

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

In re:

BRIGGS & STRATTON
CORPORATION, *et al.*,

Debtors.

Chapter 11

Case No. 20-43597-399

Jointly Administered

Related Docs.: 1323

**ORACLE'S LIMITED OBJECTION AND RESERVATION OF RIGHTS REGARDING
FIFTH AMENDED NOTICE OF CURE COSTS AND PROPOSED ASSUMPTION AND
ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES IN
CONNECTION WITH SALE**

Oracle America, Inc., including in its capacity as successor in interest to Endeca Technologies (collectively, "Oracle"), a creditor and contract counterparty in the above-captioned jointly administered Chapter 11 cases, submits this Limited Objection and Reservation of Rights ("Second Rights Reservation") regarding the *Fifth Amended Notice of Cure Costs and Proposed Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection With Sale* [Docket No. 1323] ("Fifth Assignment Notice"), filed by Briggs & Stratton Corporation, *et al.* ("Debtors"). This Second Rights Reservation supplements *Oracle's Limited Objection and Reservation of Rights Regarding (1) Debtors' Motion Authorizing (A) Sale of Debtors' Assets and Equity Interests Free and Clear of Liens, Claims, Interests, and Encumbrances and (B) Assumption and Assignment of Executory Contracts and Unexpired Leases; and (C) Granting Related Relief; ("Sale Motion")* and (2) *Notice of Cure Costs and Proposed Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Sale* [Docket No. 833] (the "First Rights Reservation"). Oracle incorporates by reference the First Rights Reservation.



I. INTRODUCTION

Oracle filed the First Rights Reservation to preserve its rights with respect to the Debtors' potential assumption and assignment of agreements between the Debtors and Oracle (the "Oracle Agreements"). Although Oracle raised several issues in its First Rights Reservation, key among them was the Cure Notices' (defined below) lack of specificity regarding the Oracle Agreements which the Debtors wished to assume and assign. Among other things, this rendered Oracle unable to verify the accuracy of the Debtors' proposed cure amount.

Since the filing of the First Rights Reservation, Oracle has been in communication with the Debtors to resolve certain issues, including: (i) refining the descriptions of, and identifying, the twenty-seven Oracle Agreements identified in the Cure Notices, and (ii) clarifying the associated cure amounts.

The Fifth Assumption Notice amends the list, and description, of the Oracle Agreements identified in the Cure Notices. In lieu of the original twenty-seven, it now identifies only four Oracle Agreements for assumption and assignment. However, among the four remaining contracts are three with lapsed support, including one which is over 24 years old, based upon Oracle's records. This may affect whether they may be assumed and assigned. Accordingly, Oracle requests that the Court deny the Debtors' motion for authority to assume and assign any Oracle Agreements, unless and until Oracle consents to the assumption and assignment.

II. FACTUAL BACKGROUND

The Debtors filed the above-captioned case on July 20, 2020 ("Petition Date"), and an order directing joint administration was entered shortly thereafter. The Debtors continue to operate as debtors in possession.

On the Petition Date, the Debtors filed the Sale Motion seeking Court approval to sell the Debtors' assets and equity interests as a going concern sale. On August 19, 2020, the Debtors filed four separate *Notices of Cure Costs and Proposed Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Sale* ("Cure Notices"). Exhibit "A" to three of the Cure Notices identified a total of twenty-seven Oracle Agreements that the Debtors may seek to assume and assign. See Docket No. 514, pg 28, Docket No. 515, pg 79, and Docket No.

516 pgs 28 and 26. The Debtors identified a \$0.00 cure cost with respect to all of the Oracle Agreements.

On September 10, 2020, Oracle filed its First Rights Reservation because, *inter alia*, Oracle was unable to determine which contracts were to be assumed and assigned based on the descriptions provided in the Cure Notices.

On September 15, 2020, the Court entered an *Order (A) Authorizing the Sale of the Assets and Equity Interests to the Purchaser Free and Clear of Liens, Claims, Interests, and Encumbrances; (II) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases and (C) Granting Related Relief* [Docket No. 898] (“Sale Order”). Pursuant to the Sale Order, all timely objections to the Cure Notices, to the extent not resolved, were continued to October 14, 2020 or to a subsequent hearing. *See*, Sale Order ¶31. The hearing on Oracle’s Rights Reservation has been continued to December 16, 2020 and the issues regarding contract description and cure, while significantly refined, as of this point remain unresolved.

On November 23, 2020, the Debtors filed the Assignment Notice. Exhibit “B” to the Assignment Notice identifies those contracts for which the Debtors have revised the cure, the description, and/or the counterparty. Exhibit “B” identifies the following Oracle Agreements:

November 20 Debtor	Nov 20 Counterparty	Nov 20 Contract Description	Nov 20 Cure Amount
Briggs & Stratton Corporation	Endeca Technologies, Inc.	Master Software License, Support and Services Agreement, Dated January 11, 2008	\$0.00
Briggs & Stratton Corporation	Oracle America, Inc.	Oracle License and Services Agreement, Executed November 23, 2010	\$0.00
Briggs & Stratton Corporation	Oracle Corporation	Software License and Services Agreement and Amendment One to the Software License and Services Agreement, Dated October 31, 1996	\$0.00
Briggs & Stratton Corporation	Oracle USA, Inc.	Oracle license and Services Agreement, Dated April 23, 2007	\$0.00

Although the contract descriptions are much clearer than the ones identified in the Cure Notices, Oracle’s records reflect that support for all but the Endeca Technologies, Inc. agreement

has expired. Therefore, Oracle is still unable to consent to the assignment of the Oracle Agreements.

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.

As set forth in Oracle's First Rights Reservation, the Debtors may not assume and assign the Oracle Agreements without Oracle's consent under applicable non-bankruptcy law.

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 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).

The Oracle Agreements are, or pertain to, non-exclusive licenses of copyrighted software. Therefore, the Debtors may not assume and assign the Oracle Agreements without Oracle's consent. For the reasons discussed herein, Oracle does not consent to the Debtors' proposed assumption and assignment at this time.

B. The Debtors Still Have Not Adequately Identified the Oracle Agreements to be Assumed and Assigned.

Although the contract descriptions in the Assumption Notice are more complete, without further clarification from the Debtors Oracle is unable to determine whether it is evaluating the same agreements the Debtors seek to assume and assign, since some of those now apparently identified may no longer to be executory. Three of the four are also unsupported. To clarify which Oracle contracts the Debtors hope to assume and assign, Oracle requests that the Debtors

specify the targeted contracts' (1) name and date; (2) identification number; (3) any associated support or support renewals; and (4) the governing license agreement. This information will enable Oracle to evaluate whether the Oracle Agreement is supported, expired or in default, and, if in payment default, the appropriate cure amount. Additionally, the information will allow Oracle to assess whether Oracle may accept performance from an entity other than the Debtors.

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

C. The Debtors May Not Have Provided the Correct Cure Amounts.

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).

The Debtors have identified a \$0.00 cure amount for the Oracle Agreements. However, if the Debtors wish to assume and assign the Oracle Agreements, given the potentially expired status of some of the agreements, Oracle would need to determine whether support reinstatement fees would be due and whether support reinstatement is an option. To make such determinations, Oracle needs more information about which Oracle Agreements may be assumed and assigned, in order to confirm the correct cure amount. Therefore, Oracle reserves its right to be heard further regarding the cure amount until after the contracts the Debtors seek to assume and assign are identified with enough specificity to allow Oracle to determine the correct cure amount.

IV. CONCLUSION

For the reasons set forth above, Oracle respectfully requests that the Court deny the Debtors' request to assume and assign the Oracle Agreements unless and until Oracle consents to such assignments. Oracle reserves its right to be heard on all issues set forth herein.

DATED: December 4, 2020

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