UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

Objection Deadline: February 18, 2009 at 4:00 p.m. (prevailing Eastern time)
Hearing: February 25, 2009 at 11:00 a.m. (prevailing Eastern time)

NOVELL'S OBJECTION TO THE DEBTORS' PROPOSED AMENDED DISCLOSURE STATEMENT

Novell, Inc. ("Novell"), and its subsidiary, SUSE Linux GmbH ("SUSE" and together with Novell the "Novell Parties") object to the proposed Disclosure Statement in Connection with Debtors' Amended Joint Plan of Reorganization (the "Amended Disclosure Statement" or "ADS") of debtors and debtors in possession The SCO Group, Inc. and SCO Operations, Inc. ("SCO" or the "Debtors") in connection with their Debtors' Amended Joint Plan of Reorganization (the "Amended Plan" or "AP").

To fund the Amended Plan, the Debtors propose a combination of continued business operations and possible auction sale of some of their assets. The Amended Plan proposes to pay most creditors in full quickly, but considerably stretches out payment of one of the two classes of general unsecured creditors: the class of general unsecured creditors, such as Novell, International Business Machines ("IBM") and Red Hat, against whom the SCO is in prepetition litigation. As certain pivotal plan terms reflect, the Debtors themselves recognize that they may be unable to pay these litigation creditors in full, so the Amended Plan proposes to pay them in new SCO stock if cash to pay them is in insufficient. In the meantime, however, SCO's current shareholders will be able to keep their existing stock.

Clearly, the Debtors' ability to fund the Amended Plan is crucial to all creditors, but especially the litigation creditors. Hence, a *thorough* analysis of the Debtors' business plan, the

proposed auction, and the claims the Debtors may have to pay, is indispensable to help creditors decide whether to vote for the Amended Plan. Yet, the Amended Disclosure Statement fails to provide the kind of meaningful information that would enable creditors to judge the Debtors' prospects of meeting their commitments under the Amended Plan. For this reason, the Court should deny approval of the Amended Disclosure Statement. The Court should also disapprove the Amended Disclosure Statement because the Amended Plan is unconfirmable on its face as violating the absolute priority rule in permitting existing shareholders to retain their stock even though its terms explicitly anticipate that litigation creditors may not be paid in full.

I. BACKGROUND

A. The Novell Litigation

1. Before filing these chapter 11 cases, SCO was involved in litigation against various parties, including Novell. (*See* Memorandum Opinion (filed herein November 27, 2007) (the "Opinion") 1-2.)[1]

2. On August 10, 2007, Novell won important rulings against SCO on summary judgment in the District Court. (Opinion 3-4.)

3. The trial on the issues left by the summary judgment was set for September 14, 2007, a Monday. (Opinion 4.) The Debtors filed their voluntary chapter 11 petitions before this Court on September 11, 2007, the preceding Friday. The filing stayed the District Court litigation.

4. In late November of 2007, Novell obtained stay relief to complete the litigation. (Dkt. Nos. 232, 233.)[2] Ultimately, Novell obtained a judgment for over $3.5 million, including about $625,000 that SCO was to hold in trust for Novell. (*See*, Final Judgment (a true and

[1] At the same time, an international arbitration (the "Arbitration") was set for December of 2007 between SCO and SUSE that related to certain issues that the District Court had agreed should be decided in the Arbitration. (Debtor The SCO Group, Inc.'s Motion to Enforce the Automatic Stay (filed September 28, 2007, Dkt No. 69) (the "Arbitration Stay Motion")); Transcript of Hearing of November 6, 2007, Dkt. No. 207) ("11/16 Tr.") at 34:19-36:20; 60:15-64:21.)

[2] However, SCO asked this Court to determine that the automatic stay barred continuation of the Arbitration. (Arbitration Stay Motion.) The Court granted the Arbitration Stay Motion as requested by SCO. (Order Granting The SCO Group, Inc.'s Motion to Enforce the Automatic Stay (filed November 14, 2007, Dkt. No. 204).)

correct copy of which is attached hereto as Exhibit A); Agreed Order Resolving Novell's Motion [etc.] (filed December 29, 2008, Dkt. No. 644).)

5. SCO thereafter appealed the District Court's judgment to the United States Tenth Circuit Court of Appeals, where the appeal is now pending. (ADS 14.)

II. THE AMENDED PLAN AND DISCLOSURE STATEMENT

A. Introduction

6. Nearing the end of exclusivity under Code[3] section 1121(d) after sixteen months, several false starts, and post-petition losses (*excluding* reorganization costs) of at least $7.7 million, the Debtors filed the Amended Plan and Amended Disclosure Statement on January 9 of this year.[4]

7. The central concept of the Amended Plan is continuation by the Debtors of litigation with Novell and other parties (the "Pending Litigation" in the Amended Plan's terminology). To this end, the Amended Plan enables the Debtors and their existing shareholders (largely management, Novell believes) to speculate on the Pending Litigation against Novell and other Pending Litigation defendant-creditors by significantly postponing payment to them in a manner that plainly puts any such payment at risk. If the Debtors win the litigation, they will recover from the defendants. If the Debtors lose, as the Amended Plan's provision for payment in new SCO stock reflects, the Debtors themselves anticipate that the defendants will be unable to recover on their claims because the Debtors will have consumed their resources in prosecuting the litigation. In the meantime, however, existing equity will retain its interests.

8. Under the Amended Plan, the Debtors will remain in business with their current management. At the same time, the Debtors will continue the Pending Litigation. The Amended Plan makes various provisions for payment of creditors. However, the Amended Disclosure Statement says little more about this blueprint than that the Debtors are going to stay in business,

[3] The "Code" is the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

[4] For this history generally, *see,*, *e.g.,* Dkt. Nos. 149, 179, 180, 193, 202, 207, 215, 218, 221, 225, 231, 255, 289, 329, 346, 359, 367, 368, 239, 407-11, 413, 414, 418, 419, 425, 437, 440, 443, 470, 502, 525, 559, 562, 644 and 649. The losses can be found in the December 2008 monthly operating report, Dkt. No. 692.

make lots of money through operations and perhaps the auction, defeat Novell and other defendants in the Pending Litigation, and pay everyone off one way or another, adding only fleeting caveats that these things might not happen. Nowhere do the Debtors provide crucial detail, support their financial projections with historical or other evidence, harmonize their projections for various potential outcomes the Amended Plan entertains, or rationalize their discriminatory treatment of Pending Litigation claimants.

B. The Amended Plan and Amended Disclosure Statement

9. To fund the Amended Plan, the Debtors will use continued operations, the proceeds, if any, of an auction of most of their business and software assets, and any recovery from the Pending Litigation. The Debtors only cursorily describe what businesses they will "continue." (*See* ADS 22-25.) They acknowledge that some of it is declining irreversibly (ADS 10, 40) and that some of it is essentially brand new, with no track record (ADS 23-24). They also say that they will be trying new pricing mechanisms (ADS 24). The Debtors say they will reduce operating costs by 10% (ADS 25)[5] and even further reduce the salaries of management in order to meet their commitments under the Amended Plan, if they can (AP 13).

10. The Debtors do not describe the proposed auction except to state that there will be certain minimum bids totaling $6 million. They recently have filed a separate motion for approval of bidding procedures. (Debtor's Motion for Order [etc.](filed February 4, 2009, Dkt. No. 695) (the "Sale Motion").[6] However, although referring to the Amended Plan, the proposed auction process is not conditioned on confirmation of the plan. (*See* Sale Motion, Ex. A (Purchase and Sale Agreement), § 10.3 (conditions to closing do not include confirmation of Amended Plan).) Indeed, quite the contrary is true. Sections 7.1(ix) and (x) of the Purchase and Sale Agreement expressly purport to require *any* plan to be subordinate to the sale. And the proposed form of order attached to the sale motion expressly contemplates that the sale is one

[5] Else, they claim the reduction will be 20-20%. (AP 11.)
[6] As described in Novell's Objection to Debtors' Motion for an Order Establishing Sale and Bid Procedures and Related Relief (filed concurrently herewith), there are some serious issues with the Sale Motion.

outside a plan and is "a prerequisite to the Debtors' ability to confirm and consummate the Plan or a different plan." (Sale Motion, proposed order, Recitals H, S.)

11. The Amended Plan proposes to pay priority claims in full on the Effective Date. It will pay Classes 3 and 3A (hereinafter together "Class 3") general unsecured creditor claims in full as of the Effective Date or when they are allowed, either in one lump sum or, if their funds are inadequate on the Effective Date, in two installments with 5% interest on the delayed payment. (AP 9, 14; ADS 27-28.) Class 3 consists of all general unsecured creditors except those creditors against whom SCO has Pending Litigation, including Novell. The *only* difference between Classes 3 and 3A is that one class is composed of unsecured creditors of SCO Group and the other of unsecured creditors of SCO Operations.

12. The Amended Plan places the latter (the Pending Litigation claimants) in their own class, Class 4.[7] If and when the Class 4 claims are allowed at the end of the relevant litigation (i.e., upon settlement or when no further appeal is possible), the Amended Plan would pay Class 4 claimants, such as Novell, in five equal installments with "applicable" interest. (AP 10, 12, 14-16; ADS 28-29, 36.) If the Debtors determine, using undisclosed criteria, that they are unable to pay Class 4 claims in full when allowed later, even in five installments, the Debtors will instead cancel their existing stock (which shareholders can retain in the meantime) and turn over to this Court's Clerk new SCO stock to "pay" those creditors according to some undisclosed formula, stock that – for reasons Novell will explain presently – is certain to be worthless because SCO necessarily will be insolvent. (AP 10, 12, 14-16; ADS 28-29, 36.) The Amended Plan imposes this decidedly less favorable treatment on Class 4 general unsecured creditors without any explanation.

13. The Amended Plan permits existing shareholders to retain their stock; only if the Debtors determine in their (unexplained) judgment that they cannot pay Class 4 creditors will the existing stock be cancelled. (AP 10, 12, 14-16, ADS 28-29, 36.) Thus, although the Amended

[7] SUSE is not, however, placed in Class 4.

Plan says shareholders will get nothing on account of their equity (AP 15), that is simply false. Not only do they get to keep their shares until and unless there is a problem with payment of Class 4 claims, but it appears they have full rights in their shares. Nothing in the Amended Plan prevents them from selling or otherwise taking advantage of the stock in the meantime; indeed, the Amended Plan does not even expressly prohibit the payment of a dividend to shareholders while they hold the stock.

14. Knowing that the Amended Plan's discriminatory treatment of the Class 4 creditors will be controversial, the Debtors say categorically in the Amended Disclosure Statement that they *will* be able to confirm the Amended Plan over the objections of dissenting impaired class because, among other things, the Amended Plan satisfies the requirements of Code section 1129(b)(2)(B), which permits equity to retain its interests only if unsecured creditors are paid in full. (ADS 36-37.)

15. The Amended Disclosure Statement contains various income and expense projections, balance sheets and a liquidation analysis purporting to compare the outcome of the Amended Plan with the outcome of conversion of the cases to chapter 7.

16. The Amended Disclosure Statement gives a glowing, lengthy account of why the Debtors think that they will win their appeal against Novell, followed by a cursory caution that they might lose (ADS 12-15). The Debtors also assign unexplained minimum bids totaling $6 million to the various assets for the proposed auction (which is addressed only in the Sale Motion and is not linked to the Amended Plan), assets that the Debtors evidently value at next to nothing in the liquidation analysis.

17. The Amended Disclosure Statement opines (as does the Amended Plan) that there is "no guarantee" that creditors will do better if the Amended Plan is not confirmed. (ADS 45.). Indeed, at the top of ADS 45 the Debtors state that the only alternatives to confirmation of the Amended Plan are dismissal or conversion.

III. OBJECTIONS TO THE AMENDED DISCLOSURE STATEMENT

18. As has been their history in these cases, the Debtors fall far short of their disclosure obligations in the Amended Disclosure Statement. In addition, the Amended Plan appears unconfirmable on its face. For both these reasons, the Court should deny approval of the Amended Disclosure Statement.

A. Summary of Applicable Law

19. Code section 1125(b) provides that:

> An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan, or a summary of the plan, and a written disclosure statement approved, after notice an a hearing, by the court as containing adequate information.

In turn, section 1125(a)(1) defines "adequate information" as being:

> [i]nformation 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 [creditor of or investor in the debtor] of the relevant class to make an informed judgment about the plan . . . .

20. There are many general formulations concerning the purpose of a disclosure statement, and given the case-by-case analysis that courts must apply and the flexibility courts have in assessing proposed disclosure statements, it is not meaningful to try to provide more than a general account of that purpose. A typical explication is:

> The general purpose of the disclosure statement is to provide 'adequate information' to enable 'impaired' classes of creditors and interest holders to make an *informed* judgment about the proposed plan and determine whether to vote for the plan.

In re Phoenix Petroleum Co., 278 B.R. 385, 392 (Bankr. E.D. Pa. 2001) (emphasis added); *see also, e.g., In re Monroe Well Service, Inc.*, 80 B.R. 324, 330 (Bankr. E.D. Pa. 1987).

21. Notwithstanding the general nature of section 1125's test for the adequacy of a disclosure statement, certain observations are possible. Indeed, some courts have composed lists of subjects a disclosure statement generally should cover. Such a case is *In re Cardinal Congregate I*, 121 B.R. 760, 765 (Bankr. S.D. Ohio 1990). Among the considerations listed there that are of particular relevance to this case are: a chapter 7 liquidation analysis; valuations or *pro forma* projections of future performance; and "[i]nformation relevant to the risks being taken by creditors and interest holders." Accordingly, a disclosure statement should illuminate financial aspects of the plan. *See, e.g., In re Monroe Well Service, Inc.*, 80 B.R. at 330, 332("[s]ufficient financial information must be provided so that a creditor (likened to a 'hypothetical reasonable investor') can make an 'informed judgment' whether to accept or reject the plan"). In that regard, a central issue is the competence of a reorganized debtor's proposed management. *E.g., See In re Prussia Associates*, 322 B.R. 572, 584 (Bankr. E.D. Pa. 2005)

22. Finally, a court should not approve a disclosure statement if the underlying plan is unconfirmable on its face because approving the disclosure statement and proceeding to confirmation would be futile and a waste of judicial and other resources. *E.g., In re Phoenix Petroleum Co.*, 278 B.R. 385, 394 (Bankr. E.D. Pa. 2001) (holding that if the described plan is fatally flawed so that confirmation would not be possible, it is appropriate to consider such issues t the disclosure hearing stage); *In re H.K. Porter Co.*, 156 B.R. 16, 17 n.1 (Bankr. W.D. Pa. 1993) ("The Objectors correctly posit that it would be a waste of the Court's resources and of the estate's assets to allow a plan which is nonconfirmable on its face to proceed through the confirmation process."); *In re Cardinal Congregate I*, 121 B.R. at 764; *In re Monroe Well Service, Inc.*, 80 B.R. at 333.

B. Inadequacies of the Amended Disclosure Statement

23. The Amended Disclosure Statement is inadequate for many reasons, some of which no doubt will be noted by other objecting parties.

- The Amended Disclosure Statement fails to explain why the Debtors expect to make substantial profits in virtually no time following confirmation ($3.8 million in 2009, $19.2 million in 2010 and $22.5 million in 2011)[8] even though they have lost money incessantly, plan to continue what they acknowledge is a declining licensing business and plan to market essentially altogether new products employing a new strategy of pricing and discounts. The projections are even more questionable in light of the current national economy, which the Debtors omit to mention at all as a factor in their future. Yet, the ability of the Debtors to turn and sustain a real profit is of special importance to creditors, especially to Class 4 creditors, who will have to wait up to five years after their claims finally are allowed to get their payment in full (or risk being saddled with "new" SCO stock). Even Class 3 creditors, although receiving more favorable treatment, must be concerned about the Debtors' prospects since the Amended Plan recognizes the possibility that the Debtors may have to pay them in two installments.
- The Amended Disclosure Statement fails to project the value of the new SCO stock that would be distributed to Class 4 creditors. This is no minor omission. After all, the Amended Plan's terms themselves make it seem unlikely that the new stock will have any value at all. By the time the occasion for such a distribution arrives, as Novell suspects it will, it will be for the very reason that SCO will be unable to pay its debts to one or more Class 4 creditors after having spent considerable time and resources in litigation against Class 4 creditors while operating under a business plan of questionable strength. What will be left in SCO to give the new stock value under those circumstances? The shares cannot be worth more than what, if anything, is left of the Debtors' assets. In that connection, the Amended Plan and Amended Disclosure Statement fail to discuss

[8] Amended Disclosure Statement, Ex. 4, Income Statement.

how the old SCO stock will be cancelled and, more importantly, what the mechanism and formula will be for distribution of the new SCO stock to Class 4 creditors.

- The Amended Disclosure Statement fails to discuss adequately the Debtors' proposed auction of various assets in various important respects. It also conflicts with the Sale Motion.

    - ¶ For example, it does not make clear any of the following: what assets are being sold, describing them only very generally; what the terms of the sale are other than minimum initial bids (the basis for which the Debtors also do not discuss); and whether there is already a stalking horse bidder and, if so, upon what terms it has bid.

    - ¶ Similarly, the Amended Disclosure Statement fails to clearly provide projections (if it provides any such projections at all) reflecting the interplay between how the Debtors (and their creditors) will fare given the range of possible auction outcomes from sale of all the assets to sale of none. Clearly, the auction may affect the Debtors' "going forward" business model and ability to pay creditors.

    - ¶ By the same token, the Amended Plan's liquidation analysis does not clearly and separately encompass and value the assets that the Debtors hope to auction for at least $6 million. Such a separate evaluation should be part of the projections so that creditors can assess the Debtors' view of how a liquidation rather than the auction sale might affect the assets' value.

    - ¶ The language in the Sale Motion about the auction's being a "prerequisite" to the Amended Plan or any other plan conflicts with Amended Plan and Amended Disclosure Statement, which at no point state that success of the auction (at any level) is a *sine qua non* of the Amended Plan. By the same token, the Sale Motion does not condition any sale on confirmation of the Amended Plan. In fact, the Amended Plan says quite the opposite. (Amended Plan 13 ("If the Asset Sale(s) do not generate sufficient funds to satisfy Allowed Claims, Reorganized SCO shall reduce the annual base compensation paid to these officers by 10% as part of the go-forward business strategy."); ADS 38 ("[I]f the proposed going concern auction proves unsuccessful in the Debtors' business judgment, the Reorganized Debtors will continue their operations with the unsold assets and repay the remaining debts . . . over time in full.").)

- The Amended Disclosure Statement's discussion of the Pending Litigation is a sales pitch regarding the Debtors' prospects rather than a balanced disclosure of what the issues and arguments are that would enable the hypothetical creditor to make an *informed* decision about the Amended Plan. For example, the Amended

Disclosure Statement spends nearly four single-spaced pages on all the reasons that SCO will win its appeal of the Novell judgment, but only one two-line paragraph *pro forma* acknowledgment that it might lose. (ADS 12-15.) A similar comment is apropos of the Amended Disclosure Statement's discussion of the other litigation, such as that against IBM. (ADS 12-12, 15-16.) This not disclosure; it is manipulation of creditors who are being asked to cast their lot with the Debtors' decision to spend (and perhaps exhaust) resources on continuing the litigation.

- The Amended Disclosure Statement does not explain why it has separated unsecured creditors into three different classes, two of which receive identical treatment and the third of which receives materially less favorable treatment. Though those reasons may affect the Amended Plan's confirmability. This is so because the classification scheme smacks of class-rigging to obtain the vote of at least one, if not two impaired classes of general unsecured creditors (Classes 3 and 3A) by providing them with more favorable treatment than the general unsecured creditors in Class 4. *See, e.g., In re National/Northway Ltd. Partnership*, 279 B.R. 17, 29-30 (Bankr. D. Mass. 2002) (attempt to classify unsecured creditor's claim separately from other unsecured claims because creditor held third party collateral improper); *In re Holly Garden Apartments, Ltd.*, 223 B.R. 822 (Bankr. M.D. Fla. 1998) (creation of two classes of unsecured creditors that were treated identically symptomatic of class rigging); *In re Montclair Retail Center, L.P.*, 177 B.R. 663 (BAP 9th Cir. 1995) (separate classification of general unsecured creditors from deficiency claimant under plan that otherwise treated both classes the same is class rigging). Indeed, the Third Circuit, in *John Hancock Mutual Life Ins. Co. v. Route 37 Business Park Assoc.*, 987 F.2d 154, 158 (3d Cir. 1993), held that "it seems clear that the Code was not meant to allow a debtor complete freedom to place substantially similar claims in

separate classes" because "critical confirmation requirements . . . would be seriously undermined if a debtor could gerrymander classes." The *John Hancock* court ruled that a debtor could not construct a classification scheme designed to secure approval by an arbitrarily designed class of impaired claims, even though the overwhelming sentiment of the impaired creditors was that the proposed reorganization of the debtor would not serve any legitimate purpose. *Id.* at 159 ("Where, as in this case, the sole purpose and effect of creating multiple classes is to mold the outcome of the voting, it follows that the classification scheme must provide a reasonable method for counting votes. In a 'cram down' case, this means that *each class must represent a voting interest that is sufficiently distinct and weighty to merit a separate voice in the decision whether the proposed reorganization should proceed*. Otherwise, the classification scheme would simply constitute a method for circumventing the requirement set forth in 11 U.S.C. § 1129(a)(10) (1988).") (emphasis added).

- The Amended Disclosure Statement should not be permitted to state affirmatively that the Debtors *will* be able to confirm the Amended Plan over a dissenting impaired class. If the Debtors want to state that they *believe* that they will be able to confirm the Amended Plan over a dissenting impaired class, Novell has no objection for disclosure purposes, but the Amended Disclosure Statement's pronouncement on this point amounts to a statement of law on an issue that only the Court can decide.
- The Amended Disclosure Statement should be corrected to state accurately what the alternatives are to confirmation of the Amended Plan. Clearly, there are other possibilities, including confirmation of a different plan, including one proposed by a party other than the Debtors, or appointment of a chapter 11 trustee. Any of these other courses might lead to a resolution of the Debtors' financial issues that is acceptable to creditors. Indeed, at the bottom of that same page of the

Amended Disclosure Statement at the Debtors state the only choices or conversion or dismissal, the Debtors more correctly add as a choice confirmation of some other plan by them or by a third party. (ADS 45.)

- The Amended Plan and Amended Disclosure Statement should not be able to state that equity interests are impaired. Equity is keeping its shares, with the only restriction being that they will be cancelled if the Debtors cannot ultimately pay their creditors, a limitation that is essentially no different than the shareholders would experience under nonbankruptcy laws for an insolvent company that is effectively owned by its creditors.
- The Amended Plan and Amended Disclosure Statement fail to set forth any standards or criteria by which the Debtors will make certain key decisions, e.g., whether to cut back on costs and expenses, to invoke the distribution of new SCO stock to Class 4 creditors, and what the "applicable interest rate" is for delayed payment on Class 4 claims. This substitution of a "trust us" standard for an objective and intelligible one is the very epitome of inadequate information.
- The Amended Plan and Amended Disclosure Statement fail to make clear the fate of the Trust Funds.

C. The Plan Is Unconfirmable on Its Face

24. There is yet another reason why the Court should deny approval to the Amended Disclosure Statement in addition to its inadequate disclosure: approval would be futile because the Amended Plan plainly is unconfirmable. *See In re Phoenix Petroleum Co.*, 278 B.R. at 294; *In re H.K. Porter Co.*, 156 B.R. at 17 n.1, *In re Cardinal Congregate I*, 121 B.R. at 764; *In re Monroe Well Service, Inc.*, 80 B.R. at 333.

25. The Amended Plan will violate the absolute priority rule of Code section 1129(b)(2)(B) because equity is being allowed to retain its interests even though the Amended Plan contemplates that Class 4 creditors cannot be paid in full. *See In re Prussia Associates*,

322 B.R. at 595 ("fair and equitable" standard of Code section 1129(b)(2)(B) requires more than "abstract" mathematical provision for payment in full; plan that shifts risk of underpayment from junior class to senior class cannot be confirmed). Such risk shifting is obvious here. Though compliance with the absolute priority rule usually is an issue for confirmation, the Amended Plan's plain expectation that Class 4 creditors may not be paid in full and provision for "payment" of any shortfall with stock that will be virtually if not totally worthless because the Debtors' resources will be spent betrays a plan that also is unconfirmable on its face in allowing existing shareholders to retain their stock in the meantime.

IV. CONCLUSION

26. Facing the expiration of their exclusivity rights for plan confirmation after languishing in chapter 11 for nearly 1 1/2 years, the Debtors' overriding concern remains control of the Pending Litigation for as long as possible in the hope it will prove to be a windfall. The Amended Plan has been cobbled together to serve this purpose. The Amended Disclosure Statement has been compiled accordingly. It is filled with material that either simply tracks the Amended Plan or is *pro forma* that is "disclosure" in name only. For the reasons stated above, the Amended Disclosure Statement is inadequate and should be rejected.

Dated: February 18, 2009
Wilmington, Delaware

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