IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	
The SCO GROUP, INC., et al.,	Chapter 11
Debtors.	Case No. 07-11337 (KG) (Jointly Administered)
	Hearing Date: April 2, 2008 at 2:00 p.m. **Docket No. 346**

OBJECTION OF INTERNATIONAL BUSINESS MACHINES CORPORATION TO DEBTORS' MOTION TO APPROVE SETTLEMENT COMPENSATION OR SALE COMPENSATION AND EXPENSE REIMBURSEMENT TO PLAN SPONSOR

International Business Machines Corporation ("IBM"), a creditor and equity security holder in these Chapter 11 cases, objects to "Debtors' Motion to Approve Settlement Compensation or Sale Compensation and Expense Reimbursement to Plan Sponsor" Stephen Norris Capital Partners, LLC ("SNCP") (the "Motion"), filed with this Court by the debtors and debtors in possession, The SCO Group, Inc. and SCO Operations, Inc. (collectively, "SCO" or "Debtors"), on February 14, 2008.

Preliminary Statement[1]

1. The Motion seeks approval of transaction-related administrative expenses, including (i) a claim for at least 50% of any net litigation or sale proceeds realized from the "Pending Litigation" whether or not the Proposed Plan is confirmed, and (ii) the right to purchase a majority of SCO's equity at a significant discount following any such sale or

[1] References to SCO's Motion are given as "Mot. ¶__." References to the Memorandum of Understanding between SCO and SNCP, dated as of February 13, 2008, are given as "MOU at __."

litigation settlement (the "Plan Sponsor Protections"). SNCP would be entitled to this recovery though it has not provided SCO's estate with any pre-confirmation benefit or committed to provide SCO with any post-confirmation financing, which even SCO characterizes as "extraordinary" and without "precedent".

2. As with the failed York Capital transaction last year, the Motion and attached documents do not provide this Court, the creditors or equity holders with a factual or legal basis to support allowance of the Plan Sponsor Protections as an administrative expense claim. There is no showing that they are "actual and necessary costs and expenses of preserving the estate". There is no showing that they benefit SCO's litigation position, that they were necessary to retain SNCP as the plan sponsor, or that they encouraged or provided a bid floor for competing offers. There is no evidence of the extent to which or how SCO shopped the SNCP deal to other potential investors. There is no evidence as to the time, effort, expense or risk that SNCP contributed to SCO's Proposed Plan of Reorganization (the "Proposed Plan"). There is no showing of benefit to the estate, or risks assumed by SNCP, from its agreement to sponsor the Proposed Plan that is commensurate with the substantial recovery to SNCP that Plan Sponsor Protections could yield.[2] There is no information about SNCP or its financial ability to meet its obligations under the Proposed Plan. There is no basis for exercise of "equitable powers" to approve the Plan Sponsor Protections. Finally, there is no basis for approving the MOU and the Plan Sponsor Protections as a sound exercise of the Debtors' business judgment to enter into a non-ordinary course transaction, nor that the transaction provides the highest and best recovery among the available alternatives.

[2] Although IBM disputes SCO's position on the Pending Litigation and that it is entitled to any recovery on its claims, IBM accepts it here solely for purposes of argument, because SCO grounds its argument in support of the Motion on that position.

3. Therefore, this Court should deny SCO's extraordinary, unprecedented request to grant the Plan Sponsor Protections administrative expense status.

Background Facts

A. SCO's Litigation against IBM and Novell

4. In early 2003, SCO attempted to profit from the increasing popularity of the Linux operating system by, among other things, embarking on a far-reaching publicity campaign to create the false and unsubstantiated impression that SCO had rights to the Linux operating system that it does not have and by bringing baseless legal claims against IBM, Novell, Inc. ("Novell") and others.

5. SCO sued both IBM and Novell in the U.S. District Court for the District of Utah, where SCO has its principal place of business. In response, IBM and Novell asserted several counterclaims against SCO. The parties have been litigating separate cases in Utah before the same U.S. District Judge (Dale A. Kimball) and the same U.S. Magistrate Judge (Brooke C. Wells) (the "Utah Court") for more than five years.

6. SCO's cases against IBM and Novell concern a host of complex intellectual property and other issues relating to SCO's Unix business, such as who owns the copyrights to the Unix operating system; whether SCO has the right to control hundreds of millions of lines of computer source code created and owned by IBM; whether SCO has the right to foreclose the use by others of the publicly-available Linux operating system, which includes hundreds of thousands of lines of IBM copyrighted code; and whether IBM has a perpetual and irrevocable license relating to Unix.

7. In a series of decisions, the Utah Court called into question the veracity of SCO's statements about its claims and rights and, at least in the IBM case, materially limited SCO's case. More importantly, the Utah court entered an order in the Novell case, rejecting a

keystone of SCO's litigation campaign. The court ruled that Novell, not SCO, owns the core Unix copyrights and that Novell has the right, which it has exercised on IBM's behalf, to waive SCO's purported claims against IBM (the "Novell Summary Judgment Ruling"). Although this chapter 11 case stayed further proceedings in that litigation, this Court has since granted Novell's motion to lift the automatic stay to permit the trial to proceed. The trial is currently scheduled to begin on April 29, 2008.

8. While the Utah Court has not yet ruled on IBM's summary judgment motions (which concern all of SCO's claims), that court has stated that the Novell Summary Judgment Ruling "significantly impacts" the IBM case. The parties disagree as to the full effect of the Novell decision on the IBM case, but SCO concedes that the ruling forecloses six of SCO's nine claims against IBM. SCO filed its petition for relief under the Bankruptcy Code on the eve of the trial to determine SCO's damages to Novell—shortly before the Utah Court was expected to rule on the pending motions.

9. The Utah litigations' costs, coupled with declining revenues, led SCO to file this chapter 11 case on September 14, 2007.

B. The SNCP Memorandum of Understanding and the Proposed Plan

10. On February 14, 2008, the Debtors filed the Motion and a Memorandum of Understanding (the "MOU") executed with SNCP that provided an outline of the Plan Sponsor Protections and of the Proposed Plan. On February 29, 2008, the Debtors filed with the Court the Proposed Plan and related Disclosure Statement (the "Disclosure Statement"). In the Motion the Debtors said, "The Debtors will file forms of the Definitive Documents (including those to be executed at the Effective Date of the Plan), at least 5 business days before the hearing on approval of the Disclosure Statement", which is the same date as the deadline for filing this Objection. (Mot. at 1.) In the Disclosure Statement, the Debtors said, "documentation

establishing the availability of the funds will be provided with the definitive documents to be filed not later than March 21, 2008". (Disclosure Statement at 51.) However, as of the date of filing this Objection, the definitive documents have not been filed. This Objection is based solely on the MOU, without consideration of the promised definitive documents.

11. The Proposed Plan is to be sponsored and funded by SNCP, an investment vehicle formed by private equity investment partnership Stephen Norris Capital Partners, LLC (the "Partnership"). SNCP has agreed to finance the Proposed Plan by purchasing shares of new convertible preferred stock (the "Series A Preferred") to be issued by SCO on the date the Proposed Plan becomes effective (the "Plan Effective Date") for $5 million and by providing a secured non-revolving debt financing facility of up to $95 million (the "Debt Financing") (collectively, the "Plan Financing Commitments"). (Mot ¶ 6; MOU at 1-2.)

12. The Debt Financing would be available to SCO for five-years after the Proposed Plan Effective Date to use for working capital, to pay interest when due under the Debt Financing and to support the continued prosecution of SCO's litigation against IBM and Novell, among others (the "Pending Litigation"). (See Disclosure Statement at 17-22.) The proposed annual interest rate for the Debt Financing carries an equity-like return for SNCP of LIBOR plus 17%. (Id. at 20.) The Debt Financing matures five years after the effective date of the Proposed Plan. (Id.)

13. The Series A Preferred would be convertible into 51% of the shares of new common stock in SCO, on a fully diluted basis, but if the amount drawn under the Debt Financing to effect a payment of one or more final, non-appealable judgments in or to settle the Pending Litigation is $30 million or more, the Series A Preferred would be convertible into 85% of the shares of the new SCO common stock. (Id.; MOU at 1-2, 4-5, 7.) If the amount drawn for

that purpose is between $0 and $30 million, then the Series A Preferred will convert into a percentage of SCO's new common stock between 51% and 85% on a sliding scale basis. (Id.) The proposed annual dividend rate on the Series A Preferred is 10% if SNCP elects to convert before the fifth anniversary of the Plan Effective Date or 22% if it converts after the fifth anniversary. (MOU at 4-5, 7.)

14. The Plan Financing Commitments are not fully binding on SNCP. If the Pending Litigation is resolved by a settlement, sale, licensing or recovery, the entire Plan Financing Commitments are terminated:

> "If the Pending Litigation shall resolve by a . . . net settlement in Debtor's favor prior to the consummation of the Proposed Plan of Reorganization, then . . . the Equity Financing and the Debt Financing will not be consummated. . . ." (MOU at 10.)

The Series A Preferred commitment then changes to an option in favor of SNCP to purchase the Series A Preferred at the same $5 million price, either before, at the time of or immediately after plan confirmation, even though SCO's value would likely have increased substantially as a result of the Pending Litigation resolution. (Id.)

C. The Plan Sponsor Protections

15. As a condition to obtaining the Plan Financing Commitments, the Debtors must provide SNCP certain protections (the "Plan Sponsor Protections"), including:

- an administrative expense claim, whether or not the Proposed Plan is confirmed, for 50% of any net litigation or sale proceeds recovered from the Pending Litigation before the Plan Effective Date, whether structured as a settlement, a purchase of SCO, or an exclusive licensing arrangement;
- the right to participate directly in any settlement discussions relating to the IBM Litigation and the Novell Litigation;
- an administrative expense claim for fees and expenses incurred, up to $500,000, if SNCP terminates the MOU for any reason not attributable to its own acts or omissions or even if SNCP becomes entitled to the 50% recovery noted above; and

- a "no shop" provision, which restricts SCO from seeking a competing transaction that might offer its estate and shareholders a higher and better deal.

(Mot. ¶¶ 5-9; MOU at 9-13.) The MOU terminates if the Court does not approve it by April 28, 2008, or confirm the Proposed Plan by August 15, 2008. (MOU at 13.)

* * *

16. The Debtors' Motion accurately labels the request to grant these Plan Sponsor Protections administrative expense priority "extraordinary" and without "precedent". Thus, it is difficult to categorize. To the extent the request is to authorize the estate to incur an administrative expense, the Plan Sponsor Protections do not meet the standards for allowance of an administrative expense. They are not necessary to preserve the estate, they have the potential to provide an unjustified windfall to SNCP, and they cannot be authorized under this Court's general equitable powers. To the extent that the request is to authorize a use or sale of property of the estate or a similar transaction out of the ordinary course of business under section 363(b), the Plan Sponsor Protections suffer from the same inadequacy as the Debtors' previous York Capital transaction. There is no evidence of any exercise of SCO's business judgment in agreeing to the Plan Sponsor Protections or that the transaction is at the highest and best price. Thus, however categorized, the request is without factual or legal support and should be denied.

17. However, as a preliminary matter, because the Debtors have not filed definitive documents before the deadline for objecting to the Motion, this Court should continue the hearing on the Motion to a reasonable time after the filing of the definitive documents. If this Court does not continue the hearing, IBM reserves the right to supplement this Objection to address information or lack of information revealed by the definitive documents, if and when filed. In addition, IBM objects to the approval of the Motion on the ground, in addition to the other grounds set forth below in this Objection, that without the definitive documents, the

Motion is incomplete and parties in interest cannot reasonably be expected to understand the precise terms and conditions of the Plan Sponsor Protections.

Argument

I. THE EXTRAORDINARY PLAN SPONSOR PROTECTIONS SHOULD NOT BE GRANTED ADMINISTRATIVE EXPENSE STATUS

A. Allowance of Administrative Expenses Is Limited to Actual and Necessary Costs and Expenses of Preserving the Estate

18. The Bankruptcy Code grants administrative expense status only to the "actual, necessary costs and expenses of preserving the estate", requirements which "must be observed with scrupulous care". 11 U.S.C. § 503(b)(1)(A); In re Merry-Go-Round Enters., Inc., 180 F.3d 149, 157 (4th Cir. 1999); see also In re O'Brien Envir. Energy, Inc., 181 F.3d 527, 535-37 (3d Cir. 1999). Priorities must be strictly construed. See Howard Delivery Serv. v. Zurich Am. Ins. Co., 547 U.S. 651, 667 (2006). Administrative expense claims are granted first priority status in a business bankruptcy case and must be paid in cash in full under a chapter 11 plan. 11 U.S.C. §§ 507(a), 1129(a)(9)(A). In light of these protections accorded to administrative expense claims, courts should aim to keep administrative costs to a minimum to preserve the debtor's scarce resources and should not "saddle debtors with special post-petition obligations . . . by creating a broad category of administrative expenses". In re Grant Broadcasting of Phila., Inc., 71 B.R. 891, 897 (Bankr. E.D. Pa. 1987).

19. Courts closely scrutinize transactions that result in an administrative expense claim, particularly where the debtor proposes to pay a breakup, termination, commitment or similar fee. See e.g., In re O'Brien Envir. Energy, Inc., 181 F.3d 527 at 534-37; In re Integrated Res., Inc., 147 B.R. 650, 657 (S.D.N.Y. 1992); In re Specialty Chem. Prods. Corp., 372 B.R. 434, 439-40 (E.D. Wis. 2007). In those circumstances, courts consider whether

the transaction fees are a fair and reasonable percentage of the proposed transaction and whether the estate received an actual benefit from the proposed transaction. Id.; see also Broadcast Corp. v. Broadfoot, 54 B.R. 606, 611 (N.D. Ga. 1985) ("use of the words 'actual' and 'necessary' indicate that the estate must accrue a real benefit from the transaction for which the claim is being filed"). A potential to benefit the estate does not satisfy the requirement for a claim to be afforded administrative expense priority. Id. at 611.

20. Approval of a transaction-related administrative expense claim is not warranted where there is no evidence as to the time, effort, expense and risk that the non-debtor party contributed to the proposed transaction, there is insufficient information about whether the debtor was able to shop the deal to other potential investors, or if the claimant has not entered into a binding agreement with the estate. See In re Hupp Indus., 140 B.R. 191, 196 (Bankr. D. Ohio 1992) (a transaction protection "should not be authorized as an administrative expense where it is ill-defined, not correlated to an actual transactional cost or expense incurred by the negotiating bidder, and otherwise cannot be addressed under a specific provision of § 503(b)"); In re Tiara Motorcoach Corp., 212 B.R. 133, 137-38 (Bankr. N.D. Ind. 1997) (approval of transaction protections is not warranted where the purchaser has not entered into a legally binding agreement and there is no evidence as to the time, effort, expense and risk that the purchaser contributed to the proposed sale); see also In re Integrated Res., Inc., 135 B.R. 746 at 750-51; In re America West Airlines, 166 B.R. 908, 912-13 (Bankr. D. Ariz. 1994).

B. The Plan Sponsor Protections Are Not a Necessary Cost or Expense of Preserving the Estate

1. SNCP's Plan Sponsor Protections Do Not Benefit SCO's Litigation Position

21. Although SCO argues that its "litigation position in the [Pending] Litigation will benefit immediately and substantially by SNCP's $100 million financing

commitments", (Mot. ¶ 9.), SCO does not need SNCP's Plan Financing Commitments during this Chapter 11 case to continue to prosecute the Pending Litigation. Though having already spent $60 million on legal fees in the Pending Litigation, its current litigation counsel, Boies, Schiller & Flexner LLP ("BSF"), is currently retained only on a contingency basis through any final judgment in the IBM Litigation: "[except for contingency fees] no other legal fees, whether hourly, contingent or otherwise shall be owing or payable to [BSF] in connection with the SCO Litigation [Pending Litigation] through the end of the current litigation between it and IBM, including any appeals. . ." (SCO's Engagement Agreement with BSF, dated as of October 31, 2004, at p. 4, Docket No. 115, Ex. A to Declaration of Stuart H. Singer.) BSF therefore must continue to prosecute the Pending Litigation regardless of SNCP's Plan Financing Commitments, and SNCP's Plan Financing Commitments do not provide any pre-confirmation benefit to the estate with respect to the continued prosecution of the Pending Litigation.

2. The Plan Sponsor Protections Are Not Necessary To Retain SNCP as Plan Sponsor

22. The Motion provides no evidence of the time, effort, expense or risk that SNCP contributed to the Proposed Plan or whether the Plan Sponsor Protections were necessary to retain SNCP as the Plan Sponsor. In fact, SNCP's chairman Steven Norris has been quoted publicly as saying: "We don't view ourselves as being in the litigation business . . . . We'd like to find a way to resolve the current situation in a manner that balances a lot of people's interests and allows us to build a business and not focus on paying enormous amounts of money to lawyers." Planned Investor Hopes To Settle Suits, The Salt Lake Tribune, Feb. 25, 2008, available at http://www.sltrib.com//ci_8363761?IADID=Search-www.sltrib.com-www.sltrib.com (last visited Mar. 25, 2008). Thus, the Plan Sponsor Protections do not appear to be essential to SNCP's commitment to the Proposed Plan. See In re America West Airlines,

166 B.R. 908 at 912-13 (transaction protections are not warranted where they are not needed to induce or retain a potential purchaser).

23. The proposed SNCP rate of return under the Plan Financing Commitments suggests the real reason for SNCP's commitment to the Proposed Plan. The annual return on the Series A Preferred, which is convertible into at least a 51% ownership position in Reorganized SCO, is 10% if SNCP elects to convert before the fifth anniversary of the Plan Effective Date but 22% if it converts after the fifth anniversary. The timing of the conversion is in SNCP's discretion. The proposed annual interest rate for the Debt Financing carries a similar equity-like rate of return of LIBOR plus 17%. The Plan Financing Commitments already offer SNCP a substantial post-confirmation return, which need not be compounded by a potential administrative expense recovery to SNCP. See id. ("No funds of the estate should be used to pay . . . fees in a transaction that on this record would appear to yield a large profit to the top bidder.").

3. The Plan Sponsor Protections Do Not Benefit the Estate by Establishing a "Floor" for the Transaction or Encouraging Competing Offers

24. The Motion mentions nothing about whether the SNCP proposal benefited the estate by establishing a floor price for the transaction or allowing SCO to shop the deal as a stalking horse bid, or even if SNCP's proposal was the best among available alternatives. In fact, the MOU contains a "no shop" clause that expressly prohibits SCO from engaging any third party about making a competing offer to finance a SCO plan: "neither SCO nor its agents or representatives shall solicit or encourage submission of inquiries, proposals or offers from any third parties regarding any potential financing of a plan of reorganization for SCO." (MOU at 13.) Therefore, SNCP's offer was not and cannot be used as a stalking horse bid with a floor price, which might have benefited SCO's estate by allowing it to shop for a deal that is less

expensive than the high rate of return promised to SNCP (LIBOR plus 17% on the Debt Financing and up to 22% on the Series A Preferred). Thus, the Plan Sponsor Protections do not benefit SCO's estate by providing an auction floor or by encouraging a competing offer, for either of which an administrative expense claim might be justified. Instead, they will likely discourage any competing offers and therefore should not be approved. See In re Hupp, 140 B.R. at 194-95 (a transaction fee "should only be authorized where the fee is to compensate an unsuccessful acquirer which served as the so-called 'stalking horse'").

C. The Plan Sponsor Protections Do Not Meet any of the Tests Required for Transaction-Related Fees and Could Provide SNCP an Unjustified Windfall to SNCP

25. The amount of transaction-related fees and expenses must constitute a fair and reasonable percentage of the committed transaction price. See, e.g., In re O'Brien Envir. Energy, Inc., 181 F.3d 527 at 534; In re Integrated Res., 147 B.R. at 657; In re Hupp, 140 B.R. at 194. In determining what is reasonable, courts will generally approve fees and expenses "limited to one to four percent" of the committed transaction price, but are reluctant to approve anything higher absent extraordinary circumstances. In re Tama Beef Packing, Inc., 321 B.R. 496, 498 (B.A.P. 8th Cir. 2005). Approval of transaction related fees is not warranted where the proposed purchaser did not enter into a legally binding agreement or does not have an obligation to fulfill its commitments under that agreement. See In re Tiara Motorcoach Corp., 212 B.R. 133 at 137-38 (approval of transaction related fees and expenses is not warranted where the parties "have not entered into a legally binding agreement" and the purchaser only has a "minimal obligation" to fulfill its commitments under that agreement).

26. The Plan Sponsor Protections are not based, as section 503(b) requires for transaction-related fees, on a reasonable percentage of the committed transaction amount, nor even on any evidence as to the time, effort, expense or risk that SNCP contributed to the

proposed transaction, nor on any evidence that SCO was able to shop the deal to other potential investors, nor on any correlation to an actual transactional cost or expense that SNCP incurred. Instead, based on SCO's position that it will obtain a significant recovery in or as a result of the Pending Litigation, they appear to offer SNCP an unjustified windfall at the expense of SCO's estate and equity security holders, without SNCP ever having to put up any pre-confirmation money or enter into a binding commitment to provide any Debt Financing.[3] A calculation of what SNCP could recover under the Plan Sponsor Protections shows why.

27. First, upon a settlement or sale transaction or a litigation recovery before confirmation of the Proposed Plan, SNCP would be entitled to receive 50% of the net proceeds from SCO's estate as an administrative expense, whether or not the Proposed Plan is confirmed. Because the entitlement arises before SNCP's Plan Financing Commitments become binding on SNCP, SNCP gets its claim without ever having provided any pre-confirmation service or post-confirmation financing to the estate.

28. Then, SNCP would still be entitled (but not committed) to purchase 51% of a reorganized SCO for $5 million, even though SCO's value would have just increased by at least half the amount of the settlement, sale, licensing or recovery proceeds. (MOU at 10.)[4] With that, SNCP would be entitled to receive an additional 25.5% of the proceeds, through its 51% ownership stake in a reorganized SCO, for an aggregate total entitlement to 75.5% of the

[3] Again, although IBM disputes SCO's position on the Pending Litigation, IBM accepts it here only for the purposes of illustration, because SCO grounds its argument in support of the Motion on that position.

[4] The MOU's "Preclosing Protections to SNCP" states: "[i]n addition to the Settlement Compensation, SNCP shall be entitled in the circumstances in which the Settlement Compensation becomes payable [as an administrative expense], to complete its acquisition of the Series A Preferred upon payment of the $5 million purchase price therefor, before, at the time of, or immediately after the Reorganized Debtor emerges from the Bankruptcy Case." (MOU at 10.)

proceeds. However, at that point, SNCP would no longer be committed to provide SCO the Debt Financing. By contrast, SCO shareholders, who have suffered SCO's spending $60 million prosecuting the Pending litigation and a plummeting equity value, could receive less than 25% of any proceeds if the Court approves the Plan Sponsor Protections.

29. SNCP's potential recovery of up to 75.5% of the aggregate settlement, sale, licensing or recovery proceeds received by SCO is not related to the $5 million price of the Series A Preferred or the $95 million amount of the Debt Financing. Viewed as a transaction-related fee, if it ever becomes payable, it could exceed substantially the 1% to 4% courts typically allow for a commitment that is actually binding and therefore should not be approved.

D. The Motion Does Not Provide Adequate Information About SNCP

30. Neither the Motion nor any other document SCO has submitted, such as the Disclosure Statement, provides information about SNCP or its financial ability to meet the Plan Financing Commitments upon which the Plan Sponsor Protections are based. SCO does not provide any details about SNCP, other than a general biography of Stephen Norris himself and that it is stated to be a Delaware limited liability company whose parent is the Partnership. (See Disclosure Statement at 18-19; MOU at 1.) SCO says nothing in the Motion or the Disclosure Statement about SNCP's or the Partnership's assets under management, if any; if either has made any past investments, let alone whether they were successful; how they actually plan to raise or fund their $100 million Financing Commitment; or who their still unnamed "Middle Eastern" investment partner is. (See Id.)

31. In fact, according to a sworn affidavit provided by Stephen Norris just over a year ago, the Partnership does not appear to have any operational or investment history: "In late 2005 in New York, GMG and I formed Stephen Norris & Co. Capital Partners, L.P. (the "Partnership"). Since its inception, the Partnership has conducted limited or no business

operations, including any co-investment transactions." Memorandum in Support of Motion to Dismiss for Lack of Jurisdiction filed by Defendants Mark Robbins, Ed Davies, Stephen Norris and Peninsula Advisors at Ex. 3, GMG Capital Investments v. Robbins et al., No. 2:06-CV-876 (D. Utah Jan. 5, 2007) (attached hereto as Exhibit A).

32. SNCP could receive a potentially large administrative expense claim under the Plan Sponsor Protections before it actually has to provide any financing to SCO. Thus, SCO must show at least that SNCP can meet its Plan Financing Commitments, if applicable.

E. Neither Equitable Powers Nor "Substantial Contribution" Rights Support the Plan Sponsor Protections

33. Approval of the Plan Sponsor Protections cannot be based solely on this Court's "equitable" powers under section 105 of the Bankruptcy Code, because section 105 cannot supplant the Bankruptcy Code's express requirements for what is allowable as an administrative expense claim under section 503(b) based on a broad reading of its purposes. As the Court of Appeals for the Third Circuit has twice stated, "[S]ection 105(a) has a limited scope. It does not create substantive rights that would otherwise be unavailable under the Bankruptcy Code." In re Continental Airlines, 203 F. 3d 203, 211 (3d Cir. 2000) (section 105 does not authorize certain non-consensual releases and permanent injunctions against non-debtor third parties under a plan, even as a pre-condition to confirmation); In re Joubert, 411 F.3d 452, 457 (3d Cir. 2000) (section 105 does not create a private right of action to remedy alleged violations under section 506(b)); accord U.S. v. Energy Resources Co., Inc., 495 U.S. 545, 549 (1990) (section 105 can support equitable remedies but only when "not inconsistent with the applicable provisions of this title [the Bankruptcy Code]."); Int. Rev. Serv. v. Kaplan, 104 F.3d 589, 597 (3d Cir. 1997); see generally Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206, 99 L. Ed. 2d 169, 108 S. Ct. 963 (1988) (court's equitable powers "must and can only be exercised within

the confines of the Bankruptcy Code"). Rather, priorities must be strictly construed. See Howard Delivery Serv. v. Zurich Am. Ins. Co., 547 U.S. 651 at 667.

34. Here, SCO seeks for SNCP just what the courts have refused to allow: creation of a substantive right that is not otherwise available under the Bankruptcy Code. This court, like those cited above, should not expand the availability under section 503(b) of an administrative expense claim by granting SCO its extraordinary and unprecedented relief.

35. Similarly, section 503(b)'s "substantial contribution" provisions do not support the Plan Sponsor Protections. Those provisions require that the applicant be a creditor, indenture trustee, or equity security holder. In re Hupp Indus., 140 B.R. at 196 ("the literal language of § 503(b)(3) and its legislative history require a 'creditor' as the applicant for an administrative expense allowance"); see also In re Frog & Peach, Ltd., 38 B.R. 307, 310 (Bankr. D. Ga. 1984) ("[t]he Court is extremely reluctant to open a potential floodgate of claims by outsiders which transact with a debtor in bankruptcy, but whose claims are not specifically authorized under § 503(b)"); H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 355 (1977). SNCP is not a creditor, nor, as discussed above, has it provided a substantial pre-confirmation benefit to the estate. The Court should not create a substantive right for SNCP that is not allowed under the Bankruptcy Code.

II. THE PLAN SPONSOR PROTECTIONS SHOULD NOT BE APPROVED AS A NON-ORDINARY COURSE TRANSACTION

36. If the Plan Sponsor Protections are instead treated as a use or sale of property of the estate or a transaction out of the ordinary course of business under section 363(b), the Motion does not meet the minimum requirements for approval. As this Court has noted, "[t]he sale of assets which is not in the debtor's ordinary course of business requires proof that: (1) there is a sound business purpose for the sale; (2) the proposed sale price is fair; (3) the

debtor has provided adequate and reasonable notice; and (4) the buyer has acted in good faith." In re Exaeris Inc., 380 B.R. 741, 744 (Bankr. D. Del. 2008); see also In re Lionel Corp., 722 F.2d 1063, 1070 (2d Cir. 1983); In re Montgomery Ward Holding Corp., 242 B.R. 147, 153 (Bankr. D. Del. 1999). There is no such evidence here, let alone proof.

37. SCO has not provided information on which creditors and the Court can evaluate the merits of the transaction and Plan Sponsor Protections, nor on whether or how SCO exercised its business judgment to enter into the MOU. The Motion and the MOU do not provide any information concerning a valuation of the assets involved or describe the process SCO undertook to arrive at this deal. SCO does not describe what other potential transaction parties it contacted (if any) or whether there was any other interest in the assets that would make the Plan Sponsor Protections unnecessary. SCO does not provide any information on whether it explored any alternatives to the Plan Sponsor Protections. There is no evidence that the transaction is the highest and best offer. SCO simply asserts that "the Plan Sponsor Protections are necessary and will benefit the Debtors' estates, their creditors and equity security holders because [it will lead to] the funding and financing necessary for the Plan". (Mot. ¶ 21.) However, the value of a plan proposal should be tested at confirmation, not on a motion to approve a transaction that will bind the debtor and the estate to a plan. On this record, SCO cannot show a good business reason to approve the MOU or the Plan Sponsor Protections. See In re Exaeris Inc., 380 B.R. 741 at 744 (denying debtor's motion to sell substantially all of its assets outside of the ordinary course of business where there was a "dearth of evidence of marketing" and "the absence of any evidence of the value of assets").

Conclusion

For the foregoing reasons, IBM respectfully requests that this Court deny SCO's request to grant the Plan Sponsor Protections administrative expense priority.

Dated: March 26, 2008

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