

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

In re:

BRIGGS & STRATTON
CORPORATION., *et al.*,

Debtors.

Chapter 11

Case No. 20-43597-399

(Jointly Administered)

Related Docs: 53, 505, 514, 515, 516, 527

ORACLE’S LIMITED OBJECTION TO AND RESERVATION OF RIGHTS REGARDING (1) DEBTORS’ MOTION AUTHORIZING (A) SALE OF DEBTORS’ ASSETS AND EQUITY INTERESTS FREE AND CLEAR OF LIENS, CLAIMS, INTERESTS, AND ENCUMBRANCES AND (B) ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES; AND (III) GRANTING RELATED RELIEF ; AND (2) NOTICE OF CURE COSTS AND PROPOSED ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES IN CONNECTION WITH SALE

Oracle America, Inc., successor in interest to RightNow Technologies, Inc., Endeca Technologies and Responsys, Inc. (“Oracle”), a creditor and contract counter-party in the above-captioned jointly administered Chapter 11 cases, submits this limited objection to and reservation of rights regarding: (1) *Motion of Debtors for Entry of an Order (I) Approving (A) Bidding Procedures, (B) Designation of Stalking Horse Bidder and Stalking Horse Bid Protections, (C) Scheduling Auction and Sale Hearing, (D) Form and Manner of Notice of Sale, Auction and Sale Hearing, and © Assumption and Assignment Procedures; (II) Authorizing (A) Sale of Debtors’ Assets and Equity Interests Free and Clear of Liens, Claims, Interests and Encumbrances, and (B) Assumption and Assignment of Executory Contracts and Unexpired Leases; and (III) Granting Related Relief [Dkt. No. 53] (“Sale Motion”); and (2) Notice of Cure Costs and Proposed Assumption and Assignment of Executory Contracts and Unexpired Leases in*



Connection with Sale [Dkt. Nos. 514, 515 and 516] (“Assumption Notices”)¹, filed by Briggs & Stratton Corporation, Inc., *et al.* (“Debtors”).

I. INTRODUCTION

The Debtors seek Bankruptcy Court authority to, among other things, assume and assign certain executory contracts between the Debtors and Oracle. Oracle objects to the proposed assumption and assignment for several reasons.

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.

Second, the Assumption Notices do not provide a complete description of the Oracle contracts the Debtors seek to assume and assign. As a result, Oracle is unable to identify with certainty the agreement(s) at issue, or confirm whether the Debtors’ proposed cure is accurate.

Third, the Sale Motion does not provide Oracle with sufficient information to determine whether the ultimate purchaser/assignee is capable of performing under the terms of the contracts the Debtors seek to assume and assign.

Finally, the APA (defined below) indicates that the Debtors and the purchaser will enter into a transition services agreement in connection with the proposed sale. Oracle objects to any unauthorized shared use of its licenses which may be contemplated by the Debtors.

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

The Debtors filed the above captioned cases on July 20, 2020 (“Petition Date”) and an order directing joint administration was entered shortly thereafter. The Debtors continue to operate as debtors in possession.

On the Petition Date, the Debtors filed the Sale Motion, which seeks Court authority to sell the Debtors’ assets and equity interests as a going concern sale. The stalking horse bidder is

¹ Debtors granted Oracle an extension to September 10, 2020 in which to file an objection to the Sale Motion and Assumption Notice.

Bucephalus Buyer, LLC, an affiliate of KPS Capital Partners, LP (the “Stalking Horse”). The Stock and Asset Purchase Agreement between the Debtors and the Stalking Horse (“APA”) is attached as Exhibit “B” to the Sale Motion.

The APA contemplates that the Debtors and the Stalking Horse will enter into a transition services agreement (“TSA”), which will be included as part of the closing documents (*See*, Sections 2.5©(ii) and (d)(ii) of the APA). Although noted as being an exhibit, the TSA was not included as part of the APA. Thus, Oracle is unable to determine whether and how it may be impacted by the TSA. Oracle reserves all rights regarding any transitional use contemplated by Debtors and the Stalking Horse, including with respect to any TSA.

On August 19, 2020, the Debtors filed the Assumption Notices which identify certain Oracle agreements the Debtors may seek to assume and assign (collectively, the “Oracle Agreements”). The Debtors identify a \$0.00 cure amount for all of the Oracle Agreements, which are identified as follows:

Debtor	Counterparty	Contract Description	Cure Amt.
Briggs & Stratton Corporation	Endeca Technologies	Indemnity Agreement	\$0.00
Briggs & Stratton Corporation	Endeca Technologies	Statement of Work	\$0.00
Briggs & Stratton Corporation	Endeca Technologies	Statement of Work	\$0.00
Briggs & Stratton Corporation	Endeca Technologies	Statement of Work	\$0.00
Briggs & Stratton Corporation	Endeca Technologies	Statement of Work	\$0.00
Briggs & Stratton Corporation	Endeca Technologies	Software Support Agreement	\$0.00
Briggs & Stratton Corporation	Endeca Technologies	Confidentiality Agreement	\$0.00
Briggs & Stratton Corporation	Endeca Technologies	Service Agreement	\$0.00
Briggs & Stratton Corporation	Endeca Technologies	Settlement Agreement	\$0.00
Briggs & Stratton Corporation	Endeca Technologies	Statement of Work	\$0.00
Briggs & Stratton Corporation	Endeca Technologies, Inc.	Confidentiality Agreement	\$0.00
Briggs & Stratton Corporation	Oracle America, Inc.	Order Form	\$0.00
Briggs & Stratton Corporation	Oracle America, Inc.	License Agreement	\$0.00

Briggs & Stratton Corporation	Oracle Corporation	License Agreement	\$0.00
Briggs & Stratton Corporation	Oracle Corporation	License Agreement	\$0.00
Briggs & Stratton Corporation	Oracle Corporation	License Agreement	\$0.00
Briggs & Stratton Corporation	Responsys, Inc.	Termination Letter	\$0.00
Briggs & Stratton Corporation	Responsys, Inc.	Service Agreement	\$0.00
Briggs & Stratton Corporation	Responsys, Inc.	Termination Letter	\$0.00
Briggs & Stratton Corporation	Responsys, Inc.	Statement of Work	\$0.00
Briggs & Stratton Corporation	Responsys, Inc.	Service Agreement	\$0.00
Briggs & Stratton Corporation	Responsys, Inc.	Statement of Work	\$0.00
Briggs & Stratton Corporation	Responsys, Inc.	Work Order	\$0.00
Briggs & Stratton Corporation	Responsys, Inc.	Work Order	\$0.00
Briggs & Stratton Corporation	Responsys, Inc.	Change Order	\$0.00
Briggs & Stratton Corporation	Responsys, Inc.	Confidentiality Agreement	\$0.00
Briggs & Stratton Corporation	Right Now Technologies, Inc.	License Agreement	\$0.00

On August 31, 2020, the Debtors filed a *Notice of Cancellation of Auction and Designation of the Stalking Horse Bid and the Successful Bid* [Dkt. No. 679] indicating that no additional qualified bids were received. Therefore, the Stalking Horse was declared the successful bidder.

III. ARGUMENT

A. 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.

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.

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).

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 the Oracle Agreements without Oracle’s consent. For the reasons discussed herein, Oracle does not consent to the Debtors’ proposed assumption and assignment at this time.

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

The Debtors’ Assumption Notice very generally describes the Oracle contracts the Debtors seek to assume and assign. The general descriptions do not contain sufficient information for Oracle to confirm which specific contracts the Debtors seek to assume and assign.²

To clarify which Oracle contracts Debtors hope to assume and assign, Oracle requests that the Debtors specify the targeted contract’s (1) name and date; (2) identification number; (3) any associated support or support renewals; and (4) the governing license agreement. This information will enable Oracle to evaluate whether the Oracle Agreements are assignable, whether they are supported, expired or in default, and, if in payment default, the appropriate cure

² Oracle also cannot ascertain if the Debtors are attempting to segregate the underlying Oracle license agreement from the corresponding support and any payment agreements for purposes of assumption and assignment. Such segregation is impermissible. See *In re Interstate Bakeries Corporation*, 751 F.3d 955, 963 (8th Cir. 2014); *In re Buffets Holdings*, 387 B.R. 115 (Bankr. D. Del. 2008).

amount. Additionally, the information will allow Oracle to assess whether Oracle may accept performance from an entity other than the Debtors. Oracle reserves its right to be heard on this issue until after the Oracle agreement(s) the Debtors seek to assume and assign are identified with greater specificity.

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

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). The Debtors have identified a \$0.00 cure amount associated with the Oracle Agreements identified by the Assumption Notice. However, the Debtors have failed to describe the Oracle Agreements they seek to assume and assign with sufficient particularity for Oracle to identify which agreements are at issue, and thereby confirm the corresponding cure amount.

Therefore, Oracle reserves its right to be heard regarding the cure amount until after the contract or 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.

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

Here, the Stalking Horse has been identified as the successful buyer. However, no adequate assurance information has been provided. To satisfy Bankruptcy Code section 365(b), Oracle requests that the Debtors provide the following information about the Stalking Horse: (1) financial bona fides; (2) confirmation that the purchaser is not an Oracle competitor; and (3) confirmation that the ultimate assignee will (a) execute an Oracle Assignment Agreement and related documentation which identifies with specificity the Oracle executory contract(s) to be assigned; and, if appropriate (b) enter into an Oracle Master License Agreement. Absent these assurances, Oracle cannot determine the proposed assignee's creditworthiness, its suitability as an Oracle customer, or its ability to adequately perform the terms of the Oracle Agreements.

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

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

The APA contemplates that undisclosed transitional services will be provided between the Debtors and the Stalking Horse. The Debtors have not provided any additional information, nor has the TSA been filed, precluding Oracle from determining either the scope of the proposed transitional use, or whether its contracts will be affected.

Shared access to and use of Oracle's licenses exceeds the scope of the permitted uses under the Oracle Agreements, and may constitute an unauthorized splitting of the respective licenses. Oracle reserves all rights regarding any transitional use, including under the TSA, pending Oracle's review of the TSA and an opportunity to assess how it may impact Oracle, including whether the use contemplated thereunder constitutes non-compliance under the terms of the Oracle Agreements.

IV. CONCLUSION

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 Agreement. Oracle reserves its right to be heard on all issues set forth herein.

SILVER LAKE GROUP, LTD.

DATED: September 10, 2020

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was filed electronically with the Court on September 10, 2020, served simultaneously upon all parties receiving service via the Court's CM/ECF System and as listed on the Court's Electronic Mail Notice List, and served by email and U.S. Mail to the Objection Notice Parties as described in Doc.# 514, 515, 516 and 527.

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