

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

In re:

The SCO GROUP, INC. *et al.*,

Debtors.

Chapter 11

Case No. 07-11337 (KG)
(Jointly Administered)

Hearing Date: November 8, 2010 at 10:00 AM
Objection Date: October 25, 2010 at 4:00 PM
Docket Entry Nos. 1141, 1161 and 1184

**ORACLE AMERICA, INC.'S OBJECTION TO NOTICE OF CURE AMOUNTS
IN CONNECTION WITH THE ASSUMPTION AND ASSIGNMENT OF
EXECUTORY CONTRACTS AND UNEXPIRED LEASES AND RESERVATION OF
RIGHTS REGARDING ADEQUATE ASSURANCE ("OBJECTION")**

Oracle America, Inc., successor in interest to Oracle USA, Inc., Oracle Corporation, BEA Systems, Inc. and Sun Microsystems ("Oracle"), is a creditor and contract counter-party in the above-captioned jointly administered Chapter 11 cases. Oracle submits this Objection to the Notice of Cure Amounts in Connection With the Assumption and Assignment of Unexpired Leases and Executory Contracts ("Cure Notice"), filed by Edward N. Cahn, Esq., Chapter 11 Trustee ("Trustee") for The SCO Group, Inc., *et al.* ("Debtors").

I. FACTUAL BACKGROUND

1. In connection with the Trustee's Motion to Authorize the Marketing, Auction and Sale of Substantially All of the Debtor's Software Business Assets ("Sale Motion"), the Trustee filed and served the Cure Notice.

2. Exhibit "A" to the Cure Notice identifies Oracle, BEA Systems, Inc. and Sun Microsystems as contract counter-parties with contracts to be assumed and assigned through the Sale Motion.

3. Based on the contract descriptions provided in the Cure Notice, Oracle is unable to identify the contracts described.

4. Without additional information from the Trustee, Oracle is unable to determine either which contracts the Trustee seeks to assume and assign, or the appropriate cure amount owed under the targeted contracts.

5. In conjunction with a prior notice, Oracle requested, and received from the Debtors' counsel, copies of certain contracts then identified for assumption and assignment.

6. The list of contracts in the recently received Cure Notice includes additional, newly identified contracts, which were not provided by Debtors to Oracle in response to the earlier request.

7. Since a number of the newly listed contracts were not previously provided, and are not recognizable as a result of their broadly worded descriptions in the Cure Notice, Oracle remains uncertain as to the Debtors' intent.

8. There is also uncertainty regarding the purchaser's identity, for no stalking horse bidder has emerged and the sale is subject to auction¹.

9. Therefore at this time, Oracle cannot evaluate either the eventual purchaser, or whether the prerequisites of 11 U.S.C. § 365(b) have been met.

10. This uncertainty leaves Oracle unable to assess how its pecuniary and proprietary interests may be affected under the proposed sale.

11. Thus, Oracle reserves all rights to be heard on the matter once the successful bidder/potential assignee is known.

12. As described below, the Trustee may not assume and assign any Oracle agreements without Oracle's consent, as such contracts involve the licensing of patented and/or

¹ Pursuant to the Cure Notice, counterparties to leases or contracts have until November 1, 2010 to file an objection based on adequate assurance concerns. The auction is scheduled to be conducted on October 25, 2010. Given the short turn around time, Oracle's Objection is both as to cure, and to preserve its right to be heard on the issue of adequate assurance of future performance once the successful bidder is known.

copyrighted materials, and Oracle does not consent to their assumption and assignment at this time.

13. In order to ensure adequate assurance of future performance by the ultimate purchaser, Oracle requests that the Trustee, at a minimum, provide to Oracle the following information about the eventual successful bidder: (a) financial bona fides; (b) confirmation of status as a non-competitor of Oracle's; and (c) confirmation of its willingness to execute an Oracle Assignment Agreement and any related documentation.

14. Without this information, Oracle is unable to determine the eventual buyer's creditworthiness or suitability/ability to adequately perform, and Oracle reserves all rights to object to the purchaser until this information is known.

15. For these reasons, Oracle requests that the Court deny, at this time, the Trustee's request for an order authorizing assumption and assignment of any Oracle executory agreement in the absence of Oracle's consent.

II. ARGUMENT

A. **The Trustee May Not Assume And Assign Any Oracle Agreements, As They Pertain To Licenses Of Intellectual Property And Oracle Does Not Consent To The Proposed Assignments At This Time.**

16. 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.

17. Federal law makes non-exclusive patent licenses non-assignable absent consent of the licensor. *In re Catapult Entertainment, Inc.*, 165 F.3d 747 (9th Cir. 1999), *cert. dismissed*, 528 U.S. 924 (1999). *See, In re Access Beyond Technologies, Inc.*, 237 B.R. 32, 48, 49 (Bankr.

D. Del 1999) (citing *In re: 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).

18. As the Oracle license agreements involve licensing of non-exclusive, patented software, and Oracle does not consent to the assignment at this time, the license agreements are non-assignable.

19. Accordingly, the proposed assumptions and assignments reflected in the Cure Notice should be denied with respect to the Oracle agreements.

B. The Sale Motion Should Be Denied With Respect To Any Oracle Agreements Because It Fails To Confirm the Ultimate Buyer/Potential Assignee's Identity.

20. Section 365(b) of the Bankruptcy Code sets forth specific prerequisites that must be met before a trustee can assume, or assume and assign an executory contract, including (a) curing (or providing adequate assurance of a prompt cure of) any defaults under the subject contracts, and (b) providing adequate assurance of future performance under the contract. Absent the foregoing, the executory contracts may not be assumed, or assumed and assigned.

21. Since the proposed sale here is subject to auction without even a stalking horse bidder, the identity of the ultimate purchaser/assignee necessarily remains unknown.

22. Therefore, at this time, Oracle cannot determine whether: (a) the ultimate purchaser/assignee is capable of providing adequate assurance of future performance; (b) the proposed assignee is a competitor of Oracle; and (c) the purchaser is willing to enter into a standard form of Oracle Assignment Agreement, and related documentation, reflecting the terms, post-assignment, of the parties' relationship.

23. Until at least the information identified above is provided, Oracle is unable to determine whether the Trustee has complied, or will comply, with the protections of section 365(b)(1)(A),(B) and (C).

C. The Sale Motion Should Be Denied With Respect To The Oracle Agreements Because the Cure Notice May Fail To Provide For Payment of Appropriate Amounts Required Prior To Any Assignment.

24. Because the Trustee has not identified the contracts sought to be assumed/assigned with adequate specificity, Oracle is unable to determine the cure amount owed.

25. The Trustee cannot assign the Oracle license agreements until all defaults thereunder are cured, including ensuring arrearages are tendered.

26. The cure of defaults, including compensation for pecuniary losses to the non-debtor party resulting from the default, is a precondition to assumption, as well as to obtaining Oracle's consent to the proposed assignments.

27. For this additional reason, Oracle withholds its consent to any assignment of the Oracle agreements. *See* 11 U.S.C. § 365(b)(1)(A) and (B).

28. Absent payment of the appropriate amounts to Oracle, the Oracle agreements may not be assumed, assumed and assigned or otherwise transferred.

29. Oracle therefore reserves its right to object to the cure until more certainty on the contract or contracts at issue is provided.

III. CONCLUSION

30. The Trustee is prohibited from assuming and assigning any Oracle contract in the absence of obtaining Oracle's consent, pursuant to section 365(c) and applicable case law.

31. Such consent cannot be given because of the open issues presented by the Cure Notice.

32. The Trustee has failed to comply with the statutory prerequisites for assumption and assignment of the Oracle agreements by, among other things, failing to: (a) identify with certainty all of the contracts at issue so as to allow for their identification by Oracle and permit an evaluation of the accuracy of the resultant cure payment; (b) identify the buyer with certainty so as to permit an evaluation of its ability to perform; and (c) provide adequate assurance of future performance.

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33. For these reasons, and all those set forth above, Oracle respectfully requests that the Court deny, at this time, the Trustee's effort to seek assumption and assignment of any Oracle agreements via the Cure Notice.

Dated: October 22, 2010
Wilmington, Delaware

Respectfully submitted,
MARGOLIS EDELSTEIN

By: /s/ James E. Huggett
James E. Huggett, Esquire (#3956)
750 Shipyard Drive, Suite 102
Wilmington, Delaware 19801
Telephone: (302) 888-1112
Facsimile: (302) 888-1119

DAY PITNEY, LLP
Amish R. Doshi (NY-AD5996)
7 Times Square, Times Square Tower
New York, New York 10036-7311
Telephone: (212) 297-5800
Facsimile: (212) 881-9019

BUCHALTER NEMER P.C.
Shawn M. Christianson (CSB #114707)
333 Market Street, 25th Floor
San Francisco, California 94105-2126
Telephone: (415) 227-0900
Facsimile: (415) 227-0770

ORACLE AMERICA, INC.
Deborah Miller (CSB #95527)
Jeffrey Ross (CSB #138172)
500 Oracle Parkway
Redwood City, California 94065
Telephone: (650) 506-5200
Facsimile: (650) 506-7114

Attorneys for Oracle America, Inc.