IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	§	**Chapter 11**
	§	
INSTANT BRANDS ACQUISITION HOLDINGS INC., et al.	§	**Case No. 23-90716 (DRJ)**
	§	
	§	
	§	
	§	**Jointly Administered**
Debtors		

SUPPLEMENTAL OBJECTION AND RESERVATION OF RIGHTS OF CORNING INCORPORATED TO DEBTORS' FIRST AMENDED SCHEDULE OF POTENTIAL ASSUMTION AND ASSIGNMENT OF EXECUTORY CONTRACTS OR UNEXPIRED LEASES AND CURE AMOUNT

Corning Incorporated ("Corning"), by and through counsel, respectfully submits this supplemental objection (the "Supplemental Objection") to the Notice of First Amended Schedule of Potential Assumption and Assignment of Executory Contracts or Unexpired Leases and Cure Amount [ECF # 492] (the "Amended Notice"), and in support thereof, represents as follows:

BACKGROUND

1. On June 12, 2023 (the "Petition Date"), the above-captioned debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Texas (the "Court").

2. On July 25, 2023, the Debtors filed the Notice of Potential Assumption and Assignment of Executory Contracts or Unexpired Leases and Cure Amount [ECF # 294] (the "Original Notice"). The Original Notice contained a Potential Assumed Contracts Schedule identifying the contracts at issue and the proposed cure amount. The Original Notice defined

"Cure Costs" to include "all liabilities of any nature of the Debtors arising under an Assumed Contract . . . prior to the closing of the Sale Transaction . . ." (*Id*. at p. 2).

3. The Original Notice established the "Cure Objection Deadline" of August 25, 2023 at 4:00 PM ("Original Deadline") and notified parties that a Sale Hearing is scheduled for September 14, 2023. (ECF # 294, pp. 3, 5).

4. The Original Notice identified six contracts between Debtors and Corning (the "Original Corning Contracts") but did not list certain Trademark License Agreements between Debtors and Corning. Further, the Original Notice listed an insufficient proposed Cure Cost for the Corning Contracts. (*Id*., pp. 18-19).

5. Within the timing framework established by the Original Notice, Corning was required to assert Cure Costs outstanding as of service of the Original Notice, and did so by filing an objection on the inaccurate Cure Costs and other stated grounds for the objection (the "Original Objection" [ECF # 409]).[1]

6. On August 31, 2023, the Debtors filed the Amended Cure Notice. It identifies ten additional contracts between Corning and Debtors (the "Supplemental Corning Contracts") and does not identify a Cure Cost for any of the Supplemental Corning Contracts. A summary of the Potential Assumed Contracts Schedule for the Supplemental Corning Contracts is set forth below:

[1] Debtors supplied a footnote to the Amended Notice which states: "The Counterparty, Corning, Inc., filed an objection [Docket No. 409] asserting Cure Costs in the aggregate amount of $ 755,340.04. The Debtors are in the process of reconciling these Cure Costs with the Counterparty and all rights are reserved." (ECF # 492-2, p. 14, n. 7).

Counterparty	Agreement Description	Cure Amount
Corning Inc	Agreement Amendment re Renewal dated 2015 02 06	-
Corning Inc.	Amendment 2 to Technology Access Agreement dated 2020 01 01	-
Corning Inc.	Corning Patent and Know How License Agreement dated 1998 04 01	-
Corning Inc.	Corning Pyrex Trademark License Agreement dated 1998 04 01	-
Corning, Inc.	Acknowledge of Confidentiality to Corning dated 2021 04 01	-
Corning Inc.	Renewal Pyrex License Agreement dated 2018 04 06	-
Corning Incorporate	Corning WK Tech Access Agrmt dated 2014 02 06	-
Corning Incorporated	Corning Services for Stormwater Improvement Project dated 2017 09 07	-
Corning Incorporated	Agreement re stormwater improvement project dated 2017 07 13	-
Corning Incorporated	CORNINGWARE and PYROCERAM Trademark License Agreement, dated April 1, 1998, between Corning Incorporated, as Licensor and Corning Consumer Products Company (n/k/a Instant Brands Holdings Inc.), as Licensee	-

7. The Amended Notice indicates that any objections to the potential assumption of the Supplemental Corning Contracts must be filed and served no later than September 13, 2023 at 4:00 pm (prevailing Central Time).

OBJECTION

8. The Original Objection stands as is and should be read in conjunction with this Supplemental Objection, and nothing in this Supplemental Objection shall be construed to replace, modify, or otherwise limit the objections and reservations of rights in the Original Objection. Corning hereby supplements its Original Objection and objects to the Amended Notice for the following reasons:

9. First, Debtors did not list a Cure Cost under the Corningware and Pyroceram Trademark License Agreement (the "Corningware TMLA"). (ECF # 492, #1443). According to Corning's books and records, as of the date of this Objection, the correct cure amount under the Corningware TMLA is $26,559.78. As a result, under 11 U.S.C. § 365(b)(1)(A), in order to assume the Corningware TMLA, Corning must receive a cure payment of $26,559.78. Otherwise, the Corningware TMLA cannot be assumed pursuant to § 365.

10. Second, Debtors did not list a Cure Cost under the Pyrex Trademark License Agreement, as amended and renewed (the "Pyrex TMLA") (ECF # 492, #1357). According to Corning's books and records, as of the date of this Objection, the correct cure amount under the Pyrex TMLA is $18,717.54. As a result, under 11 U.S.C. § 365(b)(1)(A), in order to assume the Pyrex TMLA, Corning must receive a cure payment of $18,717.54. Otherwise, the Pyrex TMLA cannot be assumed pursuant to § 365.

11. Pursuant to § 365, the Debtors must cure any defaults in connection with any proposed assumption, as well as provide adequate assurance of future performance. In this case, the Debtors' proposed cure amounts of $0 fails to cure the existing defaults under both the Corningware TMLA and the Pyrex TMLA, as is required by § 365 prior to assumption.

12. Corning also objects to the assumption and assignment of the Supplemental Corning Contracts insofar as any additional postpetition performance by Corning under the Supplemental Corning Contracts may give rise to additional accounts receivable that, as of the prospective time of assumption and assignment, may be due or past-due and properly included in the Cure Cost.

13. Second, neither the Original Notice nor the Amended Notice identifies any stalking-horse bidder or other party to which the Corning Contracts might be assigned. Corning therefore has no way of knowing whether a purchaser can successfully provide the complex and specialized services required under the Corning Contracts.

14. Corning therefore objects to the Amended Notice to the extent that any party assuming the Corning Contracts does not provide any adequate assurance that they can perform under the Corning Contracts and Corning reserves all rights regarding whether the Corning Contracts are assignable.

15. Third, the Corningware TMLA, the Pyrex TMLA, the Patent and Know-How License Agreement, and the Technology Access Agreement, (collectively, the "Corning IP Agreements") all pertain to licenses of intellectual property, including patents, know-how, and trademarks. 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 contract or lease from accepting performance 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 trademark licenses non-assignable without the consent of the licensor because the identity of the licensee is "crucially important" to the licensor, who must "ensure that all products bearing its trademark are of uniform quality." *In re Rupari Holding Corp.*, 573 B.R. 111, 117 (Bankr. D. Del. 2017). Similarly, federal patent law requires consent to assignment by the licensor. *In re Hernandez*, 285 B.R. 435, 440 (Bankr. D. Ariz. 2002). However, parties to a license are free to contract around these default bars. See *In re Rupari*, 118 (*citing In re Trump Entm't Resorts, Inc.*, 526 B.R. 116, 124 (Bankr. D. Del. 2015); *In re Hernandez*, 285 B.R. 435,

440 (Bankr. D. Ariz. 2002) ("nothing in federal patent law prevents the assignment of a license where there are express words to show an intent to extent the right to an assignee.").

16. The Corning IP Agreements expressly permit Debtors to assign the Agreements to "any successor to all or substantially all of the Business without the consent of the Licensor." Corning therefore objects to the assumption and assignment of the Corning IP Agreements to the extent that any purchaser is not a successor to all or substantially all of the Business of the Debtors. The Corning IP Agreements are, or pertain to, licenses of patents and trademarks. As licensor, Corning expressly consented *only* to the Debtors' assignment to a successor to all or substantially all of Debtors' Business. Therefore the Debtors must obtain Corning's consent before assigning the Corning IP Agreements to any party other than the "successor to all or substantially all" of the Debtors' Business.

17. To the extent that the Corning IP Agreements may be assigned, Corning objects based on failure to provide adequate assurance that any party assigned the Corning IP Agreements can perform the services required under the Corning IP Agreements, including, but not limited to, any and all obligations: (i) to maintain such quality standards, quality control and quality assurance functions as required by the Corning IP Agreements with respect to all cosmetic and functional attributes of the products licensed under the Corning IP Agreements; (ii) to indemnify Corning against all claims arising out of such party's use, manufacture, or sale of licensed products or Corning's intellectual property under the Corning IP Agreements; and (iii) not to commit or omit any act or pursue any course of conduct that might tend to bring any of Corning's intellectual property into disrepute, damage the goodwill and reputation attaching thereto, or in a manner likely to dilute the value or strength of Corning's intellectual property under the Corning IP Agreements.

18. Corning reserves all rights to amend and/or supplement this Supplemental Objection and specifically reserves its rights to object to any other relief sought by the Debtors in connection with the Bidding Procedures Order, the Sale Transaction and proposed assumption and assignment of the Supplemental Corning Contracts, including, without limitation, an assignee's adequate assurance of future performance or whether the contracts can be assigned without Corning's consent.

WHEREFORE, Corning Incorporated respectfully requests that the Court deny the relief requested by the Debtors in the Amended Notice or grant such other and further relief as is just and appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2023, a true and correct copy of the foregoing document was served on those parties entitled to notice through the Court's Electronic Filing System, and the Objection Notice Parties as set forth on the *Notice of Potential Assumption and Assignment of Executory Contracts or Unexpired Leases and Cure Amount* [Dkt. # 294], which are as follows:

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By:*/s/ Sabrina L. Streusand*