UNITED STATES BANKRUPTCY COURT **DISTRICT OF NEW JERSEY**	
Caption in Compliance with D.N.J. LBR 9004-2 Amish R. Doshi, Esq. **DOSHI LEGAL GROUP, P.C.** 1979 Marcus Avenue, Suite 210E Lake Success, NY 11042 Telephone: 516-622-2335 E-Mail: amish@doshilegal.com Shawn M. Christianson, Esq. **BUCHALTER, P.C.** 425 Market Street, Suite 2900 San Francisco, California 94105-2491 Telephone: (415) 227-0900 E-mail: schristianson@buchalter.com **Attorneys For Oracle America, Inc.**	**Case No. 24-14727 (SLM)** **Chapter 11** **Jointly Administered** **Hearing Date: June 21, 2024 at 10:00, if no auction** **Hearing Date: June 28, 2024 at 10:00 AM, if auction held** **Objection Date: June 14, 2024**
In re: **SAM ASH MUSIC CORPORATION, *et al.*** **Debtors.**	**JUDGE: STACEY L. MEISEL** **DOCKET NOS. 47 AND 152**

ORACLE'S LIMITED OBJECTION TO AND RESERVATION OF RIGHTS REGARDING DEBTORS' SALE MOTION AND ASSUMPTION NOTICE

Oracle America, Inc., successor in interest to Sun MicroSystems, Inc. and NetSuite, Inc. ("Oracle"), a creditor and contract counter-party in the above-captioned Chapter 11 cases, submits this limited objection to and reservation of rights ("Rights Reservation") regarding (1) *Debtors' Motion for Entry of Orders (I)(A) Approving Bidding Procedures and Breakup Fee, (B) Approving Stalking Horse Purchase Agreement (C) Scheduling an Auction and a Sale Hearing, (D) Approving the Form and Manner of Notice Thereof, and (E) Establishing Notice and Procedures For the Assumption and Assignment of Contracts and Leases and (II)(A) Authorizing the Debtor to Enter Into an Asset Purchase Agreement, (B) Approving the Asset Purchase*

Agreement, and (C) Authorizing the Assumption and Assignment of the Assumed Contracts ("Sale Motion") [Dkt. No. 42] and (2) *Notice Of Contract Parties to Potentially Assumed Executory Contracts and Unexpired Leases* ("Assumption Notice") [Dkt. No. 152], filed by Sam Ash Music Corporation, et al. ("Debtors").

I. INTRODUCTION

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

2. Oracle objects to, and reserves its rights regarding, the 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 agreement and applicable law.

b) Second, the Assumption Notice identifies several Oracle contracts for potential assumption and assignment with inadequate contract descriptions. Oracle remains in the process of reviewing its records. However, two of the contracts potentially designated are over seventeen years old and appear to have expired. Thus, these contracts may no longer be executory. 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 concern, coupled with others to be addressed further below, leaves Oracle without enough information to determine which agreements are at issue, and consequently, whether the Debtors' proposed cure is accurate.

c) Third, at present, no adequate assurance information has been provided for Tiger Capital Group, LLC ("Stalking Horse") and the Stalking Horse may not be the ultimate purchaser/assignee. Therefore, Oracle is unable to determine whether the successful bidder will be capable of performing under the terms of the contracts which the Debtors seek to assume and assign. Until the ultimate purchaser is known, Oracle reserves its rights on this point

d) Finally, the APA (defined below) contemplates a transition services agreement and certain shared services which may call for 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.

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 May 8, 2024. The Debtors continue to operate as debtors in possession.

5. On May 10, 2024, the Debtors filed the Sale Motion seeking Court authority to sell substantially all assets of the Debtors.

6. Exhibit "2" to the Sale Motion is the Asset Purchase Agreement dated as of May 10, 2024 between the Debtors and Stalking Horse ("APA"). Section 6.1(d) of the APA contemplates that following the closing the Stalking Horse may require transition services from the Debtors and the Debtors and the Stalking Horse may enter into a transition services agreement ("TSA").

7. In addition, Section 6.2 of the APA contemplates certain information sharing between the Debtors and the Stalking Horse for up to two (2) years following the closing. It is unclear which services will be provided during the post-closing period or through the TSA.

8. Therefore, Oracle reserves all rights in the event any provision in the APA, including the TSA, purports to authorize the shared use of Oracle's licensed software, whether post-closing, or at any other time.

9. Oracle also reserves all rights regarding any subsequent asset purchase agreement which proposes to include transitional or shared use, and which involves an as yet unknown buyer.

10. On May 31, 2024, the Debtors filed the Assumption Notice. Exhibit "A" to the Assumption Notice identifies several agreements between Oracle and the Debtors (the "Oracle Agreements"). The Oracle Agreements are described as follows:

Debtor Counterparty	Counterparty	Contracts Description	Cure Amount
Sam Ash Music Corporation	Oracle America, Inc.	Signature Page to a Master Agreement	$0.00
Sam Ash Music Corporation	Oracle America, Inc.	Oracle NetSuite Estimate DTD 11/8/2023	$0.00
Sam Ash Megastores, LLC	Sun MicroSystems, Inc.	Renewal Quotation for Enterprise Services Quote #1679397/3 DTD 9/11/2007	$0.00
Sam Ash Music Corporation	Sun MicroSystems, Inc.	Consulting Services Agreement DTS 3/9/2004	$0.00

III. ARGUMENT

A. The Debtors May Not Assume the Oracle Agreement Absent Oracle's Consent Because The Agreement Pertains To One Or More Licenses Of Intellectual Property.

11. 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.

11 U.S.C. § 365(c).

12. Federal law makes non-exclusive intellectual property 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).

13. 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.

14. For the reasons discussed herein, Oracle does not consent at present to the Debtors' proposed assumption and assignment of the Oracle Agreements.

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

15. The Assumption Notice does not provide sufficient information for Oracle to determine which contracts are at issue. Oracle is in the process of reviewing its records to determine the scope of its active relationship with the Debtors.

16. However, without more specific information, Oracle is unable to determine whether it is evaluating the same agreements the Debtors seek to assume and assign. As is noted above, certain Oracle Agreements may no longer be executory, for they may have expired.

17. In addition, in some instances neither support renewals nor governing agreements are identified. 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 – if that is the Debtors' intent. *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).

18. 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,* 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,[1] 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.

19. 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.

20. 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 renewal; and (d) the governing license agreement.

21. 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.

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

23. 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.

[1] *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.")

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

24. 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).

25. 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.

26. In addition, Oracle will need to determine whether the agreements have expired or been superseded. If the Debtors wish to assume and assign Oracle Agreements which have expired, Oracle would need to determine whether reinstatement fees would be due and whether reinstatement is an option.

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

28. Therefore, Oracle reserves its right to be heard further regarding the cure until after the contract the Debtors seek to assume and assign is 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 Purchaser and/or Assignee.

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

30. As of the date of this Rights Reservation, no adequate assurance information regarding the Stalking Horse has been provided to Oracle and the sale may be subject to overbid[2].

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[2] Oracle is aware that counterparties have until June 24, 2024 in which to file an objection to adequate assurance if

31. To satisfy Bankruptcy Code section 365(b), Oracle requests that the Debtors provide the following information about the ultimate purchaser and/or the proposed assignee: (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.

32. 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.

33. 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.

34. The APA contemplates that certain services may be provided between the Debtors and the Stalking Horse via a TSA, or another information sharing mechanism between the Debtors and the Stalking Horse.

35. 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.

36. Simultaneous use of, and access to, Oracle's licensed software may exceed the scope of the permitted uses under the Oracle Agreements.

37. Such would potentially result in an unauthorized "splitting" of the licenses between the Debtors and the Stalking Horse. Oracle objects to the extent that any transitional or

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the purchaser is someone other than the Stalking Horse. However, in order to save duplicate filings, Oracle incorporates its objection to adequate assurance in this Rights Reservation, in the event the purchaser is not the Stalking Horse.

shared use arrangement purports to grant to both the Debtors and the Stalking Horse the right to shared use of the Oracle licenses beyond the licenses' terms.

38. Oracle reserves all rights regarding any transitional or shared use, including under any final APA or TSA, pending Oracle's further review of the same.

IV. CONCLUSION

39. 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: June 14 2024
Lake Success, New York

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CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2024, I served a copy of *Oracle's Limited Objection To And Reservation Of Rights Regarding Debtors' Sale Motion And Assumption Notice* on the parties listed on the below service list via email containing a pdf of the document. 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. Finally, the parties listed as being served by regular mail were mailed a copy of the document enclosed in postage-pre-paid envelope addressed to the individual listed on the list and delivered to the sole custody of the USPS in New Hyde Park, NY.

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