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Hearing Date: December 17, 2021
Hearing Time: 10:00 AM
Objection Date: December 10, 2021

And

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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

PHILIPPINE AIRLINES, INC.,

Debtor.

Chapter 11

Case No. 21-11569 (SCC)

**ORACLE AMERICA, INC. AND ORACLE (PHILIPPINE) CORPORATION'S CURE
OBJECTION IN CONNECTION WITH THE CHAPTER 11 PLAN OF
REORGANIZATION OF PHILIPPINE AIRLINES, INC. ("CURE OBJECTION")**

Oracle America, Inc. and Oracle (Philippines) Corporation (collectively, "Oracle"), a creditor and contract counter-party in the above-captioned Chapter 11 case, submits this Cure Objection in response to the proposed assumption of any Oracle contract in connection with the *Chapter 11 Plan of Reorganization of Philippine Airlines, Inc.* [Dkt. No. 290] ("Plan") filed by Philippine Airlines, Inc. ("Debtor"). In support of the Cure Objection, Oracle states:

I. INTRODUCTION

1. The Debtors seek Bankruptcy Court authority to, among other things, assume certain executory contracts between the Debtor and Oracle through the Plan at a \$0.00 cure amount.



2. Because Oracle's agreements are, or pertain to, one or more licenses of intellectual property, they may not be assumed absent Oracle's consent.

3. At this time, Oracle does not consent to the proposed assumption because the Debtor has not cured all outstanding invoices and does not have adequate assurance that such amounts will be paid in connection with the proposed assumption.

4. Accordingly, Oracle objects and reserves all of its rights regarding the Debtor's proposal to assume Oracle's contracts pursuant to the Plan.

II. FACTUAL BACKGROUND

5. The above captioned case was filed on September 3, 2021. The Debtor continues to operate as a debtor in possession.

6. On December 3, 2021, the Debtor filed the Plan, which provides for rejection of all executory contracts, other than those specifically identified for assumption, and states as follows:

As of and subject to the occurrence of the Effective Date, all executory contracts and unexpired leases to which the Debtor is a party, and which have not expired or terminated by their own terms on or prior to the Effective Date shall be deemed rejected by the Debtor except for any executory contract or unexpired lease that (i) previously has been assumed, assumed and assigned, or rejected pursuant to a Final Order of the Bankruptcy Court, (ii) is specifically designated on the Schedule of Assumed Contracts and Leases filed and served prior to commencement of the Confirmation Hearing or is designated for assumption pursuant to Section 5.15 of the Plan, (iii) is the subject of a separate motion or notice filed by the Debtor on or before the Confirmation Date seeking to assume, assume and assign, or reject pursuant to this Plan, the Confirmation Order or section 365 of the Bankruptcy Code, or (iv) is the subject of a pending Assumption Dispute. The Debtor reserves the right to modify the treatment of any particular executory contract or unexpired lease pursuant to this Plan.

Plan Art. 8.1(a).

7. On December 4, 2021, the Debtor filed the *Notice of Filing of Plan Supplement to Proposed Chapter 11 Plan of Reorganization of Philippine Airlines, Inc.* [Dkt. No. 294] ("Plan Supplement").

8. The following Oracle contracts are listed on Exhibit D, the schedule of contracts the Debtors propose to assume through the Plan:

Counterparty	Description of Contract or Lease
Oracle (Philippine) Corporation	One Year Oracle Linux Basic Limited, Network, and Premier Support and One Year Oracle VM Premier Support
Oracle (Philippine) Corporation	One Year Oracle Linux Basic Limited Support (qty 1); One Year Oracle Linux Network Support (qty 9); One Year Oracle Linux Premier Support (qty 2); One Year Oracle VM Premier Support (qty 3)
Oracle (Philippine) Corporation	Confidential Disclosure Agreement for Customer Licensing, Services and Hardware Transactions
Oracle Corporation	Oracle Linux and Oracle VM Services Agreement

9. The Debtor indicates in the Plan Supplement that the proposed cure for each executory contract listed is \$0.00, unless otherwise noted.

10. Because no cure amount is identified for the Oracle agreements, Oracle presumes that the Debtor's proposed cure amount in connection with assuming Oracle's contracts is \$0.00.

11. Exhibit E to the Plan Supplement, the schedule of contracts to be rejected through the Plan, states that "At this time, the Debtor does not anticipate rejecting any Executory Contracts or Unexpired Leases".

12. Oracle therefore understands that the Debtor intends to assume the entire contractual relationship with Oracle – notwithstanding the default rejection provisions of the Plan.

13. Oracle's records indicate that the Debtors have active license agreements in addition to the Oracle Agreements identified in the Plan Supplement (collectively with the agreements listed on Exhibit D, the "Oracle Agreements").

14. To the extent those additional agreements will also be assumed by the Debtor, the Debtor must pay all sums owed in cure, including any post-petition amounts which may have come due.

III. ARGUMENT

A. The Debtor May Not Assume the Oracle Agreements Absent Oracle's Consent Because the Agreements Pertain to One or More Licenses of Intellectual Property

15. 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.

16. 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 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); *See, In re Patient Educ. Media*, 210 B.R. 237, 243 (Bankr. S.D.N.Y. 1997); *See, In re Adelphia Communications Corp, et al.*, 359 B.R. 65 (Bankr. S.D.N.Y. 2007).

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

18. Therefore, pursuant to Bankruptcy Code section 365, the Debtor may not assume the Oracle Agreements without Oracle's consent.

19. For the reasons discussed herein, Oracle does not consent to the Debtor's proposed assumption at this time.

B. To Assume the Oracle Agreements, the Debtor Must Cure All Arrears.

20. Before assuming an unexpired executory contract, a debtor must (1) cure (or provide adequate assurance of a prompt cure of) any defaults under the subject contracts, and (2) provide adequate assurance of future performance under the contract. *See* 11 U.S.C. § 365(b)(1).

21. Absent the foregoing, a debtor may not assume unexpired executory contracts. The Debtor indicates the cure amount for the Oracle Agreements is \$0.00.

22. At present, Oracle believes the cure amount is not less than \$1,597,933.50 PHP (\$31,731.72 USD at an exchange rate of 1 PHP = 0.0198583 USD)¹.

23. Absent Debtor's cure of all outstanding amounts due Oracle, the Debtor may not assume Oracle's agreements.

C. Unless the Debtor Provides Adequate Assurance of Future Performance, the Court Should Not Permit Assumption of Oracle's Contracts.

24. In addition to requiring that defaults be cured, Section 365(b)(2) of the Bankruptcy Code obligates a debtor to provide adequate assurance of future performance under the contract before the executory contract may be assumed. *See* 11 U.S.C. § 365(b)(2).

¹ See <https://www.xe.com/currencyconverter/convert/?Amount=1&From=PHP&To=USD> (last visited, December 9, 2021).

25. In light of the Debtor's failure to provide either adequate assurance of prompt payment of the cure or future performance under the contracts, Oracle is unable to determine whether Debtor has complied, or will comply, with all of the requirements of section 365(b) of the Bankruptcy Code.

26. Accordingly, Oracle reserves its rights to be heard regarding all assumption and cure issues.

IV. CONCLUSION

27. For the reasons set forth above, Oracle respectfully requests that the Court deny the Debtor's request for authority to assume any Oracle contract absent cure of all outstanding amounts due and owing to Oracle.

Dated: December 10, 2021
Lake Success, New York

Respectfully submitted,

By: /s/ Amish R. Doshi
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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2021, I served a copy of *Oracle America, Inc. And Oracle (Philippine) Corporation's Cure Objection In Connection With The Chapter 11 Plan Of Reorganization Of Philippine Airlines, Inc. ("Cure Objection")* on the parties listed on the below service list by methods listed above their names. For email service, a pdf copy of said document was attached and sent to the email address next to their names. For Regular Mail, a copy of the said document was enclosed in postage pre-paid envelope and sent to the address listed below their name by depositing the envelope in the sole custody of the USPS 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.

/s/ Amish R. Doshi

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