

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

<p>In re:</p> <p>THQ INC., <i>et al.</i>,¹</p> <p>Debtors.</p>	<p>CHAPTER 11</p> <p>Case No. 12-13398 (MFW)</p> <p>(Jointly Administered)</p> <p>Hearing Date: July 16, 2013, 10:30 a.m.</p> <p>Objections Due: July 2, 2013, 4:00 p.m.</p>
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**LIMITED OBJECTION OF SAP AMERICA, INC. TO
CONFIRMATION OF THE AMENDED CHAPTER 11 PLAN
OF LIQUIDATION OF THQ INC. AND ITS AFFILIATED DEBTORS**

SAP America, Inc. (“SAP”), by and through its undersigned counsel, objects to confirmation of the *Amended Chapter 11 Plan of Liquidation of THQ Inc. and its Affiliated Debtors* [Docket No. 709] (the “Plan”). In support of its limited objection, SAP states as follows:

INTRODUCTION

1. The Plan provides, *inter alia*, that all executory contracts not previously assumed by the Debtors or designated on a schedule as a contract to be assumed shall be deemed rejected pursuant to the Plan.

2. SAP and THQ Inc. (“THQ”) are parties to a certain software license agreement that has neither been previously assumed by the Debtors nor depicted in the schedule of executory contracts to be assumed under the Plan.

¹ The Debtors in these chapter 11 cases and the last four digits of each Debtor’s taxpayer identification number are as follows: THQ Inc. (1686); Volition, Inc. (4944); THQ Digital Studios Phoenix, Inc. (1056); THQ Wireless Inc. (7991); and Vigil Games, Inc. (8651). The Debtors’ principal offices are located at 29903 Agoura Road, Agoura Hills, CA 91301.



3. SAP does not object to the rejection of its software license agreement through the Plan provided that the Debtors immediately cease use of the licensed software and comply with all duties required upon termination of the agreement.

BACKGROUND

The Software License Agreement

4. On or about May 28, 1999, THQ and SAP entered into a certain software license agreement entitled “Software End-User License Agreement.” That agreement, including all schedules, appendices and amendments thereto is referred to herein as the “License Agreement.”

5. Pursuant to the terms and conditions of the License Agreement, SAP granted THQ a non-exclusive, site-specific, perpetual license to use certain Software and other Proprietary Information owned by SAP (all capitalized terms not herein defined are used as defined in the License Agreement).

6. No rights of ownership in the Software were transferred to THQ under the License Agreement. SAP retains ownership of the Software. *See In re Patient Educ. Media, Inc.*, 210 B.R. 237, 240 (Bankr. S.D.N.Y. 1997).

7. The Software licensed by SAP to THQ under the terms of the License Agreement is copyrighted pursuant to the copyright laws of the United States, 17 U.S.C. § 101 *et seq.*

8. Federal copyright law is designed to protect the limited monopoly of copyright owners and it grants the owner of the copyright the exclusive right to exploit the copyrighted work and to restrict the unauthorized use of the copyrighted works. *See In re Patient Educ. Media*, 210 B.R. at 242.

9. Upon the termination of the License Agreement, THQ must immediately cease use of the Software, destroy or return to SAP all Proprietary Information (which includes the

Software) and certify as to its compliance with the foregoing requirements. Specifically, Section 5.4 of the License Agreement provides:

5.4 Duties Upon Termination. Upon any termination hereunder, Licensee and its authorized Affiliates shall immediately cease Use of all SAP Proprietary Information and shall irretrievably delete and/or remove such items from all computer hardware and storage media. Within thirty days after any termination, Licensee shall deliver to SAP at Licensee's expense (adequately packaged and insured for safe delivery) or destroy all copies of the SAP Proprietary Information in every form. Licensee agrees an officer of Licensee's organization shall certify in writing to SAP that it and each of its authorized Affiliates has performed the foregoing.

The Bankruptcy

10. On December 19, 2012, THQ and filed its Chapter 11 petition under Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the “Bankruptcy Code”).

11. Since the filing of its bankruptcy petition, THQ has continued to use and obtain the benefit of SAP’s Software as well as the related software maintenance/enterprise support services. However, THQ has failed to remit payment to SAP for its post-petition obligations arising under the License Agreement.²

12. On or about May 28, 2013, THQ and its affiliated Debtors filed their Plan [Docket No. 709] and a *Disclosure Statement for the First Amended Chapter 11 Plan of Liquidation of THQ Inc. and its Affiliated Debtors* [Docket No. 710] (the “Disclosure Statement”).

13. On or about May 30, 2013, this Court entered an Order approving the Disclosure Statement and establishing voting, notice, and objection procedures thereof [Docket No. 720] (the “Disclosure Statement Order”).

² On or about May 7, 2013, SAP filed an administrative expense claim in the amount of \$333,663.61 for 2013 software maintenance/enterprise support arising out of the License Agreement [Claim No. 688]. SAP reserves all rights with respect to said claim.

14. Pursuant to the Plan, THQ was required to file a plan supplement five days prior to the voting deadline including Schedule 5.01(a) containing a list of all executory contracts to be assumed pursuant to the Plan. Any executory contract not assumed prior to the Plan's Effective Date or listed on the Plan schedules as a contract to be assumed is deemed rejected.

15. On or about June 25, 2013, THQ filed its plan supplement, including a schedule of executory contracts to be assumed or rejected pursuant to the Plan [Docket No. 780] (the "Plan Supplement"). The License Agreement was not included in the schedule of executory contracts contained in the Plan Supplement and has not been previously assumed by the Debtors.

16. THQ's counsel has confirmed that the License Agreement is to be rejected pursuant to the Plan.

17. SAP, through its counsel, has requested that THQ cease use of and certify as to the destruction of SAP's Software as required pursuant to Section 5.4 of the License Agreement by the Plan Effective Date. To date, THQ has not confirmed that it will comply with its obligations under the License Agreement.

BASIS FOR OBJECTION

18. The License Agreement provides THQ with the non-exclusive right to use SAP's copyrighted Software through the term of the license. Such a license of intellectual property is an executory contract: "The Third Circuit follows the general rule that intellectual property licenses, including copyright licenses, are executory contracts within the meaning of 11 U.S.C. § 365(c) under the Countryman test." *In re Valley Media, Inc.*, 279 B.R. 105, 135 (Bankr. D. Del. 2002); *see also In re Patient Educ. Media*, 210 B.R. at 241 ("Bankruptcy courts have generally treated nonexclusive copyright and patent licenses as executory contracts.").

19. Because the License Agreement was not listed in the Plan Supplement as an executory contract to be assumed, it will be deemed rejected pursuant to the Plan.

20. THQ cannot both reject the License Agreement and seek to reap the benefits of such agreement through continued use of the Software: “[T]he debtor cannot choose to accept the benefits of the contract and reject its burdens to the detriment of the other party to the agreement.” *Richard Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311 (5th Cir. 1985). “In other words, ‘rejecting a contract allows a debtor to escape a contract's burdens; but, at the same time, the debtor must also give up any future benefit he might receive from the contract.’” *In re Enron Corp.*, 349 B.R. 96, 106 (Bankr. S.D.N.Y. 2006) (quoting *In re Crippin*, 877 F.2d 594, 597 (7th Cir.1989)).

21. In addition, although rejection of a contract typically relieves a debtor-in-possession from obligations arising under the contract, bankruptcy courts notwithstanding rejection have enforced covenants in contracts that specifically govern the relationship of the parties post-termination. *See Sir Speedy, Inc. v. Morse*, 256 B.R. 657, 660 (D. Mass. 2000)(upholding a covenant not to compete post-rejection); *see also In re Old Carco LLC, f/k/a Chrysler, LLC*, 424 B.R. 633, 639 (Bankr. S.D.N.Y. 2010) (“The effect of rejection is that the *estate* does not become obligated on the contract or lease, it does not affect a *debtor's* obligations, which continue and which form the basis of the non-debtor’s claim.”).

22. THQ, which has continued to benefit from its post-petition use of SAP’s Software and software maintenance/enterprise support services without payment to SAP, has failed to confirm that it will comply with its duties under Section 5.4 of the License Agreement by the Plan’s Effective Date.

23. The License Agreement requires, *inter alia*, that THQ (i) cease using the Software, (ii) destroy or return SAP's Software and other Proprietary Information upon termination and (iii) certify as to its compliance with the foregoing obligations.

24. Although the License Agreement has not been terminated, the equities demand that THQ should not be permitted to use the mechanism of rejection to circumvent these contractual requirements that are necessary to preserve SAP's intellectual property interests while THQ continues to reap the benefits from Software post-rejection. Rather, THQ should be required to cease all use of the Software and comply with all duties upon termination as a condition to rejection of the License Agreement.

WHEREFORE, SAP America, Inc. respectfully requests that this Court deny confirmation of the Debtors' Plan insofar as it seeks to reject the License Agreement without the Debtors first complying with the termination provisions set forth in Section 5.4 of the License Agreement, and grant such other relief as it may deem appropriate.

Dated: July 2, 2013

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

In re:

THQ INC., *et al.*,¹

Debtors.

CHAPTER 11

Case No. 12-13398 (MFW)

(Jointly Administered)

CERTIFICATE OF SERVICE

I, Donald K. Ludman, Esquire, hereby certify that on this date I caused true and correct copies of the *Limited Objection of SAP America, Inc. to Confirmation of the Amended Chapter 11 Plan of Liquidation of THQ, Inc. and Its Affiliated Debtors* to be served upon all parties receiving pleadings via the CM/ECF system in this case and upon the following via first class mail and email unless otherwise indicated:

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¹ The Debtors in these chapter 11 cases and the last four digits of each Debtor's taxpayer identification number are as follows: THQ Inc. (1686); Volition, Inc. (4944); THQ Digital Studios Phoenix, Inc. (1056); THQ Wireless Inc. (7991); and Vigil Games, Inc. (8651). The Debtors' principal offices are located at 29903 Agoura Road, Agoura Hills, CA 91301.

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