

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

In re:)	
)	Chapter 11
The SCO Group, Inc., <u>et al.</u> ,)	
)	Case No. 07-11337 (KG)
Debtors.)	(Jointly Administered)

Re: Docket No. 278

Hearing: January 8, 2007 at 10:00 a.m. (prevailing Eastern time)
Objection Deadline: December 28, 2007 at 4:00 p.m. (prevailing Eastern time)

**OBJECTION OF NOVELL, INC. TO MOTION TO APPROVE THE ASSUMPTION OF
NONRESIDENTIAL REAL PROPERTY LEASES WITH GRE MOUNTAIN HEIGHTS
PROPERTY LLC AND CANOPY PROPERTIES INC. [D.I. 278]**

Novell, Inc. ("Novell") hereby submits this objection (the "Objection") to the Motion of the Debtors to Approve the Assumption of Nonresidential Real Property Leases with GRE Mountain Heights Property LLC and Canopy Properties, Inc. (the "Motion") [D.I. 278] filed by the debtors and debtors in possession SCO Group, Inc. and SCO Operations, Inc. (together, the "Debtors"), seeking to "assume" two expiring office leases pursuant to Code¹ section 365(a) under terms and conditions that – to the extent disclosed at all – impose substantial administrative expense burdens on already financially-strained estates whose futures are in serious doubt. Novell urges the Court to deny the Motion as not merely failing to meet the business judgment test for motions to assume, but also for being yet another in a series of cryptic, unjustified and inexplicable decisions by the Debtors in these chapter 11 cases.

In support of its Objection, Novell respectfully states as follows:

¹ The Code is the Bankruptcy Code, 11 U.S.C. §§ 101-1551.

The Motion

1. The Debtors seek the Court's approval, pursuant to Code section 365(a), of the Debtors' decision to assume their leases (the "Leases") of two of the Debtors' office spaces. One lease is for the Debtors' headquarters in Lindon, Utah (the "Utah Lease"). The other lease comprises supporting office space in New Jersey (the "NJ Lease"). According to the Debtors, the Leases both expire at the end of 2007. The Motion seeks to assume them as amended to extend them beyond their current expiration dates and to modify certain other terms (such as square footage and rent).

2. With respect to the Utah Lease, the Motion fails to describe *any* other terms of the proposed transaction. Instead, the Motion states that the Debtors are negotiating the other terms and hope to have a deal with the landlord by the time the Court hears the Motion.

3. With respect to the New Jersey Lease, the Debtors actually attached a copy of the proposed form of amendment. However, while the proposed lease extension the Debtors seek to "assume"² reduces somewhat the space and rent for the Debtor over that two additional years, it nevertheless burdens this estate with a significant financial commitment of nearly *1.1 million dollars* for an additional three years (with no reduction from the prior rent for the first few months, even for the reduced space). Moreover, that commitment will be a *dollar-for-dollar obligation* of the Debtors. *All* rent payable currently and in the future under an assumed lease becomes an expense of administration in the cases, payable dollar for dollar. *Interface Group-Nevada v. TWA (In re TWA)*, 145 F.3d 124, 136 (3d Cir. 1997). It stands to reason that the rent for the Utah Lease will be an even bigger such financial commitment of administrative expense since it involves the Debtors' headquarters.

² Arguably, this transaction is simply a new lease rather than an assumption of a modified lease that should be considered under Code section 363 rather than section 365(a).

4. In seeking the Court's authority to assume the Leases as extended, the Debtors fail to explain the genesis of, and rationale for, their decision in any manner. For example, the Debtors do not say:

- Why they need both spaces for two years (that is, what their underlying business plan is (if they have one), including what they anticipate the course of these cases to be, and why they need the two Leases for that plan)
- What efforts they have made to satisfy their space needs consistent with that business plan
- What other, less burdensome alternatives were/are available to meet their demonstrable space needs

5. According to the Debtor's most recent monthly operating reports (November 2007), since filing these cases on September 11, 2007, the Debtors have barely broken even on their operations on a cash flow basis, and last month (November 2007) they lost about \$250,000. *See Debtor-In-Possession Monthly Operating Report for Filing Period November 2007*, Docket No. 282. The reality of the Debtors' situation is even worse. Currently, the Debtors' financial advisor has pending an application for payment of interim fees of just about \$500,000. No doubt the bills of the Debtors' other professionals are piling up, too. Hence, the Debtors' accrued (as opposed to cash flow) losses probably are really much greater than reflected in the operating reports.³

6. The present Motion is not the first time the Debtors sought relief from this Court based upon inadequate information. The Court will recall that the Debtors asked the Court to approve a sale of significant assets on an "emergency" basis without attaching a sale agreement

³ The Debtors' results would be still worse had they not underspent their projected wages by about half a million dollars since filing the cases. This figure is itself a bit puzzling since the operating reports indicate that the debtors *overspent* their projected payroll taxes about by almost \$400,000 for the same period.

or describing its prior marketing efforts to justify its request to the Court and creditors.

Ultimately, facing the objections of Novell and IBM Corporation (“IBM”) and the Court’s reservations on these and other points, and unable to produce a sale agreement, the Debtors simply abandoned their emergency motion several weeks later.

7. Similarly, the Debtors asked this Court to approve a settlement of their “incipient” controversy with nondebtor subsidiary Cattleback in a motion that again failed to make even the most rudimentary disclosures. On that occasion, the Debtors managed to provide adequate information under oath at the last moment, thereby sufficiently addressing Novell’s objections for purposes of that motion.

8. Although the Debtors correctly characterize the standard by which the Court should review the Motion as whether the Debtors have exercised a sound business judgment in deciding to assume the Leases, the Motion wholly fails to meet that test.

9. The business judgment test is not a license for the Debtors to do as they see fit, with the relief they seek in essence theirs for the asking. “The principal test is that the assumption must be in the exercise of a sound business judgment showing benefit to the Debtor.” *In re Global Int’l Airways*, 35 B.R. 881, 886 (Bankr. W.D. Mo. 1983) (motion to assume aircraft lease for \$1.9 million rent and other costs in order to make \$300,000 was denied; debtor also unable to show it cannot operate without lease of that particular aircraft); *accord Citizens Nat’l Bank of Greater St. Louis v. Selma Properties, Inc. (In re Crystalin, L.L.C.)*, 293 B.R. 455, 463-64 (B.A.P. 8th Cir. 2003). As one court noted even early in a case when a debtor perhaps merits special latitude (as contrasted with a case that, like this one, is already nearly four months old) a debtor must *justify* its decision as a *sound* business judgment:

The Court is mindful of the leeway a debtor in possession should be given in the exercise of its business judgment. The Court is also

sympathetic to the debtors' desire to retain its management team; to avoid the possible cost in time and expense in hiring new employees, and to add to the employees' sense of job security.

Clearly, any corporation in the process of a Chapter 11 reorganization faces uncertainty as to its future. Employees of such companies may often find it more advantageous to seek more secure surroundings. Nevertheless, the Court should not be constrained to accept the debtors' generous award of compensatory benefits when in the early stages of the reorganization process the employees have already been granted substantial incentives to remain with the company.

In re Anglo Energy Limited, 41 B.R. 337, 341 (Bankr. S.D.N.Y. 1983) (denying debtor's motion to assume employment contracts as not making economic or practical sense at that juncture).

Moreover, the Debtors have the burden of proof on the Motion. *Crystalin, L.L.C.*, 293 B.R. at 464; *Global Int'l Airways*, 35 B.R. at 886.

10. Here, the Debtors have not only failed to satisfy their burden of proof, but they have failed to include all but the most minimal and cryptic discussion that the Court and creditors need to evaluate the Motion, instead of the factual and financial *evidence* necessary to support approval of the Motion. The Debtors fail to allege any facts regarding the details of the Utah Lease other than that request for a three-year extension; there is no discussion or evidence at all about how either of the Leases fits into the Debtors' operational and financial future, both of which subjects are cloudy, to say the least; and there is no information or evidence on what alternatives, if any, the Debtor considered before proceeding with what appear on their faces to be improvident extensions of the Leases. In short, the Debtors seek to burden their estates with significant administrative financial liabilities, but have failed to provide this Court or parties in interest with any relevant information to evaluate the merits of the relief requested or, more importantly, determine whether such relief is actually in the best interest of the Debtors, their estates and their creditors.

11. There is a woeful lack of information and facts upon which parties in interest and the Court can consider, let alone grant, the relief requested in the Motion. As such, Novell respectfully submits that the Motion should be denied.

Dated: December 28, 2007
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP



James L. Patton (No. 2202)
Michael R. Nestor (No. 3526)
Sean T. Greecher (No. 4484)
The Brandywine Building
1000 West Street, 17th Floor
P.O. Box 391
Wilmington, Delaware 19899-0391
Telephone (302) 571-6600

-- and --

MORRISON & FOERSTER LLP
Adam A. Lewis
425 Market Street
San Francisco, California 94105-2482
Telephone (415) 268-7000

-- and --

MORRISON & FOERSTER LLP
Larren M. Nashelsky
Julie D. Dyas
1290 Avenue of the Americas
New York, New York 10104-0050
Telephone (212) 468-8000

Counsel for Novell, Inc.