

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY**

Caption in Compliance with D.N.J. LBR 9004-1(b)

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America, Inc.**

In re:

CYXTERA TECHNOLOGIES, INC., et al.,

Debtors.

Case No. 23-14853 (JKS)

Chapter 11

Jointly Administered

Plan/Sale Hearing Date: November 16, 2023

Hearing Time: 2:00 PM

Sale/Plan Objection Date: November 7, 2023

JUDGE: HON. JOHN K. SHERWOOD

DOCKET NOS. 648, 649 AND 650

**ORACLE’S LIMITED OBJECTION TO AND RESERVATION OF RIGHTS
REGARDING: (1) NOTICE OF SALE TRANSACTION; (2) THIRD AMENDED JOINT
PLAN OF REORGANIZATION OF CYXTERA TECHNOLOGIES, INC. AND ITS
DEBTOR AFFILIATES PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY
CODE; AND (3) NOTICE OF FILING PLAN SUPPLEMENT FOR THE THIRD
AMENDED JOINT PLAN OF REORGANIZATION OF CYXTERA TECHNOLOGIES,
INC. AND ITS DEBTOR AFFILIATES PURSUANT TO CHAPTER 11 OF THE
BANKRUPTCY CODE**

Oracle Canada ULC and Oracle America, Inc., successor in interest to NetSuite, Inc. (jointly “Oracle”), a creditor and contract counter-party in the above-captioned Chapter 11 case, submits this limited objection to and reservation of rights (“Rights Reservation”) regarding: (1) *Notice of Sale Transaction* [Dkt. No. 648] (“Sale Notice”); and (2) *Notice of Filing Plan Supplement for the Third Amended Joint Plan of Reorganization of Cyxtera Technologies, Inc and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Dkt. No. 650] (“Plan



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Supplement”), filed by Cyxtera Technologies, Inc., et al. (“Debtors”) in connection with the *Third Amended Joint Plan of Reorganization of Cyxtera Technologies, Inc and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Dkt. No. 650] (“Plan”).

I. INTRODUCTION

1. In connection with the Sale Notice and Plan Supplement, the Debtors seek Bankruptcy Court authority to, among other things, assume and assign numerous executory contracts between the Debtors and Oracle.

2. Oracle objects to, and reserves its rights regarding, this 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 Plan Supplement identifies approximately six pages of Oracle contracts which may be assumed and assigned. In many instances the contract descriptions are inadequate. Given this extensive list, Oracle still is in the process of reviewing its records. However, if Oracle is correctly construing some of the contract descriptions on the list of those the Debtors intend to assume and assign, Oracle’s records reflect that most of the identified contracts have expired. Thus, these contracts may no longer be executory, unless the Debtors in the interim renewed the potentially targeted contracts. Expired contracts may not be assumed and assigned, so if that is their status, these contracts should be removed from the potential list of contracts targeted for assumption. This uncertainty, coupled with others to be addressed further below, leaves Oracle without enough information to determine even which agreements are at issue, and consequently, whether the Debtors’ proposed cure attributed to this long list of contracts is accurate
- c) Third, the Sale Notice identifies Phoenix Data Center Holdings LLC (“Purchaser”) as the purchaser. No adequate assurance information has been provided for the Purchaser. Therefore, Oracle is unable to determine whether the Purchaser is capable of performing under the terms of the contracts which the Debtors seek to assume and assign.
- d) Finally, the Proposed APA (defined below) may 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 case on June 4, 2023 ("Petition Date"). The Debtors continue to operate as debtors in possession.

5. On November 1, 2023, the Debtors filed the Sale Notice which seeks Court authority to sell substantially all assets of the Debtors. The Debtors intend to seek approval of the sale at the Plan confirmation hearing.

6. Attached as Exhibit A to the Sale Notice is the asset purchase agreement between the Debtors and the Purchaser ("APA"). The APA contemplates certain information sharing between the Debtors and the Purchaser, which will take place for a period of three years following the Closing Date. (*See*, APA §6.2(c)).

7. It is unclear which services will be provided during the post-closing period. Therefore, Oracle reserves all rights in the event this provision purports to authorize the shared use of Oracle's licensed software, whether post-closing, or at any other time.

8. In addition, the APA contemplates the separation of certain contracts which the APA defines as a Shared Agreement. (*See*, APA §6.19). Although the APA acknowledges that consent is required for this shared use, it is unclear which agreements constitute Shared Agreements. Therefore, Oracle reserves all rights in the instance its agreements are contemplated to be treated as Shared Agreements.

9. On November 3, 2023, the Debtors filed the Plan Supplement. Exhibit "C-1" to the Plan supplement is a Draft Schedule of Assumed Executory Contracts and Unexpired Leases which identifies numerous Oracle agreements ("Oracle Agreements") as an "Assigned"

agreement. The cure amount for each of the Oracle Agreements is shown on the Plan Supplement as \$0.00. (*See*, pgs 317, and 329-335 of the Plan Supplement).¹

10. If Oracle's current assessment of the designated contracts is correct, then some of the designations may pertain to non-executory agreements, which would not be susceptible to assumption and assignment.

11. Accordingly, further clarity on the targeted contracts must be provided, to allow Oracle to assess the feasibility and appropriateness of inclusion by Debtors of the Oracle Agreements in the Plan Supplement's proposed designations.

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.

12. 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.

13. 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:*

¹ Oracle understands that Exhibit C-1 is a draft and remains subject to continued review by the Debtors, but in light of the established response deadlines, raises these concerns to ensure an ongoing right to be heard on the issue.

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).

14. 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 any Oracle agreement without Oracle’s consent.

15. For the reasons discussed herein, Oracle does not consent to the Debtors’ proposed assumption and assignment of the Oracle Agreements at this time.

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

16. The Plan Supplement does not provide sufficient information for Oracle to determine which contracts are at issue.

17. Oracle is in the process of reviewing its records but at present it is aware of four active contracts; far fewer than the many pages of Oracle agreements the Debtors have identified in the Plan Supplement.

18. Without more specific information, Oracle is unable to determine whether it is evaluating the same agreements the Debtors seek to assume and assign.

19. As is noted above, certain Oracle Agreements may no longer be executory, for they may have expired.

20. In addition, in some instances neither support renewals nor governing agreements are identified.

21. 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, whether as a Shared Agreement or otherwise. *See, e.g., In re Interstate Bakeries Corporation*, 751 F.3d 955, 961–2 (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*, No. 09-14089 (BLS), 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)). Under California law,² 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.

22. 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.

23. To clarify which Oracle contracts Debtors hope to assume and assign, Oracle requests that the Debtors specify the targeted contracts' (a) identification or contract number; (b) the contract date; (c) any associated support or support renewals; and (d) the governing license agreement, if not already identified.

24. 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.

² *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.”)

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

26. 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.

27. 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).

28. The Debtors have identified a \$0.00 cure amount for the Oracle Agreements. However, since the Debtors have failed to provide a complete description of the contracts they seek to assume and assign, Oracle is unable to determine whether the cure amount is accurate. In addition, if the Debtors wish to assume and assign the Oracle Agreements which have expired, Oracle would need to determine whether reinstatement fees would be due and whether reinstatement is an option.

29. Oracle needs more information about which Oracle agreements may be assumed and assigned, in order to confirm the correct cure amount.

30. Therefore, Oracle reserves its right to be heard further regarding the cure 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

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

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

32. The Debtors have not provided adequate assurance information for the Purchaser.

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

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

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

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

36. The APA contemplates that certain services may be provided between the Debtors and the Purchaser for an extended period of years.

37. Precise information about the nature of these proposed services is not provided. This omission precludes Oracle from determining how, or if, its contracts will be affected.

38. Simultaneous use of, and access to, Oracle's licensed software exceeds the scope of the permitted uses under the Oracle Agreements.

39. It would potentially result in an unauthorized "splitting" of the licenses between the Debtors and the Purchaser.

40. Oracle objects to the extent that any transitional or shared use arrangement purports to grant to both the Debtors and Purchaser the right to shared use of the Oracle licenses beyond the licenses' terms.

41. Oracle reserves all rights regarding any transitional use, including under the APA or transition services agreement, pending Oracle's further review of the same.

IV. CONCLUSION

42. 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, or any Oracle agreement. Oracle reserves its right to be heard further on all issues set forth herein.

Dated: November 7, 2023
Lake Success, New York

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2022, I served a copy of *Oracle's Limited Objection To And Reservation Of Rights Regarding: (1) Notice Of Sale Transaction; (2) Third Amended Joint Plan Of Reorganization Of Cyxtera Technologies, Inc. And Its Debtor Affiliates Pursuant To Chapter 11 Of The Bankruptcy Code; And (3) Notice Of Filing Plan Supplement For The Third Amended Joint Plan Of Reorganization Of Cyxtera Technologies, Inc. And Its Debtor Affiliates Pursuant To Chapter 11 Of The Bankruptcy Code* on the parties listed on the below service list by enclosing a copy of the aforementioned documents in a sealed envelope, postage pre-paid and delivered to the exclusive custody of the United States Postal Service in New Hyde Park, NY. In addition, the parties entitled to receive notice by the Court's CM-ECF system were sent an email notification of such filing by the Court's CM-ECF System.

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