

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MINNESOTA

In re:

Jointly Administered Under
Case No. 17-30673 (MER)

Gander Mountain Company,
Overton's Inc.

Case No. 17-30673
Case No. 17-30675

Debtors.

Chapter 11 Cases

ORACLE'S LIMITED OBJECTION AND RESERVATION OF RIGHTS ("RIGHTS RESERVATION") REGARDING (1) NOTICE OF HEARING AND FIRST OMNIBUS MOTION FOR ORDER (I) GRANTING EXPEDITED RELIEF AND (II) AUTHORIZING ASSUMPTION AND ASSIGNMENT OF UNEXPIRED LEASES AND EXECUTORY CONTRACTS [DKT. NO. 751] ("FIRST EXPEDITED ASSUMPTION AND ASSIGNMENT MOTION"); (2) NOTICE OF HEARING AND SECOND OMNIBUS MOTION FOR ORDER (I) GRANTING EXPEDITED RELIEF AND (II) AUTHORIZING ASSUMPTION AND ASSIGNMENT OF UNEXPIRED LEASES AND EXECUTORY CONTRACTS [DKT. NO. 752] ("SECOND EXPEDITED ASSUMPTION AND ASSIGNMENT MOTION"); AND (3) NOTICE OF HEARING AND THIRD OMNIBUS MOTION FOR ORDER (I) GRANTING EXPEDITED RELIEF AND (II) AUTHORIZING ASSUMPTION AND ASSIGNMENT OF UNEXPIRED LEASES AND EXECUTORY CONTRACTS [DKT. NO. 753] ("THIRD EXPEDITED ASSUMPTION AND ASSIGNMENT MOTION")

Oracle Credit Corporation and its affiliate, Oracle America, Inc. successor in interest to Retek, Inc., (together "Oracle"), a creditor and contract counter-party in the above-captioned jointly administered Chapter 11 cases, submits this Rights Reservation in response to the First Expedited Assumption and Assignment Motion, the Second Expedited Assumption and Assignment Motion, and the Third Expedited Assumption and Assignment Motion (together, the "Expedited Assumption and Assignment Motions"), filed by Gander Mountain Company, *et al.* (the "Debtors").

I. INTRODUCTION

The Expedited Assumption and Assignment Motions identify certain Oracle agreements that the Debtors seek Court authority to assume and assign to CWI, Inc. (“CWI”). Oracle objects to the assumption and assignment of its agreements, for three reasons.

First, 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. As discussed herein, Oracle does not presently consent to the assumption and assignment of its agreements.

Second, the Oracle contracts are not described with sufficient particularity by the Assumption and Assignment Motions for Oracle to ensure that it is evaluating the same contracts the Debtors intend to identify.

Finally, to the extent that Oracle can identify the contracts described by the Assumption and Assignment Motions the Debtors have not provided the correct cure amount.

Accordingly, Oracle requests that the Court deny the Expedited Assumption and Assignment Motions to the extent they seek to authorize the Debtors to assume and assign any Oracle agreement.

II. FACTUAL BACKGROUND

The above captioned case was filed on March 10, 2017 (“Petition Date”) and an order directing joint administration was entered on March 14, 2017.

On March 10, 2017, the Debtors filed their Notice of Motion and Motion for (A) an Order (I) Approving Bidding Procedures in Connection with the Sale of Substantially All of the Debtors’ Assets, (II) Approving the Form and Manner of Notice, and (III) Setting Further Hearing on Approval of Sale, and (B) an Order Authorizing and Approving (I) the Sale of Substantially All of the Debtors’ Assets Free and Clear of Liens, Claims, Rights, Encumbrances, and other Interests and (II) the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases [Dkt. No. 31] (the “Sale Motion”), which sought Court authority to sell

substantially all of the Debtors’ assets and potentially effect the assumption and assignment of certain executory contracts.

CWI, Inc. (“CWI) emerged as the successful bidder with respect to certain of the Debtors’ assets, to be operated as a going concern. On May 4, 2017 the Court entered the Order Authorizing the Sale of Certain Assets Free and Clear of Liens, Claims, Rights, Encumbrances, and Other Interests [Dkt. No. 691] (“CWI Sale Order”). In connection with the CWI Sale Order, on May 11, 2017 the Court entered the Order Approving Assumption And Assignment Of Executory Contracts And Unexpired Leases And Granting Relating Relief [Dkt. No. 730] (“Initial Assignment Order”). The Initial Assignment Order provides, among other things, that:

Notwithstanding anything to the contrary in this Order, nothing in this Order shall permit any agreements between Oracle Credit Corporation and Oracle America, Inc. (including, in its capacity as successor-in-interest to Retek, Inc.) and the Debtors to be transferred, assumed, and/or assigned to any third party, or to be used in a fashion not otherwise permitted under such agreements, absent further order of the Court or agreement between the parties.

Initial Assignment Order ¶ 32.

As contemplated by the CWI Sale Order, on May 16, 2017 the Debtors filed the Expedited Assumption and Assignment Motions. The Expedited Assumption and Assignment Motions identify several Oracle agreements, as follows:

Counterparty	Description Of Contract	Cure	Dkt. No.
Banc of America Leasing & Capital, LLC Oracle Financing/Corporation	Payment Plan Agreement #6123	\$0.00	751
Oracle Credit Corporation, PNC Equipment Finance, LLC	Payment Plan Agreement #6123	\$289,858.00	752
Wells Fargo Equipment Finance, Inc. Oracle Credit Corporation	Contract #79369	\$2,467.77	752
Oracle America, Inc.	Cloud Services Agreement		753 ¹

¹ Oracle acknowledges that the Third Expedited Assumption and Assignment Motion states that, “If a counterparty on this list previously filed a timely objection to the cure amount on the Cure Notice, it should not file another objection; the previous objection will be deemed to apply with respect to the motion to which this list is an exhibit, and to the contracts, leases, or other agreements on this list.” Oracle previously objected to the proposed assumption

The agreements mentioned above are referred to herein as the “Oracle Agreements.”

III. ARGUMENT

A. **The 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 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)); *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.”).

The Oracle Agreements are, or pertain to, non-exclusive licenses of copyrighted software. Therefore, the Debtors must obtain Oracle’s consent before seeking to assume and assign the Oracle Agreements. At this time, for the reasons discussed below, Oracle does not consent to assumption and assignment of its agreements.

B. **The Debtors Inadequately Describe The Oracle Agreements To Be Assumed And Assigned, And Identify The Incorrect 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).

and assignment of its agreements at docket nos. 543 and 717. In light of Oracle’s position with respect to the Oracle contracts identified by the First and Second Expedited Assumption and Assignment Motions, Oracle makes reference to the Third Expedited Assumption and Assignment Motion here merely to be complete.

Oracle's records indicate that Oracle and the Debtors are parties to numerous contracts with significant pre-petition amounts outstanding and post-petition amounts accruing. It is not clear based on the Debtors' descriptions in the Expedited Assumption and Assignment Motions which Oracle agreements the Debtors intend to identify. Depending on the scope of agreements targeted for assumption and assignment, the cure amount identified by the Debtors may need to be increased substantially.² In short, the Debtors have failed to describe the Oracle Agreements with sufficient particularity for Oracle to identify which agreements are at issue, and thereby confirm the corresponding cure amount.

Oracle requests that the Debtors (or CWI) provide (1) a specific contract name; (2) identification number; (3) date; (4) whether the targeted contract pertains to support or support renewals; and (5) the governing license agreement for each contract. This information will enable Oracle to evaluate whether the agreements are assignable, whether the Debtors are in default and, if so, what the appropriate cure amount is, and whether Oracle may accept performance from CWI.

Accordingly, Oracle reserves its right to be heard further regarding the appropriate cure amount after the Oracle contracts are identified with enough specificity to allow Oracle to determine the correct cure amount.

IV. NOTICE OF WITNESS

Pursuant to Local Rule 9013-2(c), Oracle gives notice that it may, if necessary, call one or more of the following to testify regarding the facts set forth in this Rights Reservation: Ronald Strong, VP, OFD Funding and Risk Management, whose business address is 500 Oracle Parkway, Redwood Shores, CA 94065.

V. CONCLUSION

For the reasons set forth above, Oracle respectfully requests that the Court deny the Expedited Assumption and Assignment Motions to the extent they seek to authorize the Debtors

² Oracle has informally provided counsel to the Debtors and counsel to CWI with information regarding amounts owed on the various agreements between Oracle and the Debtors in an effort to better identify the contracts at issue and to establish the appropriate cure amount.

to assume and assign any of the Oracle Agreements. Oracle reserves its right to be heard on all issues set forth herein.

ECKBERG LAMMERS, P.C.

Dated: May 22, 2017

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Chapter 11 Cases

UNSWORN CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2017, I caused the following document:

**ORACLE'S LIMITED OBJECTION AND RESERVATION OF RIGHTS
("RIGHTS RESERVATION") REGARDING (I) NOTICE OF HEARING AND
FIRST OMNIBUS MOTION FOR ORDER (I) GRANTING EXPEDITED RELIEF
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ASSUMPTION AND ASSIGNMENT OF UNEXPIRED LEASES AND
EXECUTORY CONTRACTS [DKT. NO. 753] ("THIRD EXPEDITED
ASSUMPTION AND ASSIGNMENT MOTION")**

To be filed electronically with the Clerk of Court through ECF, and that the above document will be delivered by automatic e-mail notification pursuant to ECF and this constitutes service or notice pursuant to Local Rule 9006-1(a).

I further certify that I caused a copy of the foregoing document to be mailed, by first-class, postage paid mail, and e-mailed to the following:

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