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. 394**

OBJECTION OF INTERNATIONAL BUSINESS MACHINES CORPORATION TO DEBTORS' MOTION TO APPROVE DISCLOSURE STATEMENT AND SOLICITATION PROCEDURES

International Business Machines Corporation ("IBM"), a creditor and equity security holder in these Chapter 11 cases, objects to the "Motion to Approve (I) Scheduling the Confirmation Hearing; (II) Approving Form and Contents of Solicitation Package; (III) Approving Form and Manner of Notice of the Confirmation Hearing; (IV) Establishing Record Date and Approving Procedures for Distribution of Solicitation Packages; (V) Approving Forms of Ballot; (VI) Establishing Voting Deadline for Receipt of Ballots; (VII) Approving Procedures for Vote Tabulations; (VIII) Establishing Deadline and Procedures for Filing Objections to Confirmation of the Plan; and (IX) Granting Related Relief", filed with this Court by the debtors and debtors in possession, The SCO Group, Inc. and SCO Operations, Inc. (collectively, "SCO" or "Debtors"), on March 11, 2008 (the "Motion") seeking, among other things, approval of the Disclosure Statement filed February 29, 2008 (the "Disclosure Statement").

Preliminary Statement[1]

1. The Motion seeks approval of a Disclosure Statement for the Debtors' Joint Plan of Reorganization, filed February 29, 2008 (the "Proposed Plan"), that simply omits substantial and necessary information: Reorganized SCO's business plan and financial projections, the plan sponsor's ability to fund the Proposed Plan, the identity and qualifications of Reorganized SCO's management, SCO's intentions regarding non-consensual plan confirmation, and the effect of the intellectual property litigation that forced it into bankruptcy on its future business operations. Because all of this information is required to enable creditors and equity security holders to make an informed judgment about whether to accept or reject the Proposed Plan, the Disclosure Statement does not meet the requirements of Section 1125 that a disclosure statement contain "adequate information".

2. The Motion also seeks approval of solicitation procedures that would deny creditors holding claims in Class 4 (General Unsecured Claims against SCO Group in Respect of Pending Litigation) the right to accept or reject the Proposed Plan. However, Class 4 is an impaired class, because the Proposed Plan would impose an indefinite post-confirmation stay on an enforcement action by Class 4 creditors who prevail against SCO in the Pending Litigation, thus altering their legal and equitable rights. Therefore, Class 4 creditors are entitled to accept or reject the Proposed Plan.

3. For these reasons, as explained more fully below, this Court should deny the Motion.

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[1] References to SCO's Motion are given as "Mot. ¶__." References to the Disclosure Statement, filed February 29, 2008, are given as "Disclosure Statement at __." References to "Debtors' Motion To Approve Settlement Compensation Or Sale Compensation And Expense Reimbursement To Plan Sponsor", filed February 14, 2008, are given as "Plan Sponsor Mot. at__."

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' cost, coupled with declining revenues, led SCO to file this chapter 11 case on September 14, 2007.

B. SCO's Proposed Plan and Disclosure Statement

10. SCO filed the Disclosure Statement and the Proposed Plan with the Court on February 29, 2008, and the Motion on March 11, 2008. 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.) In the "Debtors' Motion To Approve Settlement Compensation Or Sale Compensation And Expense Reimbursement To Plan Sponsor", filed February 14, 2008, the Debtors said, "[t]he Debtors will file the 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. (Plan

Sponsor Mot. at 1.) As of the date of filing this Objection, the definitive documents have not been filed. This Objection is based solely on the bare Disclosure Statement, without consideration of the promised definitive documents.

11. According to the Disclosure Statement, the Proposed Plan will be sponsored and funded by SNCP, an investment vehicle formed by private equity investment partnership Stephen Norris Capital Partners, LLC (the "Partnership"). (Disclosure Statement at 18-20.) 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 (the "Equity Financing") and by providing a secured non-revolving exit financing facility of up to $95 million (the "Debt Financing") (collectively, the "Financing Commitments"). (Id.)

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"). (Id. 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. at 29.) 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. (Disclosure Statement at 29.) 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. (Id. at 20, 29-33.)

14. The Proposed Plan contemplates, among other things: (1) paying holders of all allowed claims 100% of the principal amount of such claims, with interest if applicable, on the Plan Effective Date or as soon thereafter as practicable; (2) paying unsecured claims held in respect of Pending Litigation against SCO, including IBM's and Novell's counterclaims, which are in Class 4, 100% of the principal amount of such claims, with interest if applicable, on the later of the Proposed Plan's Effective Date or the dates such claims become Allowed Claims; and (4) an aggregate distribution to SCO Common Stock holders (a) on the Plan Effective Date, of $2 million minus certain expenses, and (b) within one year after final resolution of all of the Pending Litigation, of an amount equal to the sum of (i) a percentage (between 15% and 49% depending on the conversion percentage of the Series A Preferred described above) of net litigation proceeds recovered by the Debtors from the Pending Litigation and (ii) the same percentage (between 15 and 49%) multiplied by four times SCO's earnings before interest, taxes, depreciation and amortization for the last twelve months before the payment ("LTM EBITDA"). The existing common equity interests would be cancelled as of the Plan Effective Date. (See Disclosure Statement at 17-18; Proposed Plan at 9-13.)

15. The Proposed Plan also provides that after the Plan Effective Date, SNCP will appoint a new seven-member Board of Directors to manage SCO and will replace current CEO Darl McBride. (Id. at 21-22; 16.)

* * *

16. IBM objects to the Motion on two grounds. First, the Disclosure Statement as currently written does not contain adequate information concerning the Proposed Plan, as required by section 1125(a) of the Bankruptcy Code. Second, Class 4 (General Unsecured Claims against SCO Group in Respect of Pending Litigation) is impaired under the Proposed Plan, and the Motion does not provide for holders of claims in that Class to accept or reject the Proposed Plan.

17. However, as a preliminary matter, because the Debtors have not filed definitive documents before the deadline for objecting to the Disclosure Statement, this Court should continue the hearing on the approval of the Disclosure Statement to a date that is at least 25 days 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 Disclosure Statement on the grounds, in addition to the other grounds set forth below in this Objection, that without the definitive documents, the Disclosure Statement is incomplete and that parties in interest will not have had 25 days notice, as required by Fed. R. Bankr. Proc. 3017, in which to review and object to material contents of the Disclosure Statement.

Argument

I. THE MOTION SHOULD BE DENIED BECAUSE THE DISCLOSURE STATEMENT DOES NOT CONTAIN ADEQUATE INFORMATION

A. A Disclosure Statement Must Contain "Adequate Information"

18. Section 1125(b) of the Bankruptcy Code prohibits SCO from soliciting acceptances of the Proposed Plan until after this Court approves the Disclosure Statement as

containing "adequate information". Section 1125(a) of the Bankruptcy Code defines "adequate information" as:

> "information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records . . . that would enable [] a hypothetical investor of the relevant class to make an informed judgment about the plan. . . ." 11 U.S.C. § 1125(a)(1).

The express statutory obligation to provide adequate information in a disclosure statement is a "pivotal concept in reorganization procedure under the Code". Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 417 (3d Cir. 1988); see also Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp., 337 F.3d 314, 322 (3d Cir. 2003) ("The importance of full disclosure is underlaid by the reliance placed upon the disclosure statement by the creditors and the court. Given this reliance, we cannot overemphasize the debtor's obligation to provide sufficient data to satisfy the Code standard of adequate information.") (quotations and citations omitted); Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 358 (3d Cir. 1996) ("Because creditors and the bankruptcy court rely heavily on the debtor's disclosure statement in determining whether to approve a proposed reorganization plan, the importance of full and honest disclosure cannot be overstated.") (citations omitted).

19. To satisfy Section 1125(a)'s standard, a disclosure statement must contain, "at a minimum", adequate information concerning "all those factors presently known to the plan proponent that bear upon the success or failure of the proposals contained in the plan." In re Beltrami Enters., 191 B.R. 303, 304 (Bankr. M.D. Pa. 1995) (quotations and citations omitted); see also In re Ligon, 50 B.R. 127, 130 (Bankr. D. Tenn. 1985); In re Stanley Hotel, Inc., 13 B.R. 926, 929 (Bankr. D. Colo. 1981). "Conclusory allegations or opinions without supporting facts"

concerning these factors "are generally not acceptable". In re Beltrami Enters., 191 B.R. 303, 304 (Bankr. D. Pa. 1995) (citations omitted).

20. These factors include, among others: a description of the reorganized debtor's business and a projection of future operations; information as to how the plan is to be executed and the funding source; information about future directors and management, including qualifications and compensation; scheduled claims as allowed or estimated by category; information relevant to the risks posed to creditors and equity security holders under the plan; current litigation against the debtor or litigation likely to arise in a non-bankruptcy context; and an accurate description of the debtor's available assets and their value. See In re Microwave Products of America, Inc., 100 B.R. 376, 378 (Bankr. D. Tenn. 1989); In re Scioto Valley Mortg. Co., 88 B.R. 168, 171 (Bankr. D. Ohio 1988).

21. SCO fails to satisfy the statutory standards of disclosure as required under section 1125(a) of the Bankruptcy Code because its Disclosure Statement does not contain (i) a description of Reorganized SCO's business plan or any financial projections; (ii) information about SNCP's ability to satisfy its Financing Commitments; (iii) information about the identity, qualifications, or compensation of Reorganized SCO's management; (iv) information about whether the Proposed Plan contemplates nonconsensual confirmation against SCO's equity security holders; or (v) adequate information about the effect of pending litigation over the ownership of certain Unix-based copyrights and intellectual property.

B. The Disclosure Statement Does Not Contain Adequate Information

1. The Disclosure Statement Does Not Contain a Description of Reorganized SCO's Business Plan or any Financial Projections

22. As SCO acknowledges, "a disclosure statement for a plan of reorganization typically includes information (including relevant financial information) about the

debtor's future business operations, including projections for future profits, and the assumptions that underlie those projections". (Disclosure Statement at 50.) Yet the Disclosure Statement provides virtually no such information. The Disclosure Statement section entitled "Debtor's Go-Forward Business Strategy" includes only two paragraphs, neither of which provides any concrete information concerning a business strategy or future business operations for Reorganized SCO:

> "SCO Group will hold its annual partner conference in Las Vegas, Nevada in August 2008, which includes keynote addresses, engineer-to-engineer training, and a hands on lab. SCO uses this annual event to unveil new innovations and its latest technology solutions and roadmaps.
>
> At this year's event, SNCP will be announcing the new private company strategy that will be implemented upon SCO Group's exit from Chapter 11. The go-forward strategy announcements will include new management, new partners and new products aimed at making SCO the leading platform software provider to the emerging global growth markets (Middle East, Africa, Brazil, Russia, India and China); and to the SCO Group installed base of millions of servers. This year's event will be exclusive to SCO partners, customers and employees and will not be open to the public as in years past." (Disclosure Statement at 10.)

A promise to reveal Reorganized SCO's business plan at a private post-confirmation conference does not give SCO's creditors or equity security holders information to make an informed judgment about its business prospects under the Proposed Plan. Under section 1125, SCO must provide this information in its Disclosure Statement before it may solicit acceptances of the Proposed Plan.

23. This is especially true when the Proposed Plan does not seem to change or even address any of the factors that drove SCO into bankruptcy. SCO filed for Chapter 11 because of, among other things, a significant "decline in revenue" over the past several years due to increased competition in its Unix business. (Disclosure Statement at 10-11.) The Disclosure

Statement does not suggest that this problem has gone away. Yet SCO provides only vague, general statements in its Disclosure Statement about how it plans to combat its still unresolved business issues.

24. SCO also does not provide any financial projections in its Disclosure Statement to support its ability to operate profitably after confirmation. The Disclosure Statement contains no income statement or cash flow projections for Reorganized SCO, nor does it provide any financial information on how Reorganized SCO intends to meet its obligations to repay the Series A Preferred Dividend or the Debt Financing (especially if SCO must draw the Debt Financing for working capital or to satisfy a Novell Summary Judgment award that could be "in excess of $37 million"). The Proposed Plan will saddle Reorganized SCO with substantial, expensive post-confirmation obligations to SNCP, yet SCO provides no information in the Disclosure Statement about how it intends to make money to satisfy such obligations.

25. SCO argues that such information does not matter here because "creditors will be paid in full in cash shortly after the Plan is confirmed, or when their Claims become Allowed" and that there will be "sufficient cash on hand (and committed availability under the Debt Financing) to do that". (Disclosure Statement at 50.) However, without post-confirmation financial projections, Class 4 claimants cannot evaluate if in fact there will be "committed availability under the Debt Financing" to pay their claims when allowed. If SCO breaches a financial covenant in the Debt Financing Agreement or is unable to pay Debt Financing interest payments, does the Debt Financing terminate? Will the "committed availability" under the Proposed Plan have amounted to nothing more than an illusory promise? SCO must provide "adequate information" in its Disclosure Statement to answer these questions.

26. Similarly, SCO equity security holders are also left to guess about whether they will ever see the future payments promised to them under the Proposed Plan. The Proposed Plan promises SCO equity security holders a future payment based, in part, on Reorganized SCO's LTM EBITDA. But how can they evaluate whether SCO will be able to generate positive EBITDA if the Disclosure Statement provides no financial projections?

27. Thus, contrary to SCO's assertion in its Disclosure Statement, providing a business plan and financial projections is important to the ability of its creditors and equity security holders to evaluate the Proposed Plan. Without this basic, standard information, creditors and equity security holders are not able to make an informed judgment about whether to accept or reject the Proposed Plan, as Section 1125 requires.

2. The Disclosure Statement Does Not Contain Adequate Information About SNCP or its Ability To Satisfy its Financing Commitments

28. A disclosure statement must provide information about proposed sources of funding, especially here, where SCO's Proposed Plan is entirely dependent on SNCP's Financing Commitments. Yet, the Disclosure Statement 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. (Disclosure Statement at 18-19.)

29. The Disclosure Statement says nothing 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 substantial $100 million Financing Commitment; or their still unnamed "Middle Eastern" investment partner. (Id.)

30. In fact, according to a sworn affidavit provided by Stephen Norris in January 2007, 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).

31. SCO's creditors and equity security holders should be able to evaluate the credibility of the Financing Commitments that serve as the foundation for the Proposed Plan. Therefore, SCO must also provide additional information about SNCP and the Partnership in its Disclosure Statement.

3. The Disclosure Statement Does Not Provide Adequate Information About the Identity, Qualifications or Compensation of Reorganized SCO's Management

32. A disclosure statement must provide information about future management, so that creditors and equity security holders can evaluate the qualifications and compensation of the team who will run the reorganized debtor. The Proposed Plan contemplates that SNCP will select an entirely new seven member board of directors and hire a new CEO and CFO. (Disclosure Statement at 21-22.) While the Proposed Plan provides for this complete leadership change, the Disclosure Statement is completely silent on who SNCP will put forward to serve on SCO's board or who will be hired to lead SCO's new post-confirmation management team. SCO is thus asking creditors and equity security holders to evaluate the company's future prospects without knowing the background or qualifications of a single individual who will be responsible for implementing the Proposed Plan or running SCO after confirmation. The Proposed Plan is also silent about the compensation structure for this unknown future management team.

33. The failure of SCO to identify, let alone to provide the qualifications or compensation, of the individuals who will lead the company post-confirmation is another critical piece of information that is missing in the Disclosure Statement, which SCO must provide.

4. The Disclosure Statement Does Not Contain Adequate Information About Whether the Proposed Plan Contemplates Nonconsensual Confirmation Against SCO's Equity Security Holders

34. The Bankruptcy Code permits plan confirmation even if impaired classes have not accepted the plan, as long as at least one impaired class has accepted the plan. A plan may be confirmed in this manner if, in addition to satisfying all of section 1129(a)'s requirements other than paragraph (8) ("such class has accepted the plan"), the plan "does not discriminate unfairly" and is "fair and equitable" with respect to each impaired class that has not accepted the plan. 11 U.S.C. §§ 1129(a)(8); 1129(b).

35. The Disclosure Statement is unclear about whether the Proposed Plan can or will be confirmed under these provisions if Class 5 (Equity Interests) does not accept the Proposed Plan. The Disclosure Statement says "only Class 5 Equity Interests are Impaired under the Plan" and "[a]cceptances of the Plan are being solicited only from those Holders of Equity Interests in Class 5 because all other Classes are Unimpaired". (Disclosure Statement at 41.) It also says, "[i]n these Chapter 11 Cases . . . all Classes of Claims are conclusively presumed to have accepted the Plan" (Id. at 43), and that "both these [cramdown] tests will be satisfied". (Id. at 44.) However, the Plan does not request nonconsensual confirmation, and the Disclosure Statement says, "[i]f the Plan does not receive sufficient votes for Confirmation pursuant to section 1129(a) of the Bankruptcy Code, then the Plan cannot be confirmed since the cannot [sic] seek to employ the 'cramdown' procedures set forth in section 1129(b) of the Bankruptcy Code. (Id. at 51.) Which statement is correct? And what does SCO intend to do? "Adequate information" requires the answers to these questions.

5. The Disclosure Statement Does Not Contain Adequate Information About the Effect of Litigation Over Ownership of Certain Unix Copyrights and Intellectual Property

36. The Disclosure Statement section entitled "SCOsource Business" states that SCO owns certain Unix-based copyrights and intellectual property:

> "SCO Group acquired certain rights relating to the UNIX (including UnixWare) source code and derivative works and other intellectual property rights when it purchased substantially all of the assets and operations of the server and professional services groups of The Santa Cruz Operation, Inc. in May 2001. The Santa Cruz Operation had previously acquired such UNIX source code and other intellectual property rights from Novell in 1995. Novell had acquired its rights from UNIX System Laboratories, a subsidiary of AT&T. Through this process, SCO Group believes that it acquired all UNIX source code, source code license agreements with thousands of UNIX vendors, certain UNIX intellectual property, all claims for violation of the above mentioned UNIX licenses and copyrights and other claims, and control over UNIX derivative works." (Disclosure Statement at 9.)

However, the Utah Court held in the Novell Summary Judgment Ruling that SCO did not acquire the intellectual property rights that it claims to own but instead ruled that Novell owns this intellectual property and SCO in fact owes Novell at least some portion of funds it received from Sun Microsystems and Microsoft Corporation (as much as $37 million) relating to the copyrights. The Utah Court also held that Novell has the right, which it has exercised on IBM's behalf, to waive SCO's purported claims against IBM based on the copyrights.

37. Although the Disclosure Statement notes that ownership of the Unix and Unixware intellectual property is the subject of litigation between Novell and SCO, the Disclosure Statement does not address what effect a final adverse ruling on this litigation might have on SCO's future business or operations or on the success of its post-confirmation business plan, other than the need to satisfy monetary judgments. It is not adequate to state only "there can be no assurance" that equity security holders will receive any addition compensation after

the initial distribution. For equity security holders to make an informed judgment about the Proposed Plan and their potential recoveries, they need information about the risk of an adverse ruling and how it may affect the business and therefore their EBITDA-based recovery.

II. THE MOTION SHOULD BE DENIED BECAUSE CLASS 4 IS IMPAIRED UNDER THE PROPOSED PLAN YET NOT PERMITTED TO ACCEPT OR REJECT THE PLAN

A. The Proposed Plan Continues the Automatic Stay Indefinitely After Confirmation as to Class 4 Creditors

38. Section 4.6 of the Proposed Plan provides that property of SCO Group, "shall not vest in Reorganized SCO until Reorganized SCO files a notice of vesting, but in no event later than the date that all Disputed Claims and, in particular, any claims held by Novell, IBM, Red Hat or Autozone, are finally Allowed or Disallowed pursuant to Final Orders." (Proposed Plan at 15; Disclosure Statement at 22.)

39. The Disclosure Statement, in a special display of candor, explains the purpose of Section 4.6:

> "The automatic stay in section 362(a) of the Bankruptcy Code bars parties from taking any act to obtain possession or exercise control over property of the estate, to create or enforce a lien against property of the estate, or otherwise to establish or exercise rights to property of the estate. Pursuant to section 362(c)(1) of the Bankruptcy Code, "the stay of an act against property of the estate . . . continues until such property is no longer property of the estate." Pursuant to section 1141(b) of the Bankruptcy Code, confirmation of a plan of reorganization vests all of the property of the debtor's estate in the reorganized debtor, "[e]xcept as provided in the plan or the order confirming the plan." Therefore, unless the plan or the order confirming the plan provides otherwise, once the plan is confirmed the property that was once 'property of the estate' is property of the estate no longer and the automatic stay protecting the property from the claims of the creditors ceases automatically. To protect the Property against the possibility that a Creditor holding a Disputed Claim, such as Novell, may obtain a judgment against SCO Group . . . the Plan provides . . . that the Property of the Estate of Reorganized SCO will not vest in Reorganized SCO until it elects to have this occur by filing a

> notice of vesting, but in no event later that the date that all Disputed Claims, and, in particular, any claims held by Novell, IBM, Red Hat or Autozone, are finally Allowed or Disallowed by ***Final*** Orders." (Disclosure Statement at 37.) (emphasis added)

40. Under this Proposed Plan provision, SCO, or at least the property of the SCO estate, will have all the protections of the automatic stay afforded to a debtor who remains in chapter 11. It will have those protections as to each Class 4 creditor not just until the particular creditor's claim is resolved, but until all of the Pending Litigation is resolved and thereafter Allowed or Disallowed by a Final Order. The Plan does not provide any outside date.

B. A Class of Claims is "Impaired" Upon any Alteration of Legal, Equitable Or Contractual Rights

41. Section 1124 of the Bankruptcy Code provides, in part, that a class of claims or interests is impaired under a plan unless "with respect to each claim or interest in the class, the plan leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest." 11 U.S.C. § 1124(1).

42. "Impaired" is a term of art used to determine whether a class of claims or interest may accept or reject a plan. Solow v. PPI Enters. (U.S.), Inc. (In re PPI Enters. (U.S.), Inc.), 324 F.3d 197, 202 (3d Cir. 2003). "Section 1124, by defining who may dissent from a plan, not only serves negotiated plans but also is the threshold to creditor protection." In re Barrington Oaks Gen. P'ship, 15 B.R. 952, 959 (Bankr. D. Utah 1981).

43. The statute imposes a bright line test for determining whether a class is impaired. In re Jones, 32 B.R. 951, 957 (Bankr. D. Utah 1983) (in determining impairment, "[n]o creativity, with resulting unpredictability, is permitted. . . . Section 1124 should establish, as nearly as possible, a bright line test for impairment."). Any alteration by the plan, no matter how small, to a claim's rights makes the class impaired. Solow v. PPI Enters. (U.S.), Inc. (In re PPI Enters. (U.S.), Inc.), 324 F.3d 197 at 202 ("If the debtor's Chapter 11 reorganization plan

does not leave the creditor's rights entirely 'unaltered,' the creditor's claim will be labeled as impaired . . . ."); L & J Anaheim Assocs. v. Kawasaki Leasing Int'l, Inc. (In re L & J Anaheim Assocs.), 995 F.2d 940, 943 (9th Cir. 1993) ("The plain language of section 1124 says that a creditor's claim is 'impaired' unless its rights are left 'unaltered' by the Plan. There is no suggestion here that only alterations of a particular kind or degree can constitute impairment."); In re American Solar King Corp., 90 B.R. 808, 819 (Bankr. W.D. Tex. 1988) ("[E]ven the smallest impairment . . . entitles a creditor to participate in voting."); Ronit Inc. v. Block Shim Dev. Co.-Irving (In re Block Shim Dev. Co.-Irving), 118 B.R. 450, 454 (Bankr. N.D. Tex. 1990) ("Impairment under § 1124 has generally come to mean in its most basic form any alteration of the holder's legal, equitable, or contractual rights. . . ."); In re Rhead, 179 B.R. 169, 177 (Bankr. D. Ariz. 1994) ("[A]ny change of a creditor's rights, whether for the better or for the worse, constitutes impairment. . . ."). Even a plan's improvement in rights or recoveries is an alteration that renders the class impaired. In re Union Meeting Partners, 160 B.R. 757, 771 (Bankr. E.D. Pa. 1993) ("'[I]mpairment' is a term of art and includes virtually any alteration of a claimant's rights . . . even where a creditor's rights are improved by a plan.").

44. The purpose of the strict definition of "impaired" is clear. Congress intended to permit any creditor or equity security holder whose claim or interest was altered in any way to accept or reject the plan and to be protected by the absolute priority rule in section 1129(b). In re Barrington Oaks Gen. P'ship, 15 B.R. 952, 959-60 (Bankr. D. Utah 1981). As importantly, Congress intended to exclude from the nonconsensual confirmation provisions of section 1129(b) any creditors or equity security holders whose claims are untouched by the plan. See J. Ronald Trost & Lawrence P. King, "Congress and Bankruptcy Reform Circa 1977", 33 BUS. LAW. 489, 551 (1978) ("[I]f a claim or interest is not dealt with by the plan, i.e., left

undisturbed, the claim is not impaired."). The complex and time-consuming valuation mechanics of section 1129(b) and the strictures of the absolute priority rule are not needed to protect such creditors or equity security holders, because as to them, the plan leaves in place everything to which they were entitled before bankruptcy. See In re Jones, 32 B.R. 951 at 957-58.

45. Equally clear is that a class of claims is impaired only if the plan alters the claims holders' rights, not if the statute does so independently of any plan. Thus, where the statute requires, for bankruptcy purposes, partial disallowance of an otherwise enforceable claim or subordination of an otherwise *pari passu* claim, the statutory disallowance is not an impairment of the claim. Solow v. PPI Enters. (U.S.), Inc. (In re PPI Enters. (U.S.), Inc.), 324 F.3d 197 (disallowance of landlord's claim under section 502(b)(6)); In re American Solar King Corp., 90 B.R. 808 (subordination under section 510(b) of a securities purchase-related claim).

46. By contrast, where a plan provides for the alteration in a claim's rights, the class that includes the claim is impaired. In re American Solar King Corp., 90 B.R. 808 at 819 ("Impairment results from what the plan does, not what the statute does."). For example, section 1123(b) lists provisions that a plan may include, such as a provision to "modify the rights of holders of secured claims . . . or of holders of unsecured claims". 11 U.S.C. § 1123(b)(5). Any such modification is an impairment under section 1124. That the Code permits the plan provision, rather than requires it, such as it does for the treatment of an entire category of claims under sections 502(b)(6) (landlords' claims) and 510(b) (securities purchase-related claims), does not make the treatment under such a permissive plan provision any less of an impairment. Id.

47. Similarly, imposition of the automatic stay is mandatory upon the commencement of a case. 11 U.S.C. § 362(a). So delaying a creditor's right to foreclose during the case, while the automatic stay remains in effect, does not impair the creditor's claim. But the automatic stay is not forever. The automatic stay terminates as to any action against property of the estate when the property is no longer property of the estate, 11 U.S.C. § 362(c)(1), and as to any other act, when the discharge is granted. Id. at §362(c)(2). Chapter 11 plan confirmation discharges the debtor, so the stay should terminate upon confirmation or, as is often the case when the plan or the confirmation order so provides, upon the effective date. 11 U.S.C. § 1141(d)(1). Chapter 11's protections are not intended to be permanent or outlive the case for any substantial period of time. See Am. Hardwoods, Inc. v. Deutsche Credit Corp. (In re Am. Hardwoods, Inc.), 885 F.2d 621 (9th Cir. 1989) (stay of actions against guarantors imposed during the case to protect the reorganization process must terminate upon confirmation); Binder v. Price Waterhouse & Co., LP (In re Resorts Int'l, Inc.), 372 F.3d 154 (3d Cir. 2004) (scope of bankruptcy court's "related to" jurisdiction reduces after confirmation). Thus, a plan provision delaying a secured tax creditor's right to foreclose after the case impairs the creditor's class. In re Ropt Ltd. P'ship, 152 B.R. 406, 411 (Bankr. D. Mass. 1993).

C. Class 4 Is Impaired Because the Proposed Plan Imposes a Post-Confirmation Stay on Holders of Class 4 Claims

48. In this case, the Proposed Plan provides for the indefinite continuation of the automatic stay against Class 4 creditors after confirmation and the Plan Effective Date. Surely such an indefinite continuation, solely within the Reorganized Debtor's control, alters the creditors' legal and equitable rights.

49. Before bankruptcy and the imposition of the automatic stay, a Class 4 creditor had the right to pursue collection action against SCO once it obtains a judgment. It

could pursue collection by legal means (for example, by writ of execution) or by equitable means (for example, by supplemental proceedings or a judgment debtor's exam). For SCO to prevent collection, it would need a stay, which is an equitable remedy. Under the Proposed Plan, the Class 4 creditors' rights are not restored to what they were before bankruptcy. They would not be "left undisturbed" by the Proposed Plan. See Trost & King, supra. The creditors would not be permitted to pursue collection, and enforcement of any judgment would be subject to a stay pending appeal—and in some cases, long after any appeal is resolved—thus altering their legal and equitable rights.

50. Nothing in the Bankruptcy Code requires this treatment of the Class 4 creditors. To the contrary, such treatment is not the norm, as property ordinarily revests in the reorganized debtor upon confirmation or the effective date. See Binder v. Price Waterhouse & Co., LP (In re Resorts Int'l, Inc.), 372 F.3d 154 at 165 (property revests and estate terminates after confirmation). Thus, this treatment of the Class 4 creditors is a plan impairment, not a statutory impairment. Class 4 is impaired under the Proposed Plan.

D. The Motion Improperly Seeks to Deny Class 4 Creditors' Right To Accept or Reject the Proposed Plan

51. Holders of a claim in an impaired class may accept or reject a plan. 11 U.S.C. §§ 1126(a), 1129(a)(8), (10); Fed. R. Bankr. Proc. 3018(a). Indeed, the purpose of the impairment/non-impairment distinction is to separate classes that may accept or reject a plan from those who may not. See In re Barrington Oaks Gen. P'ship, 15 B.R. 952 at 959-60; 11 U.S.C. § 1126(f) (class that is not impaired is deemed to accept the plan). A motion for approval of voting procedures that does not provide for voting by holders of claims in an impaired class (especially the only impaired class of claims) should not be approved, because the confirmation process would then be futile.

52. In this case, the Motion does not provide for voting by Class 4. Class 4 is impaired, because the Proposed Plan alters the legal and equitable rights to which the Class 4 claims are entitled. Therefore, the Motion should be denied.

Conclusion

For the foregoing reasons, IBM respectfully requests that this Court deny the Motion unless SCO supplements the Disclosure Statement to provide adequate information about the matters set forth above and modifies the solicitation procedures to permit Class 4 creditors to accept or reject the Proposed Plan.

Dated: March 26, 2008

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