

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re: ) Chapter 11  
 )  
The SCO GROUP, INC., et al.,<sup>1</sup> ) Case No. 07-11337 (KG)  
 ) (Jointly Administered)  
 )  
Debtors. )

Objection Deadline: September 9, 2008 at 4:00 p.m. (prevailing Eastern time)  
Hearing: September 16, 2008 at 10:00 a.m. (prevailing Eastern time)

**THIRD MOTION BY DEBTORS UNDER SECTION 1121(d)  
FOR EXTENSION OF EXCLUSIVITY DEADLINES**

For cause shown, the above captioned Debtors<sup>2</sup> request the Court to extend the Debtors' exclusive period to file a plan of reorganization to a date that is 45 days after a final judgment (the "Plan Deadline") is entered in the action pending in the United States District Court for the District of Utah styled *The SCO Group, Inc. v. Novell, Inc.*, Case No. 2:04CV00139 (the "Novell Litigation"), and to extend the Debtors' exclusive period to seek approval from impaired classes of such a plan to a date 60 days after the Plan Deadline (collectively, the "Exclusive Periods"). In support of this motion (the "Motion"), the Debtors state:

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<sup>1</sup> The Debtors and the last four digits of each of the Debtors' federal tax identification numbers are as follows: (a) The SCO Group, Inc., a Delaware corporation, Fed. Tax Id. #2823; and (b) SCO Operations, Inc., a Delaware corporation, Fed. Tax ID. #7393.

<sup>2</sup> The Debtors and the last four digits of each of the Debtors' federal tax identification numbers are as follows: (a) The SCO Group, Inc., a Delaware corporation, Fed. Tax Id. #2823; and (b) SCO Operations, Inc., a Delaware corporation, Fed. Tax ID. #7393. The address for both Debtors is 355 South 520 West, Lindon, Utah 84042.

## Introduction

There were several reasons for the filing of these cases. One significant reason was the negative impact of the August 10, 2007 summary judgment ruling in the Novell Litigation (defined below) on the Debtors' business. In that ruling the court found that SCO Group did not own a substantial portion of the business that it had been operating since 1996—without objection from Novell—and the ruling raised certain questions as to what rights SCO Group had to the business. Because of the summary judgment ruling, SCO Group's customers and partners and the marketplace in general began to question the company's right to conduct this business. SCO Group had also spent millions of dollars developing a new line of mobility products which were going to be ready for market in the next few months and the company's ability to continue business and see those efforts to fruition was called into question as well. Pursuant to the August 10, 2007 summary judgment ruling, SCO Group was found to be in debt to Novell in an unknown amount, but potentially up to \$40,000,000 and it was unclear what rights SCO Group had to continue business with its various product lines.

As a result, several things needed to happen for SCO Group to get back to the business plans it had been working on since 2002 and to preserve and continue its UNIX business and successfully launch its new mobility line of products and services. First, SCO Group needed to determine how much, if anything, it owed to Novell and whether a constructive trust would be placed over some or all of those funds. Second, because the summary judgment ruling had such a serious impact on SCO Group's viability and its business opportunities, SCO Group needed to file a notice of appeal as soon as possible to let its customers and the market

place understand the timeline for a challenge of that summary judgment which would resolve doubts about its ability to conduct business and related issues.

### **Jurisdiction and Background**

1. The Court has jurisdiction over the matters subject of this Motion pursuant to 28 U.S.C. §§ 157 and 1334. The procedural predicates for the relief sought herein is 11 U.S.C. § 1121(d), implemented by Fed.R.Bankr.P. 3016.

2. On September 14, 2007 (the "Petition Date"), the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

3. For greater detail regarding the background of the Debtors' business and events leading up to the filing of these cases, the Debtors refer the Court and parties to the *Declaration of Darl C. McBride, Chief Executive Officer of the Debtors, in Support of First Day Motions* (the "McBride Declaration") filed on the Petition Date and incorporated herein.

4. Pursuant to 11 U.S.C. § 1121(b), the initial period in which only the Debtors may file a plan was scheduled to expire on January 12, 2008. On January 2, 2008, the Debtors filed the *Motion by Debtors Under Section 1121(d) for Extension of Exclusivity Deadlines* (D.E. No. 289). On February 5, 2008, the Court entered the *Order Pursuant to 11 U.S.C. § 1121(d) Further Extending Debtors' Exclusive Periods in Which to File a Chapter 11 Plan and Solicit Votes Thereon* (D.E. No. 329) extending the Debtors' exclusive period for filing a chapter 11 plan through May 11, 2008 and the exclusive period to solicit acceptances of such plan through July 11, 2008.

5. On February 29, 2008, the Debtors filed the *Debtors' Joint Plan of Reorganization* (the "Plan") (D.E. No. 368) and the *Disclosure Statement in Connection with*

*Debtors' Joint Plan of Reorganization* (the "Disclosure Statement") (D.E. #369). In summary, the Plan provided for payment in full and with interest to all creditors, including Novell and IBM on the earlier of the effective date or the date such claims became allowed. Various parties in interest filed objections to the Disclosure Statement, relating to, among other things: (a) the relatively high leverage ratio required by the Plan, and the high interest cost of the debt component contemplated by the Plan, and (b) various uncertainties pertaining to the Novell litigation pending in Utah District Court, and the difficulties of evaluating and confirming the Plan before the District Court rendered a final ruling therein.

6. On May 9, 2008, the Debtors filed their *Second Motion By Debtors Under Section 1121(d) For Extension Of Exclusivity Deadlines* (D.E. No. 470) seeking an extension of time based upon the conclusion of the trial in the Novell Litigation pending in Utah in early May, and the anticipation of the entry of a final judgment in that litigation soon. At the conclusion of the trial in Utah on May 2, 2008, the trial judge stated that a ruling would be forthcoming "without undue delay" as the court understood that "there are many important reasons for that." (Trial Transcript at 733; May 2, 2008.) SCO understood the court to be saying that a final judgment would be entered soon which would remove the substantial uncertainty as to the size of a judgment that would be entered against SCO and would permit SCO to advance to an appeal of the court's prior summary judgment ruling, both of which are critical steps for SCO to move forward. On June 17, 2008, this Court granted the motion and extended the Debtors' Exclusive Periods through August 11, 2008 and October 13, 2008 (See D.E. No. 502).

### ***Novell Litigation***

7. On August 10 2007, the Utah District Court ruled (the “August 2007 Ruling”) that Novell was the owner of the UNIX and UnixWare copyrights that existed at the time of the 1995 Asset Purchase Agreement (between Novell and SCO Group’s predecessor), that Novell granted an implied license in favor of SCO Group (the terms of which were unknown) and that Novell retained broad rights to waive SCO Group’s contract claims against IBM. SCO Group was directed to accept Novell’s waiver of its UNIX contract claims against IBM. In addition, the Court determined that certain SCOSource licensing agreements that SCO Group executed in fiscal year 2003 included SVRx technology and that SCO Group was required to remit some portion of the proceeds to Novell (liquidated through the July 2008 Ruling discussed below). SCO Group sought leave to appeal the August 2007 Ruling, but that request was denied.

8. After conducting a four-day bench trial in late April and early May of this year, on July 16, 2008, the Utah District Court entered its *Findings Of Fact, Conclusions Of Law, And Order* (the “July 2008 Ruling”). In that ruling, the Utah District Court concluded that SCO Group was entitled to enter into the 2003 Microsoft Agreement and the other SCOSource Licenses and awarded Novell \$2,547,817, an amount significantly less than the approximately \$30 million reflected in the proof of claim Novell filed in connection with these bankruptcy cases. The court also requested briefing from the parties on the issue of prejudgment interest.

9. The July 2008 Ruling also directed Novell to submit a final judgment consistent therewith. However, Novell did not submit a final judgment and instead filed a

response indicating that a final judgment could not be entered because several of SCO Group's claims remain stayed and unresolved pending the SuSE arbitration and because Novell's claim for constructive trust is to be adjudicated by this Court. Novell asserts that the SuSE arbitration affects SCO Group's claims for breach of contract and unfair competition, and copyright infringement. Novell also submitted a request for prejudgment interest that the Debtors believe is well in excess of what is justified. Novell and SCO Group have been discussing these issues and on August 1, 2008 submitted to the Utah District Court a Joint Motion for Extension seeking an extension through August 22, 2008 for Novell to submit the proposed final judgment while the parties work together to try to resolve the issues of finality, interest calculation and constructive trust.

10. The Debtors and SNCP continue to make good faith progress towards improving the structure of a sale or financing transaction that would form the basis of an amended plan. Further, based upon feedback from prospective interested parties, the Debtors believe that the entry of a final judgment (and the commencement of the appellate process) in the Novell Litigation will greatly facilitate the Debtors' ability to sell, finance or recapitalize as necessary as a basis for a plan of reorganization. The Debtors have been told by prospective parties to a transaction that the uncertainty of SCO Group's interest in the UNIX and UnixWare copyrights that existed at the time of the 1995 Asset Purchase Agreement, and the terms of the implied license — first mentioned by Novell nearly ten years after the transaction, gives prospective purchasers pause on the ability to acquire those rights from SCO Group, and hinders the ability to raise capital or obtain financing. Obviously, the final answer to some of these questions will not come until after a decision is issued on the appeal. However, the market and

potential investors want to know if and when SCO Group will be able to commence the appeal process as it relates to these important rights. Once the appeal process is commenced, customers and potential investors can make reasonable assumptions as to how long it will take to get a resolution on appeal and investment decisions can be structured to take that process into account. If it appears that SCO Group will not be able to file an appeal for several months or longer, that creates a different set of problems for SCO Group, its customers and investors.

11. There has been some speculation in the marketplace that SCO Group will not be able to get to an appeal of the August 10, 2007 ruling because Novell (and IBM) will be able to block any such attempts and to delay the Novell Litigation until SCO Group does not have an ability to proceed. It is very important for SCO Group to get the final judgment entered and a notice of appeal filed as soon as possible so the market can estimate the time frame in which SCO Group's appeal will be heard and resolved. Delays in SCO Group's ability to appeal impede SCO Group's ability to finalize a plan to submit to this Court. The timeline of the final judgment and appeal are critical to this process. SCO anticipated that a final judgment would be entered soon after the ruling from the trial came down. Novell apparently has other plans.

### **Relief Requested**

12. By this motion, the Debtors seek to extend the section 1121(b) deadline to a date 45 days after a final judgment is entered in the Novell Litigation, and to extend the Debtors' exclusive period to seek approval from impaired classes of such a plan to a date 105 days after the entry of a final judgment in the Novell Litigation. The Debtors submit that section 1121(d) and existing case law amply support such an extension.

13. The court may extend the exclusive period within which only a debtor may file a plan for “cause.” 11 U.S.C. § 1121(d). Section 1121(d) of the Bankruptcy Code grants this Court authority to extend the Exclusive Periods “for cause” after notice and hearing. Although the Bankruptcy Code does not define the term “cause” in this context, the legislative history indicates that “cause” should be interpreted flexibly “in order to allow the debtor to reach an agreement.” H.R. Rep. No. 95, 95<sup>th</sup> Cong., 1st Sess. 232 (1997): see also, In re McLean Indus., Inc., 87 B.R. 830, 833 (Bankr. S.D. N.Y. 1987) (quoting H.R. Rep. No. 595, 95th Cong., 2d Sess. 231 (1978), reprinted in 1978, U.S.C.C.A.N. 5963, 6190) and In re Public Serv. Co. of New Hampshire, 88 B.R. 521, 534 (Bankr. D.N.H. 1988) (“[T]he legislative intent . . . [is] to promote maximum flexibility.”).

14. To facilitate this legislative intent, the court should give a debtor a reasonable opportunity to negotiate an acceptable plan with creditors and to prepare adequate financial and non-financial information concerning the ramifications of any proposed plan for disclosure to creditors. See, e.g., In re McLean Indus., Inc., 87 B.R. at 833-34; In re Texaco Inc., 76 B.R. 322, 327 (Bankr. S.D. N.Y. 1987).

15. The decision to extend a debtor’s exclusive period is committed to the sound discretion of the bankruptcy court, based upon the facts and circumstances of each particular case. See, e.g., First American Bank of New York v. Southwest Gloves and Safety Equip., Inc., 64 B.R. 963, 965 (D. Del. 1986).

16. A determination of whether “cause” exists to extend such time will depend on the facts and circumstances of the case. Factors a court considers in determining cause include:

- a. The size and complexity of the case;
- b. The necessity of sufficient time to negotiate and prepare adequate information;
- c. The existence of good faith progress toward reorganization;
- d. Whether the debtor is paying its debts as they come due;
- e. Whether the debtor has demonstrated reasonable prospects for filing a viable plan;
- f. Whether the debtor has made progress in negotiating with creditors;
- g. The length of time the case has been pending;
- h. Whether the debtor is seeking the extension to pressure creditors; and
- i. Whether unresolved contingencies exist.

In re Dow Corning Corp., 208 B.R. 661, 664 – 665 (Bankr. E.D. Mich. 1997) (citing In re Express One Int'l, Inc., 194 B.R. 98, 100 (Bankr. E.D. Tex. 1996)); In re McLean Indus., Inc., 87 B.R. 830 (Bankr. S.D.N.Y. 1988); In re Wisconsin Barge Line, Inc., 78 B.R. 946 (Bankr. E.D. Mo. 1987)).

17. The Debtors believe that cause exists because, among other things:
  - a. The Debtors' cases are complex and complicated by virtue of, among other things, the Novell Litigation which involves ownership rights that have a significant impact on the Debtors' business model and terms of a plan of reorganization;
  - b. Novell asserts that the July 2008 Ruling does not render adjudication of the litigation "final," which delays SCO Group's ability to appeal — which is critical for SCO Group to move forward;
  - c. The Debtors have made good faith progress toward reorganization;
  - d. The Debtors are paying their debts as they come due;

- e. The Debtors have and can demonstrate reasonable prospects for filing a viable amended plan that will pay creditors in full with interest;
- f. The cases have been pending for less than one year; and
- g. The Debtors are not seeking an extension of the Exclusive Periods to pressure creditors or equity security holders.

18. The Debtors submit that the entry of a final judgment in the Novell Litigation (and SCO Group's appeal thereof) is important because SCO Group's business model and the feasibility of a plan are impacted thereby.

19. An extension of the Exclusive Periods will allow an amended plan to take into account the extent of SCO Group's rights relating to the UNIX and UnixWare intellectual property, which the Court recognized as important to the Debtors' ability to confirm a plan. *See* Memorandum Opinion (D.E. No. 232), p. 11, fn. 7.<sup>3</sup>

20. The Debtors also need additional time to prepare an amended plan, including the liquidation and feasibility analysis to accompany such plan, as well as in order to incorporate the July 2008 Ruling's impact on terms of the plan (which will likely have alternative treatment based upon the ultimate outcome of the Novell Litigation after all appeals are exhausted) as well as the recovery to creditors and shareholders.

21. The Debtors have also begun the claims analysis process with respect to the approximately \$96 million of claims and scheduled liabilities against the estates. While the Debtors believe a significant amount of these claims can and should be reduced, the Debtors

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<sup>3</sup> In addition, Novell has also expressed its opinion that "SCO's plan must take into account the amount of Novell's claim and what cash it has that does not belong to Novell. Determination of the remaining issues in the District Court Action will clarify these important subjects, too." *See* Novell Stay Relief Motion (D.E. No. 89), p. 6, ¶13.

would like to get a resolution of at least a few of the largest claims, e.g., the \$59.7 million claim asserted in connection with IPO litigation, prior to filing an amended plan.

22. Based upon the foregoing, the Debtors request a period of 45 and 105 days, respectively, from the entry of a final judgment in the Novell Litigation, to maintain their exclusivity under section 1121.

### **Notice**

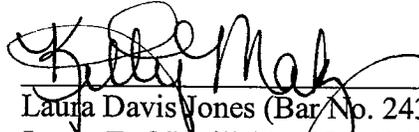
23. Notice of this Motion has been given to the following parties or, in lieu thereof, to their counsel, if known: (i) the Office of the United States Trustee; (ii) the creditors holding the 20 largest unsecured claims against the Debtors' estates (on a consolidated basis); and (iii) any party which has filed a request for notices with this Court prior to the date of this Motion. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

*[Remainder of page intentionally left blank]*

WHEREFORE, the Debtors request that the Court enter an order granting this motion and extending the Debtors' exclusivity periods as requested herein, and granting them whatever other and further relief the Court deems just and appropriate.

Dated: August 11, 2008

PACHULSKI STANG ZIEHL & JONES LLP



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