction would take place.

20. Upon information and belief, the purchaser entity is now AOC, though this new entity appears to be a very recent development.

21. On August 10, 2020, the Debtors served a revised Assumption Notice which identified five “Technical Support Services Renewal Order” between Oracle and Akorn, Inc. and a cure amount of \$35,086.58 for one of the agreements.

22. Oracle expects to receive a further revised Assumption Notice identifying the agreements which Debtor proposes to assume and assign to AOC (the “Oracle Agreements”).

23. Further, Oracle continues to reconcile the proposed cure amount and review the proposed assignment to AOC

### **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.**

24. 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.

25. 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).

26. The Oracle Agreements are, or pertain to, non-exclusive licenses of copyrighted software.

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

28. 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.**

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

30. Following the receipt of the Assumption Notice, counsel for Oracle contacted Debtors’ counsel to determine the scope of contracts that may be assumed and assigned.

31. Oracle provided to Debtors with a copy of all active contracts and the outstanding amounts needed to bring those contracts current.

32. The Debtors and Oracle have come to an agreement on which contracts will be assumed and assigned.

33. However, to date, the Debtors have not modified the Assumption Notice to reflect the contract descriptions.

34. Oracle reserves its right to be heard on this issue after the Debtors specify the Oracle Agreements they seek to assume and assign.

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

35. 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).

36. The Debtors identified a \$35,086.58 cure (the “Cure Amount”) for the one of the Oracle Agreements.

37. however, Oracle is aware of one additional invoice in the amount of \$15,698.51. Oracle reached out to Debtors’ counsel and provided them with copies of the two outstanding post-petition invoices.

38. Debtors indicate the Cure Amount will be paid in the ordinary course and the remaining invoice has been paid.

39. However, Oracle has been unable to confirm receipt of payment and reserves its rights with respect to the proper cure amount.

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

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

41. Debtors have not provided adequate assurance information for AOC.

42. Because the name of the purchasing entity has changed during the sale process, Oracle has not had sufficient time to evaluate the proposed purchaser.

43. Therefore, Oracle is unable to determine whether it would be an acceptable customer at this time.

#### **IV. CONCLUSION**

44. 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 the Debtors seek to assume and assign the Oracle Agreements without Oracle's consent. Oracle reserves its right to be heard on all issues set forth herein.

Dated: August 28, 2020  
Wilmington, Delaware

#### **MARGOLIS EDELSTEIN**

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	)	<b>Case No. 20-11177 (KBO)</b>
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**CERTIFICATE OF SERVICE**

I, James E. Huggett, hereby certify that on August 28, 2020, I served a copy of *Oracle's Limited Objection And Reservation Of Notice To Contract Parties To Potentially Assumed Executory Contracts And Unexpired Leases* on the parties listed on the attached Service List via electronic mail, where available.

/s/ James E. Huggett  
James E. Huggett (#3956)



**SERVICE LIST**

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