

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

	-X	
	:	
In re:	:	Chapter 11
	:	
THQ INC., <i>et al.</i> ,	:	Case No. 12-13398 (MFW)
	:	
Debtors. ¹	:	Jointly Administered
	:	
	:	RE: Docket Nos. 19 and 191

**DEBTORS' REPLY TO 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**

THQ Inc. ("THQI") and its affiliated debtors in the above-captioned chapter 11 cases, as debtors and debtors in possession (collectively, the "Debtors"), by and through their undersigned counsel, respectfully submit this reply (the "Reply") to the preliminary objection and reservation of rights [D.I. 191] (the "Objection") filed by South Park Digital Studios LLC ("South Park" or the "Licensors"), and respectfully state as follows:

RELEVANT BACKGROUND

1. On December 19, 2012 (the "Petition Date"), the Debtors commenced the above-captioned chapter 11 cases by filing voluntary petitions under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the "Bankruptcy Code").

2. On December 19, 2012, the Debtors filed a motion [D.I. 19] (the "Sale Motion") seeking among other things, entry of an order: (a) approving and authorizing (i) bidding

¹ The Debtors in these chapter 11 cases and the last four digits of each Debtor's taxpayer identification number are as follows: THQ Inc. (1686); THQ Digital Studios Phoenix, Inc. (1056); THQ Wireless Inc. (7991); Volition, Inc. (4944); and Vigil Games, Inc. (8651). The Debtors' principal offices are located at 29903 Agoura Road, Agoura Hills, CA 91301.

procedures in connection with the sale of some or substantially all of the assets of the Debtors (the “Acquired Assets”); (ii) stalking horse bid protections; (iii) the form and manner of notice of the sale hearing (the “Sale Hearing”) and (iv) other related relief; and (i) authorizing and approving the sale of the Acquired Assets free and clear of all liens, claims, and encumbrances; (ii) approving the asset purchase agreement; (iii) authorizing and approving the assumption and assignment of executory contracts and unexpired leases (the “Contracts”); and (iv) related relief.

3. On January 13, 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 “Bidding Procedures Order”).

4. On January 14, 2013, the Debtors filed a notice of filing [D.I. 155] 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* (the “Contract Notice”) that was served on January 13, 2013 in accordance with the Bidding Procedures Order.

5. Prior to the Petition Date, THQI entered into a license agreement, dated June 29, 2011, with South Park (the “Deal Memo”). A copy of the Deal Memo is attached hereto as Exhibit A. Under the terms of the Deal Memo, South Park granted licenses to THQI of various intellectual property (the “Licenses”), including among other things, characters, storylines, performance by actors, and designs (the “Property”) for use in connection with the development, publication and marketing of a certain video game related to the television show South Park (the “Initial Game”).

6. Pursuant to the Contract Notice, the Deal Memo listed as one of the Contracts that the Debtors may seek to assume and assign in connection with the sale of the Acquired Assets.

REPLY

7. The Debtors will continue to work toward a consensual resolution of the Objection prior to the Sale Hearing. However, if the Debtors are unable to reach consensual terms of assumption and assignment of the Deal Memo prior to the Sale Hearing, the following provides the Debtors' reply to the Objection. The Debtors reserve all rights to respond to the Objection in light of what results from the auction process on January 22, 2013.

A. Certain Rights Under the Deal Memo Can be Assumed and Assigned by the Debtors Under Applicable Law Without Licensor's Consent.

8. Section 365(c)(1) of the Bankruptcy Code provides that an executory contract may be assumed or assigned unless applicable non-bankruptcy law excuses the contract counterparty from accepting performance from or rendering performance to an entity other than the debtor or debtor in possession. *See* 11 U.S.C. § 365(c). Courts generally find that intellectual property licenses constitute executory contracts within the context of this section. *See In re Golden Books Family Entm't, Inc.*, 269 B.R. 311, 314 (Bankr. D. Del. 2001); *In re Access Beyond Tech., Inc.*, 237 B.R. 32 (Bankr. D. Del. 1999). Thus, courts must look to applicable non-bankruptcy law to determine whether a license is assignable.

9. Courts apply federal copyright law to determine the assignability of a license. *See e.g., In re Valley Media, Inc.*, 279 B.R. 105, 137 (Bankr. D. Del. 2002); *In re Golden Books*, 269 B.R. at 314. The crux of the assignability determination is whether a license is non-exclusive or exclusive in nature. *See In re Valley Media*, 279 B.R. at 137; *In re Golden Books*, 269 B.R. at 314.

10. Non-exclusive licenses do not constitute a transfer of copyright ownership under the Copyright Act of 1976 (the “Act”), and therefore, are not assignable by the licensee without the consent of the licensor. 17 U.S.C. § 101; *see In re Golden Books*, 269 B.R. at 314 (stating that “a non-exclusive licensee . . . has only a personal and not a property interest” in the intellectual property, which “cannot be assigned unless the [licensor] authorizes the assignment”); *In re Valley Media*, 279 B.R. at 135; *In re Patient Educ. Media*, 2010 B.R. 237, 242-43 (Bankr. S.D.N.Y. 1997).

11. In contrast, an exclusive license is included within the definition of a “Transfer of Copyright Ownership” under the Act, granting property rights to the holder of an exclusive license. 17 U.S.C. § 101. The Act further bestows upon the holder of an exclusive right “all of the protections and remedies accorded to a copyright owner by this title.” 17 U.S.C. § 201(d). Consequently, exclusive licenses may be assigned without the licensor’s consent. *In re Valley Media*, 279 B.R. at 135 (Bankr. D. Del. 2002) (“Exclusive licenses grant the licensee a property right in the copyright that is freely transferrable”); *In re Golden Books*, 269 B.R. at 314 (“[A]n exclusive licensee acquires property rights in the licensed material and ‘may freely transfer his rights.’” (quoting *In re Patient Educ. Media*, 210 B.R. 237, 240 (S.D.N.Y. 1999))); *see also* 3 Melvin B. Nimmer & David Nimmer, Nimmer on Copyright § 10.02[A] [4][a] (an exclusive licensee acquires “‘title’ or ownership of the rights conveyed, [and] may reconvey them absent contractual restrictions”).

12. Contrary to South Park’s assertion, the Licenses are not merely limited, non-exclusive licenses to the Property, but include an exclusive license in certain of the Property. Specifically, the Deal Memo includes the following provision: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [Deal Memo at 2]. [REDACTED]

[REDACTED]

[REDACTED] *Id.* The plain language of the contract indicates the parties' intention for the License related to the Initial Game to be exclusive (the "Exclusive License"). Therefore, federal copyright law does not prohibit the Debtors' assumption and assignment of its Exclusive License.

13. Not only does federal law not prohibit the Debtors' assumption and assignment of the Exclusive License, there is nothing under California law that prohibits the assumption and assignment. Despite the Licensor's unsupported contention that the Deal Memo is a contract for "unique" services, it is not a personal services contract subject to restrictions on assignment under California law. There is no language in the Deal Memo itself to indicate that the parties intended this to be a personal services contract, nor is there any mention of the "unique nature of the services to be rendered." *See Keville v. Hollister Co.*, 29 Cal. App. 3d 203, 208 (Cal. App. 2d Dist. 1972) (rejecting argument that a contract was for personal services and thus non-transferrable where there was no language in the contract indicating the parties intention for it to be so).

14. The only case cited by South Park is a 1936 case that found that a personal services contract existed between an individual inventor and another individual who agreed to sell, distribute, and nationally advertise an invention for use in internal combustion engines because the contract relied on the character and personal ability of a party, which clearly is distinguishable from the facts in this instance. *See Coykendall v. Jackson*, 17 Cal. App. 2d 729, 731 (Cal. App. 1936). "In order to be considered a personal service contract, there must be a

special relationship between the parties or the party to perform must possess special knowledge or a unique skill, *such that no performance save that of the contracting party could . . . meet the obligations of the contract.*” *Husain v. McDonald's Corp.*, 205 Cal. App. 4th 860, 870 (Cal. App. 1st Dist. 2012) (citing *In re Health Plan of the Redwoods*, 286 B.R. 407, 409 (Bankr. N.D. Cal. 2002)). The court in *In re Health Plan of the Redwoods* recognized that what constituted a personal services contract 50 years ago is different than what constitutes a personal contract in today’s society. *See In real Health Plan of the Redwoods*, 286 B.R. at 409. South Park has made no representation or provided any facts indicating that only THQI could perform the obligations under the Deal Memo.

15. Further, THQI is the party that contracted to perform services and was granted the Exclusive License. A corporation “in the nature of things, cannot perform personal functions.” *Haldor, Inc. v. Beebe*, 72 Cal. App. 2d 357, 365 (Cal. App. 1945); *Keville v. Hollister Co.*, 29 Cal. App. 3d at 208; *see also Farmland Irrigation Co. v. Dopplmaier*, 48 Cal. 2d 208, 223 (Cal. 1957) (holding that a contract is not for personal services, even of a corporate employee, when that is not specified in the contract because “a corporation by nature may change both in ownership and the agents through whom it acts”). Thus, the Deal Memo is not a contract for personal services and the Debtors’ assumption and assignment of its Exclusive License is not prohibited by California law.

16. For these reasons, applicable law does not prohibit the Debtors’ assumption and assignment of its Exclusive License.

B. There Are No Monetary Defaults Under the Deal Memo.

17. South Park asserts that there are certain monetary defaults that must be cured prior to an assumption and assignment of the Deal Memo. The Debtors are currently evaluating

the amount that South Park asserts is owing and anticipate working with South Park to resolve this issue. Consequently, the Debtors reserve all rights with respect to the asserted cure amounts.

C. The Debtors Will Provide Adequate Assurance of Future Performance.


18. While South Park objects to the assumption and assignment of the licenses on the grounds that the Debtors have not demonstrated adequate assurance of future performance, the Debtors fully intend to provide an appropriate evidentiary record at the Sale Hearing for the Court to determine that the adequate assurance requirements of section 365 have been satisfied.

D. The Debtors Reserve All Their Rights With Respect to Licensor's Option to Acquire Elements of the South Park Game and Related Products.

19. South Park reserves its rights to exercise an option to acquire elements of the South Park game and related products in the event of a breach of the Deal Memo. To the extent the Deal Memo is not assumed and assigned, the Debtors reserve all rights with respect to any such option that South Park exercises.

WHEREFORE, the Debtors respectfully request that the Court overrule the Objection as proposed herein and grant the relief requested in the Sale Motion.

Dated: January 21, 2013
Wilmington, Delaware



Michael R. Nestor (No. 3526)
M. Blake Cleary (No. 3614)
Jaime Luton Chapman (No. 4936)
YOUNG CONAWAY STARGATT & TAYLOR, LLP
Rodney Square
1000 North King Street
Wilmington, Delaware 19801
Telephone: (302) 571-6600
Facsimile: (302) 571-1253

*Proposed Counsel to the Debtors
and Debtors in Possession*

EXHIBIT A

Deal Memo

[REDACTED]