

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

In re

THQ Inc., *et al.*,¹

Debtors.

Chapter 11

Case No. 12-13398

Jointly Administered

Re: D.I. 19, 152, 155 & 167

**PRELIMINARY OBJECTION AND RESERVATION OF RIGHTS OF
SOUTH PARK DIGITAL STUDIOS LLC TO DEBTORS' PROPOSED
ASSET SALE AND ASSUMPTION AND ASSIGNMENT OF CONTRACT
BETWEEN THQ INC. AND SOUTH PARK DIGITAL STUDIOS LLC**

South Park Digital Studios LLC (“Licensor”) submits this preliminary objection and reservation of rights with respect to the Debtors’ proposed asset sale and assumption and assignment of that certain Deal Memo between Licensor and THQ Inc. (“THQ”), and respectfully states as follows:

BACKGROUND

1. Licensor, together with certain of its affiliates, is the owner and producer of the popular South Park television show and certain rights associated with the show and its related products. Licensor and THQ are parties to a Deal Memo, dated June 29, 2011 (as amended from time to time, the “Deal Memo”),² pursuant to which Licensor granted to THQ a limited license to certain of its intellectual property—including, among other things, trademarks

¹ The Debtors in these cases and the last four digits of each Debtor’s federal tax identification number are as follows: THQ, Inc. (1686), THQ Digital Studios Phoenix, Inc. (1056), THQ Wireless, Inc. (7991), Volition, Inc. (4944), and Vigil Games (8651). The Debtors’ principal offices are located at 29903 Agoura Road, Agoura Hills, CA 91301.

² The Deal Memo contains a provision obligating the parties to keep confidential the terms of the Deal Memo. Given this confidentiality provision and the preliminary nature of this objection, Licensor has not attached a copy of the Deal Memo at this time.

and copyrights—for use in connection with the development, publication and marketing of the upcoming role-playing video game entitled “South Park: The Stick of Truth.” In exchange, THQ is providing publication, marketing and related services on the game and certain related products. Licensor has the option to acquire from THQ all elements of the game and related products at THQ’s actual cost in the event of THQ’s breach of the Deal Memo.

2. On December 19, 2012, the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”).

3. On January 11, 2013, the Court entered the *Corrected Order Approving and Authorizing (A) Bidding Procedures in Connection with the Sale of the Operating Assets of the Debtors, (B) Stalking Horse Bid Protections, (C) Form and Manner of Notice of the Sale Hearing and (D) Related Relief* (D.I. 152) (the “Bid Procedures Order”).

4. On January 14, 2013, the Debtors filed a notice of filing of the *Notice of (I) Entry into Stalking Horse Agreement and (II) Potential Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection with the Sale of the Debtors’ Assets* (D.I. 155) (the “Assignment Notice”). Pursuant to the Assignment Notice, the Debtors indicate that they may seek to assume and assign the Deal Memo to a potential purchaser of their assets.

5. Under the Assignment Notice and the Bid Procedures Order, Licensor’s deadline to file an objection to the Debtors’ proposed assumption and assignment is January 18, 2013 at 4:00 p.m. Licensor timely submits this preliminary objection and reservation of rights and opposes the assumption or assignment of the Deal Memo. Licensor also reserves the right to exercise its option to acquire from THQ all elements of the games and related products under the Deal Memo.

PRELIMINARY OBJECTION

6. Under section 365(c)(1) of the Bankruptcy Code, the Debtors cannot assume or assign the Deal Memo without Licensor's consent because, as set forth below, applicable law excuses Licensor from accepting performance from or rendering performance to a party other than THQ. Even assuming that the Debtors could assume and assign the Deal Memo or that Licensor was inclined to consent to an assignment to an appropriate purchaser, the Debtors must cure monetary and nonmonetary defaults under the Deal Memo. The current monetary defaults total at least \$2,275,000. Additionally, the Debtors and the prospective purchaser must carry their burden to show adequate assurance of future performance of the Deal Memo. At this time, Licensor has not consented to assignment of the Deal Memo to the Stalking Horse Bidder (as defined in the Bid Procedures Order), and will consider whether to consent to assignment to any other bidder after it has been provided with a copy of the bids, the identity of the prospective purchaser, and a proposal for curing all outstanding defaults and providing adequate assurance of future performance.

7. Finally, Licensor reserves the right to exercise its option to acquire from THQ all elements of the game and related products for THQ's actual costs, and objects to the sale or transfer of any such elements.

A. The Deal Memo Cannot be Assumed or Assigned Under Applicable Law Without Licensor's Consent.

8. Section 365(c)(1) of the Bankruptcy Code prohibits a debtor from assuming or assigning a contract if applicable law excuses the nondebtor party to the contract from accepting performance from, or rendering performance to, a party other than debtor,

regardless of whether or not the contract prohibits or restricts assignment. 11 U.S.C § 365(c).³ Applicable law for purposes of section 365(c)(1) is any nonbankruptcy law applicable to the contract, and includes the laws governing personal services contracts, trademark licenses, and copyright licenses. *See, e.g., In re XMH Corp.*, 647 F.3d 690, 695 (7th Cir. 2011) (Posner, J.) (finding that “[t]he term ‘applicable law’ means any law applicable to a contract, other than bankruptcy law,” including trademark licensing law); *Matter of Midway Airlines Inc.*, 6 F.3d 492, 495 (7th Cir. 1993) (stating that section 365(c)(1) contemplates personal services contracts and any other applicable law prohibiting assignment); *In re Travelot Co.*, 286 B.R. 447 (Bankr. S.D. Ga. 2002) (federal trademark law) (citing *Perlman v. Catapult Entm’t, Inc. (In re Catapult Entm’t, Inc.)*, 165 F.3d 747, 750 (addressing patent license); *In re Golden Books Family Entm’t, Inc.*, 269 B.R. 300, 308-10 (Bankr. D. Del. 2001) (addressing copyright license)).

9. The Deal Memo is governed by California law. Under California law, the Deal Memo is a personal services contract due to the unique nature of the services to be rendered, and therefore, cannot be assigned by THQ without Licensor’s consent. *See Coykendall v. Jackson*, 62 P.2d 746, 747 (Cal. Ct. App. 1936) (“[C]ases are unanimous that an executory contract for personal services involving a personal relation of confidence between the parties, or involving liabilities or duties, which in express terms impute or indicate reliance on the character and personal ability of the parties, cannot be assigned, nor can such contract be specifically enforced.”).

10. Additionally, the Deal Memo contains limited, nonexclusive licenses of certain of Licensor’s trademarks, copyrighted material and other intellectual property, none of which may be assigned under applicable law without Licensor’s consent. *See, e.g., XMH*, 647

³ Pursuant to *In re West Electronics, Inc.*, 852 F.2d 79, 83 (3d Cir. 1988), a debtor also cannot assume a contract where applicable law prohibits assignment.

F.2d at 695 (“[T]he universal rule is that trademark licenses are not assignable in the absence of a clause expressly authorizing assignment.”); *Golden Books*, 269 B.R. at 311 (holding that nonexclusive copyright licenses cannot be assigned without a licensor’s consent under copyright law). The Deal Memo does not contain a clause authorizing assignment, and Licensor has not otherwise authorized an assignment.

11. For these reasons, applicable law prohibits assumption or assignment of the Deal Memo without Licensor’s consent.

B. Even Assuming THQ Could Assume and Assign the Deal Memo, THQ Would Be Required to Cure All Monetary and Nonmonetary Defaults Under the Deal Memo.

12. Pursuant to sections 365(b)(1)(A) and 365(f)(2)(A), a debtor must cure, or provide adequate assurance that it will promptly cure, all monetary and nonmonetary defaults under a contract prior to assuming or assigning the contract. 11 U.S.C. § 365(b)(1)(A) & (f)(2)(A). The Debtors’ Assignment Notice states that there are no monetary defaults under the Deal Memo. Licensor’s records, however, reflect that the Debtors have failed to make pre- and postpetition payments totaling at least \$2,275,000. Accordingly, even assuming the Debtors were permitted to assign the Deal Memo under applicable law, the Debtors would be required to cure these monetary defaults and any nonmonetary defaults.⁴

C. Even Assuming THQ Could Assume and Assign the Deal Memo, THQ or the Prospective Purchaser Must Also Provide Adequate Assurance of Future Performance.

13. Pursuant to section 365(f)(2)(B), adequate assurance of future performance by the assignee of a contract must be provided, regardless of whether there has been a default under the contract. 11 U.S.C. § 365(f)(2)(B). The Debtors have not provided adequate

⁴ Licensor is not aware of the existence of nonmonetary defaults at this time, and reserves all rights with respect to the existence and cure of nonmonetary defaults.

assurance of future performance of the Deal Memo in the hands of a prospective purchaser. Accordingly, even assuming the Debtors were permitted to assign the Deal Memo under applicable law, the Debtors or the prospective purchaser would be required to carry their burden of demonstrating adequate assurance of future performance. As of the date of this preliminary objection, Licensor has not been provided with adequate assurance of future performance with respect to the Stalking Horse Bidder or any other potential purchaser.

D. Licensor Has the Option to Acquire from THQ All Elements of the South Park Game and Related Products and THQ Cannot Sell or Transfer Such Elements.

14. The Deal Memo provides Licensor the option to acquire from THQ all elements of the South Park game and related products in the event of THQ's breach, provided that Licensor pays to THQ the actual costs incurred and paid by THQ. If the Deal Memo is not assumed and assigned with Licensor's consent, then it will be rejected. Licensor reserves the right to exercise its option and acquire from THQ all elements of the South Park game and related products for the amount of THQ's actual costs. Moreover, even absent Licensor's option rights, THQ could not transfer any of the elements to a purchaser without Licensor's consent because the elements are comprised of licensed trademarks and other intellectual property owned by Licensor.

RESERVATION OF RIGHTS

15. As of the filing of this limited objection, the identity of the successful bidder has not been determined. Additionally, pursuant to the terms of the Bid Procedures Order, the Debtors have not yet identified a definitive, binding list of contracts to be assumed and assigned. Further, although the Debtors have filed a form of proposed sale order (D.I. 148), they have reserved the right to amend the proposed order. Accordingly, Licensor reserves the

right to file a further or supplemental objection on any basis, including, without limitation, objections based on the identity of the successful bidder, the successful bidder's ability to provide adequate assurance, the performance necessary to cure defaults under the Deal Memo, and the form of the proposed sale order. Licensor reserves the right to be heard and to present evidence at any hearing on the proposed sale or assignment, including by way of declaration or witness testimony.

16. Notwithstanding Licensor's limited objections, it has been discussing, and remains willing to discuss, appropriate circumstances under which it would consent to an assumption and assignment of the Deal Memo with the Stalking Horse Bidder or any other qualified bidder interested in bidding on the Debtors' assets.

CONCLUSION

WHEREFORE, Licensor respectfully requests that the Court deny (i) assumption or assignment of the Deal Memo absent (a) Licensor's consent, (b) cure of all monetary and nonmonetary defaults, including, without limitation, payment of \$2,275,000, and (c) the Debtors and the prospective purchaser providing adequate assurance of future performance and (ii) transfer of any of the elements of the South Park game or other products created under the Deal Memo without Licensor's consent.

[Signature follows]

Dated: January 18, 2013
Wilmington, Delaware

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

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