

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

)	Chapter 11
In re:)	
)	Case No. 24-10137 (MFW)
INVIVO THERAPEUTICS)	
CORPORATION, et. al.,)	(Jointly Administered)
)	
Debtors.)	Hearing Date: April 9, 2024 at 2:00 PM
)	Objection Date: March 29, 2024
)	Docket Nos. 18 & 113

**ORACLE’S LIMITED OBJECTION TO AND RESERVATION OF RIGHTS
REGARDING DEBTORS’ SALE MOTION AND RELATED NOTICE OF DEBTORS’
INTENT TO ASSUME AND ASSIGN CERTAIN UNEXPIRED LEASES AND
EXECUTORY CONTRACTS AND FIXING OF CURE AMOUNTS**

Oracle America, Inc., successor in interest to NetSuite, Inc. (“Oracle”), a creditor and contract counter-party in the above-captioned Chapter 11 case, submits this limited objection to and reservation of rights (“Rights Reservation”) regarding: (1) *Motion of Debtors’ For Entry Of Orders: (A)(I) Approving Bid Procedures Relating To The Sale of Substantially All Of The Debtors’ Assets, (II) Approving Stalking Horse Bid Protections, (III) Scheduling A Hearing To Consider The Sale, (IV) Approving The Form And Manner Of Notice Of Sale By Auction, (V) Establishing Notice And Procedures For The Assumption And Assignment Of Contracts And Leases, and (VI) Granting Related Relief; and (B)(I) Approving Asset Purchase Agreement And Authorizing The Sale Of Certain Assets Of The Debtors Outside The Ordinary Course Of Business; (II) Authorizing The Sale Of Assets Free And Clear Of All Liens, Claims, Encumbrances And Interests, (III) Authorizing The Assumption And Assignment Of Certain Executory Contracts And Unexpired Lease, and (IV) Granting Related Relief [Dkt. No. 18] (“Sale Motion”); and (2) *Notice of Debtors’ Intent To Assume And Assign Certain Unexpired Leases And Executory Contracts and Fixing of Cure Amounts [Dkt. No. 113] (“Assumption Notice”)*, filed by InVivo Therapeutics 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 an executory contract between the Debtors and Oracle.

2. Oracle objects to, and reserves its rights regarding, the proposed assumption and assignment for several reasons.

a) First, as stated in the Assumption Notice, the Debtors assert that no consent is required for the assumption and assignment of any contract. Oracle disagrees with this blanket statement as its agreements with the Debtors 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 does not provide a complete description of the contracts to be assumed and assigned. Although the cure amount identified in the Assumption Notice may be correct, until Oracle receives clarification on the exact contracts Debtors seek to assume, it reserves its right regarding the cure amount.

c) Third, at present, there is no stalking horse bidder and as such, Oracle is unable to determine whether the ultimate purchaser/assignee will be capable of performing under the terms of the contract that Debtors seek to assume and assign. Until the ultimate purchaser is known, Oracle reserves its rights on this point.

d) Finally, Oracle objects to the extent any final Asset Purchase Agreement between the Debtors and the purchaser ("APA") includes the unauthorized shared use of Oracle's licenses. Oracle objects to any unauthorized shared use of its licenses which may be contemplated by the Debtors, as such actions are not permitted under Oracle's agreements.

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 February 1, 2024 ("Petition Date"). The Debtors continue to operate as debtors in possession.

5. On the Petition Date, the Debtors filed the Sale Motion which seeks Court authority to sell substantially all of the Debtors' assets. No stalking horse bidder has been identified.

6. On February 22, 2024, an Order [Dkt. No. 79] was entered approving certain bid and assumption and assignment procedures (“Bid Procedures Order”).

7. The Bid Procedures Order sets forth the following deadlines: (a) March 29, 2024 at 4:00 p.m., as the deadline to submit bids; (b) March 29, 2024 at 4:00 p.m., as the deadline to submit objections to the Sale Motion and Assumption Notice; (c) April 1, 2024 as the deadline for Debtors to notify parties whether an auction will be held; and (d) April 3, 2024 at 10:00 a.m., as the auction date.

8. This timeline requires that interested parties file sale objections prior to knowing the successful bidder’s identity, and provides no opportunity for those parties to review any additional or amended sale or purchase related documents, including any final APA.

9. Therefore, Oracle reserves all rights regarding any APA which may include the authorized shared use of Oracle’s licensed software, via a Transitional Services Agreement (“TSA”) or the APA.

10. On March 15, 2024, the Debtors filed the Assumption Notice. Exhibit “1” to the Assumption Notice identifies one Oracle agreement between Oracle and InVivo Therapeutics Corporation (the “Oracle Agreement”), described as a “Software License Agreement.”

11. The Assumption Notice includes a stated cure of \$0.00.

III. ARGUMENT

A. The Debtors May Not Assume And Assign Oracle’s Agreements Absent Oracle’s Consent Because They Pertain To Licenses Of Intellectual Property.

12. 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.

13. Federal law makes non-exclusive patent 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); *In re: West Elec., Inc.*) 852 F. 2d 79 (3d Cir. 1988) (holding that the “provision limiting assumption of contracts is applicable to any contract subject to a legal prohibition against assignment.”), *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).

14. Oracle’s agreements are, or pertain to, non-exclusive licenses of copyrighted software.

15. Therefore, pursuant to Bankruptcy Code section 365, the Debtors may not assume and assign any Oracle agreement without Oracle’s prior consent, despite the Assumption Notice’s purported assertion that a contract counter-party’s consent is not required for the assumption or assignment of contracts.

16. For the reasons discussed herein, Oracle does not consent to the Debtors’ proposed assumption and assignment of the Oracle Agreement at this time.

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

17. The Assumption Notice does not provide a complete description of the Oracle Agreement to be assumed and assigned. No governing agreement or estimate is identified—the Assumption Notice merely attempts to assume a “Software License Agreement.”

18. It is impermissible for the Debtors to segregate the underlying Oracle license agreement from the corresponding support and master agreement for purposes of assumption and assignment, if that is the Debtors’ intention. *See, e.g., In re Interstate Bakeries Corporation*, 751 F.3d 955, 961–62 (8th Cir. 2014); *In re Buffets Holdings*, 387 B.R. 115 (Bankr. D. Del. 2008). 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*, No. 09-14089 (BLS), 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)).

19. Under California law,¹ made applicable by the Oracle Agreement, “[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.

20. 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.

21. To clarify which Oracle contract Debtors hope to assume and assign, Oracle requests that the Debtors specify the targeted contract’s: (a) identification or contract number; (b)

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.”).

the contract date; (c) any associated support or support renewals; and (d) the governing license agreement, if not already identified.

22. This information will enable Oracle to evaluate whether the Oracle Agreement is assignable, supported, expired or in default, and, if in payment default, the appropriate cure amount.

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

24. Oracle reserves its right to be heard on this issue until the time at which the exact 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.

25. 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).

26. The Debtors have identified a \$0.00 cure amount for the Oracle Agreement. However, since the Debtors have failed to provide a complete description of the contract they seek to assume and assign, Oracle is unable to confirm the accuracy of the cure amount.

27. Oracle reserves its right to be heard further regarding the cure until after the contract(s) the Debtors seek to assume and assign are identified with greater specificity.

D. The Debtors Have Not Provided Adequate Assurance of Future Performance By the Assignee.

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

29. There is currently no stalking horse bidder and the auction, if any, will be held after objections to the Sale Motion and Assumption Notice are due.

30. 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.

31. 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 Agreement.

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

E. The Oracle Agreement Does Not Authorize Simultaneous Use By The Debtors and the Eventual Purchaser.

33. Oracle reserves its rights to the extent that the final APA contemplates that certain services may be provided between the Debtors and the eventual purchaser for an extended period of time, via a TSA or otherwise.

34. Simultaneous use of, and access to, Oracle's licensed software exceeds the scope of the permitted uses under the Oracle Agreement and would potentially result in an unauthorized "splitting" of the licenses between the Debtors and the ultimate purchaser.

35. Oracle objects to the extent that any transitional or shared use arrangement purports to grant to both the Debtors and purchaser(s) the right to shared use of the Oracle licenses beyond the licenses' terms.

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

IV. CONCLUSION

37. 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, or any Oracle agreement. Oracle reserves its right to be heard further on all issues set forth herein.

Dated: March 29, 2024
Wilmington, Delaware

MARGOLIS EDELSTEIN

By: /s/ James E. Huggett
James E. Huggett, Esq. (#3956)
300 Delaware Avenue, Suite 800
Wilmington, Delaware 19801
Telephone: (302) 888-1112
E-mail: jhuggett@margolisedelstein.com
Amish R. Doshi, Esq.
DOSHI LEGAL GROUP, P.C.
1979 Marcus Avenue, Suite 210E
Lake Success, NY 11042
Tel: (516) 622-2335
E-Mail: amish@doshilegal.com

Shawn M. Christianson, Esq.
Arlen Moradi, Esq.
**BUCHALTER, A PROFESSIONAL
CORPORATION**
425 Market Street, Suite 2900
San Francisco, California 94105-2491
Tel: (415) 227-0900

Peggy Bruggman, Esq.
Alice Miller, Esq.
ORACLE AMERICA, INC.
500 Oracle Parkway
Redwood City, California 94065

Attorneys for Oracle America, Inc.

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CERTIFICATE OF SERVICE

I, James E. Huggett, hereby certify that on March 29, 2024, I served a copy of *Oracle's Limited Objection To And Reservation Of Rights Regarding Debtors' Sale Motion And Related Notice Of Debtors' Intent To Assume And Assign Certain Unexpired Leases And Executory Contracts And Fixing Of Cure Amounts* on the parties listed on the attached Service List via service as indicated.

/s/ James E. Huggett
James E. Huggett (#3956)

SERVICE LIST

BY REGULAR MAIL

<p>Matthew B. McGuire, Esq. Joshua B. Brooks, Esq. LANDIS RATH & COBB, LLP 919 Market Street, Suite 1800 Wilmington, DE 19801</p>	<p>Joseph Cudia, Esq. OFFICE OF US TRUSTEE 844 King Street, Suite 2207 Wilmington, DE 19801</p>
<p>George Shuster, Esq. Benjamin Loveland, Esq. WILMER CUTLER PICKERING HALE & DORR LLP 7 World Trade Center 250 Greenwich Street New York, New York 10007</p>	