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: June 8, 2009 at 4:00 p.m. (prevailing Eastern time)
Hearing: June 15, 2009 at 2:00 p.m. (prevailing Eastern time)[1]

NOVELL'S REPLY TO THE DEBTORS'
OPPOSITION TO ITS MOTION FOR CONVERSION

Novell[2] hereby replies to the Debtors' Response to Motions to Dismiss or Convert [etc.] (filed June 5, 2009) (the "Opposition" or "Opp.").[3] The Opposition responds to Novell's Motion to Convert (filed May 11, 2007) (the "Motion") and similar motions (together with the Motion, the "Motions") filed by the United States Trustee on May 5 and IBM on May 11.

I. INTRODUCTION

1. The Motions ask the Court to convert the Cases to chapter 7 to preserve what little of the estates remains to pay creditors and to permit a neutral to assess the litigation against Novell, IBM and others that has been the driving force in these Cases. The Motions call the Court's attention to these salient facts: the Debtors have languished in chapter 11 for nearly two years without filing a confirmable plan; Debtors' estates are shrinking to the point where creditors, who the Debtors repeatedly claimed would be paid in full, will recover little unless the Debtors someday win big in the litigation; the absence of prospects for Debtors' "rehabilitation" (not merely "reorganization" as required by Code section 1112(b)(1)); and (as Novell urged) the

[1] The original hearing date of June 12, 2009 was continued to June 15 at the Debtors' request.

[2] Terms not defined in this reply will have the meanings ascribed to them in Novell's Motion for Conversion.

[3] Although the Opposition was due by 4:00 p.m. Eastern Daylight Time on June 5, the ECF notification shows that it was not actually filed until 11:46 p.m. Hence, instead of receiving the Opposition by early afternoon on June 5, Novell did not have an opportunity to review it until the morning of June 6, a Saturday.

Debtors' unmistakable gross mismanagement, represented by their wasteful operations and repeated missteps as their management tried to retain personal control of the litigation by fostering the illusion of an operating business that could be rehabilitated.

2. In the Opposition, Debtors: (1) claim that they have a thriving business that is not losing *too* much money — by misrepresenting their financial performance and offering a smattering of hearsay purported testimonials — *even as they admit they have never made a profit, in or out of bankruptcy* (Opp. 6); (2) elevate speculation to fact by essentially assuming both that they will win the Tenth Circuit appeal of Novell's victory in the litigation and that such a reversal will *ipso facto* rehabilitate them; and (3) try to dismiss their mismanagement by saying they meant well while acknowledging the "unhappy details" of their regime (Opp. 39).[4]

3. Alternatively the Debtors argue that their situation constitutes "unusual circumstances" under Code section 1112(b)(2) so that the Court should not order conversion even if it finds "cause" under section 1112(b)(1). Here, the Debtors' grounds essentially are nothing more than a re-hash of portions of their futile arguments in opposition to the Motions. Finally, evidencing yet again (and more incontestably than ever) management's desperate desire to retain personal control over the litigation at any cost, the Debtors ask the Court, if it finds "cause" under section 1112(b), to do *anything* but convert; since conversion would put the

[4] Right at the outset of the Opposition, the Debtors also argue, in essence, that the Court should deny the Motion because IBM and Novell are evil players having in mind only to squash the Debtors, while the Debtors, by contrast, are only selflessly looking out for others. (*See, e.g.*, Opp. 1-4.) Of course, even if its premises were true, which Novell disputes, this argument is irrelevant to the merits of the Motions: the Debtors' estates either are or are not diminishing, they either do or do not have a prospect of rehabilitation, and they either have or have not mismanaged the Cases. The Debtors' accusations do not explain why the Motions ask only for conversion rather than dismissal when the latter would allow Novell to execute on its judgment forthwith. Nor do they square with the United States Trustee also moving to convert; as the Debtors themselves admit (Opp. 4), that party's motives cannot be impugned (evidently, they credit that office with more integrity than any possible chapter 7 trustee). Similarly, the Debtors' reliance on the lack of participation by other creditors in the Cases does not mean that they speak for those other creditors; there are all sorts of other possible explanations for this silence, including that the other creditors believe that Novell and IBM are pushing the agenda they would follow or that they are loathe to put money into being active in a case that they see as a looming failure. Notably, despite the Debtors' suggestion that the creditors will support them in opposing the Motions, no such support has materialized (although a *shareholder* filed a letter in support of the Debtors on June 8, 2009.

litigation in the hands of a chapter 7 trustee who, they claim, would abandon his fiduciary duties by entering into (ill-considered) "*de minimis*" settlements of the litigation (Opp. 47).

4. In assessing the Opposition in light of the Motions, the Court should bear in mind that if it finds "cause" under section 1112(b)(1), it *must* act unless it finds "unusual circumstances" and that on the latter issue the Debtors have the burden of proof. (*See* Motion 10-11.)

II. DIMINUTION OF THE ESTATES AND REHABILITATION

5. As Novell pointed out in the Motion, the issue here is whether the Debtors are gambling at the creditors' expense (Motion 12). They are.

A. Diminution of the Estates

6. The Debtors contend in their Opposition that they are not losing nearly as much money as the Motions argue. According to Debtors, the losses they have suffered since their filings in September of 2007 have not been "substantial." They arrive at this conclusion through two devices. First, they mischaracterize what the MORs show. Next, they argue that the (inaccurate) admitted losses are not substantial because they must be compared to their prepetition performance during which, Debtors admit, they made money only during one quarter in 2003 (Opp. 6).[5]

7. Initially, it is worth observing that the Debtors' theory that the Court should deny the Motions even though the Debtors admittedly are doing badly because the Debtors are (allegedly) not doing as badly as the moving parties suggest is an astonishing argument in itself. But, in fact, the Debtors are doing far worse than they admit.

[5] It bears noting that the quarter to which Debtors refer is the quarter Debtors took in $2.5M in money from Sun that the Utah District Court has held SCO owed a fiduciary duty to remit to Novell.

1. Postpetition Losses: the Real Dollar Figures

8. According to the Debtors, their losses are not as great as they appear and they should be able to continue their business in its current incarnation. However, even a cursory examination of their analysis shows how wrong they are.

9. The Debtors reasoning is as follows: they say the $8,652,000 loss since the beginning of the bankruptcy as stated in the MORs to which Novell referred in the Motion should be reduced by (1) non-cash expenses, apparently because these are just accounting losses not "real" losses; (2) reorganization expenses, since these have nothing to do with ongoing operations; and (3) the costs of the Novell trial, again because this has nothing to do with ongoing operations. They then calculate that the "real" losses are only $29,500 per month as follows:

Actual losses	$8,652,000
Less	
Non cash expenses	($4,295,000)
Reorganization expenses	($2,305,000)
Costs of Novell trial	($1,491,000)
"Real" losses	$561,000
Number of months	19
Average loss per month	$29,500

But almost every number in Debtors' calculation is incorrect or suspect:

- Contrary to the Debtors argument, the loss of $8,652,000 set forth in the MORs *expressly* represents operating losses *before* Reorganization Items.[6]. As such, Reorganization Costs cannot be subtracted from the $8,652,000 loss.
- The Debtors offer no support for the supposed value of non-cash items ($4,295,000) other than a vague reference to the MORs. Yet a scouring of the operating expenses and related detail in the MORs fails to unearth information

[6] The MORs scheduled losses *including* Reorganization Items at $11,521,000.

indicating that non-cash expenses reach anything close to the Debtors' supposed total. Generally, non-cash items consist of things like depreciation, amortization, bad debt expenses and write-offs of property or long term assets due to impairment arising from general or specific economic events. The MORs show that expenses include depreciation ($208,000), bad debts ($77,000) and impairment of assets ($253,000), totaling $539,000. Even assuming that it is appropriate for the Debtors to exclude these non-cash expenses in their analysis, they still have not pointed to anything in the MORs justifying the additional $3,756,000. Thus, Debtors' $4,295,000 "non-cash items" total must be viewed with considerable skepticism.

- Costs of the Novell *trial* are claimed at $1,491,000. Again, there is no evidence to support this in the MORs. Further, this amount is particularly problematic as total non-bankruptcy professional fees as shown on the MORs total only $1,060,000.

10. Simply correcting the actual loss number and adjusting for the Novell trial costs to a figure consistent with the MORs[7] yields the following:

Actual losses	$8,652,000
Less	
Non-cash expenses	($4,295,000)
Costs of Novell trial	($1,060,000)
"Real" losses	$3,297,000
Number of months	19
Average loss per month	$173,500

11. The resulting average monthly loss of $173,500 (or over $2 million per year) is more than 5 times higher than the $29,500 average monthly loss claimed by Debtors[8]. Further, this

[7] Even this sum gives the Debtors the benefit of the doubt since it assumes that *all* non-bankruptcy professional costs relate to the Novell trial.

calculation would substantially change if ultimately it were determined that there was no support for the full amount of non-cash expenses in the MORs. For instance, if the $4,295,000 were reduced to $539,000 described above, the average monthly loss would increase to $371,200 (or almost $4.5 million per year), more than 12 times the amount claimed by the Debtors.

12. Most importantly, these losses must be viewed in the context of the Debtors' cash position. The MORs show total cash of $2,368,000[9]. Cash has been reduced by over $3.5 million from the $5,914,000 reported as of the Petition Date[10]. The total available cash of $2,368,000 contrasts to total postpetition current liabilities of $4,841,000, not to mention prepetition liabilities of $6,935,000. Revenue is quickly decreasing and accounts receivable are down 55% (to $1,382,000) since the Petition Date. Almost two-thirds of the Debtors' accounts payable are more than 90 days past due.

13. As these figures show, it also simply is not true, contrary to what the Debtors contend, that they are paying their postpetition debts in due course. Only by not paying reorganization expenses have they been able to pay other debts currently. Moreover, it is irrelevant to the current issue that they are paying their debts as they come due postpetition if in doing so they are not also equally replenishing their cash. Diminution of the estate is a balance sheet issue, not a current item liquidity issue; it is concerned with how the creditors will fare in the end, and in this instance creditors' fate is worsening by the day.

2. Postpetition Losses: Substantial

14. The Debtors' claims that these losses are not substantial are simply wrong, as the foregoing analysis reflects. Nor is it any comfort that the Debtors have *always* lost money, that, as the Debtors contend, "Compared to the Debtors' losses before bankruptcy, their losses are

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[8] While there might be quibbling over some of the numbers, simply adjusting the calculation to remove only the inappropriately included Reorganization expenses yields a monthly loss of $150,800, many multiples of the $29,500 monthly losses the Debtors claim in the Opposition.

[9] $729,000 is classified as unrestricted; the remaining is classified as restricted.

[10] Almost $3.3 million of this decrease relates to cash classified as unrestricted.

hardly substantial." (Opp. 6.)[11] In fact, the significance of the fact that a debtor continues to lose money even with the protections of bankruptcy is quite the opposite. It is common sense that companies that have always lost money and then lose even more money in bankruptcy are not companies that hold promise for their creditors. Indeed, the prior question is whether the Debtors' formula of comparing prepetition losses to postpetition losses necessarily is the correct one. (Opp. 6.) The Debtor provides absolutely no support for that view.

B. Rehabilitation

15. "[R]ehabilitation" means, as Novell explained in the Motion, to "'put back in good condition and reestablish on a sound basis.'" (Motion 13.) "'[V]isionary schemes'" and "unsubstantiated'" hopes do not satisfy this heightened standard. (Motion 13.) Yet, that is all the Debtors offer; indeed, the problem with these Cases is that that is all the Debtors have *ever* offered.

16. Though taking many pages, the essence of the Debtors' argument is that *if* they win their appeal of the Tenth Circuit argument in the Novell litigation, they will be rehabilitated because customers and investors will flock to them. They all but assume they will win the appeal, and spend many pages re-arguing the appeal later in the Opposition to try to convince the Court of the merits of their case. Novell will address the latter below, although briefly. Here, it will make a few points specifically directed at the Debtors' rehabilitation argument.

17. What is the evidence that all will be well with the Debtors if they win the appeal? There is none. The Debtors simply assert that this will be so. This bald claim is reminiscent of one they made a year ago when asking for one of their four exclusivity extensions: that once investors and customers knew that the Debtors' appeal of Novell's judgment in the litigation was on file, people who were holding back would suddenly come out of the woodwork to make a reorganization plan possible. (Third Motion by Debtors under Section 1121(d) for Extension of Exclusivity Deadlines (filed 8/11/2008, Dkt. No. 525) 5-6, 9-10; Transcript of 9/16/2008 Hrng.

[11] And, as just observed, the Debtors' loss figures are materially understated.

(filed 9/26/2008, Dkt. No. 567) 7:10-8:11.) As the Court knows, however, that claim was never heard of again. There were no supporters or investors, no sudden improvement in the Debtors' business, and no plan. There was just silence until the Debtors' desperate defensive filing of the wholly illusory Amended Plan as their exclusivity ran out yet again. There is no reason to ascribe any greater accuracy to the Debtors' current claim about the effects of reversal.[12]

18. In this connection, moreover, it is important to remember that the *best* the Debtors can achieve in the appeal is reversal for re-trial. Thus, "winning" the appeal would mean, at most, that the Debtors face another long period of uncertainty and expense. That is the most that the Debtors and their phantom allies can expect. That is not much.

In short, a reversal in August in the Tenth Circuit appeal, should that even happen, does not equate to the Debtors' *ipso facto* being able to rehabilitate themselves.

III. THE LITIGATION AND THE APPEAL

19. The Debtors argue that reversal will mean rehabilitation by trying to convince the Court that their claims against Novell, IBM and others are meritorious and, as subtext, that they will therefore both win the appeal and any retrial, generating "billions" of dollars.

20. This is not the occasion for this Court to try to predict the outcome of the appeal, much less the litigation as a whole. There is far too much for the Court to try to digest and understand about this years-old litigation in the time available. The complexity confronting the Court in any such enterprise is reflected in the fact that the Debtors employ 22 pages in their Opposition to try to make their point. However, for the Court's information and to demonstrate the weakness of the Debtors' claims, Novell will provide below a short account of the litigation.[13]

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[12] To the extent that the Debtors mean their Exhibit 1 to support the case that they have a real business to preserve, they have offered nothing of substance. These "testimonials" are few and hearsay in response to undisclosed communications from the Debtors. Moreover, one easily can imagine customers highly satisfied with a product on which the vendor is losing money.

[13] To the extent that the Court wishes to confirm that the following description accurately summarizes the positions that Novell has taken, Novell asks the Court to take judicial notice of its brief in the Tenth Circuit appeal (Case No. 08-4217, filed 4/9/2009.).

21. In the 1980s, AT&T developed and licensed UNIX System V ("SVRX") to various companies, who developed their own UNIX "flavors." In 1993, Novell paid over $300 million to purchase UNIX System Laboratories, the AT&T spin-off that owned the UNIX copyrights and licenses. In 1995, Novell decided to sell its UNIX business to Santa Cruz, another UNIX vendor. Because Santa Cruz did not have sufficient cash to buy all of Novell's UNIX assets, the Assset Purchase Agreement (the "APA") was structured so that Novell retained certain UNIX-related rights and received other consideration. *Santa Cruz paid no cash.* Instead, it transferred shares of its stock worth approximately $50 million and promised a portion of future UnixWare revenue exceeding certain targets (which were not met).

22. To bridge this considerable gap between the value of what Santa Cruz wanted to buy and the purchase price of $50 million in Santa Cruz stock — a differential of hundreds of millions of dollars — Novell reduced the value of what it conveyed by retaining significant rights, including 95% of license royalties from SVRX (which amounted to $50 million in 1995 alone) and the UNIX copyrights on which that SVRX revenue was based. To protect those license royalties, Novell also retained extensive control over SVRX licenses.

23. The negotiations of the APA and subsequent amendments confirm Novell's retention of rights. As reflected in the plain, written drafting record, Santa Cruz twice asked for the transfer of UNIX copyrights, and Novell twice refused. An early draft of the APA included "all . . . copyrights" in the list of assets transferred from Novell to Santa Cruz. Novell refused to make such a transfer, instead editing the APA to place "[a]ll copyrights" on the list of assets <u>excluded</u> from transfer and editing the list of included "intellectual property" to transfer only "[t]rademarks UNIX and UnixWare as and to the extent held by Seller." That language became the final, executed APA, thereby excluding "all copyrights" from the assets to be transferred.

24. At closing, Novell and Santa Cruz executed an Amendment No. 1 to the APA, which edited the list of transferred and excluded assets, but left the exclusion of copyrights in place. As a consequence, the bill of sale executed at closing — the only document that ever transferred any assets between Novell and Santa Cruz — excluded all copyrights.

25. Later, the parties negotiated an Amendment No. 2. Again, Santa Cruz offered language suggesting that "all copyrights" should transfer. Novell rejected Santa Cruz's proposal, stating that Novell would confirm only Santa Cruz's right to use Novell's copyrighted UNIX and UnixWare products, but would not transfer ownership of any copyrights to Santa Cruz through Amendment No. 2. In the end, Amendment No. 2 revised the schedule of excluded assets to read: "All copyrights and trademarks, except for the copyrights and trademarks owned by Novell as of the date of the Agreement required for SCO to exercise its rights with respect to the acquisition of the UNIX and UnixWare technologies." The parties never executed a bill of sale or any other document purportedly transferring any copyrights to Santa Cruz.

26. In May 2001, SCO purchased Santa Cruz's UNIX business. Santa Cruz purported to transfer its interest in UNIX and UnixWare copyrights to SCO, but warned SCO in the accompanying representations and warranties that Santa Cruz "may not be able to establish a chain of title from Novell." SCO announced that its acquisition of Santa Cruz's UNIX business made SCO "the largest Linux company in the world," and that the deal would enable SCO to "broaden and validate both the Linux and UNIX industries and communities, by providing open access to its unified Linux and UNIX technologies."

27. However, after hiring a new CEO (Darl McBride) in 2002, SCO embarked on a new business model called "SCOsource": abandoning its open access model, SCO claimed that Linux contained SCO's copyrighted SVRX code. SCO attempted to extract license fees, suing targets if they did not give in. SCO's new "SCOsource" campaign required SCO to establish title to UNIX copyrights, despite Santa Cruz's warning. SCO hired a consultant, Michael Anderer, to advise SCO on its intellectual property position. Anderer concluded that Santa Cruz's "asset purchase" from Novell "excludes all patents, copyrights, and just about everything else." Anderer warned SCO, "We need to be really clear about what we can license. It may be a lot less than we think."

28. SCO thereafter repeatedly contacted Novell seeking a transfer of copyrights so SCO could pursue its new business model. Novell rejected SCO's requests. Despite this rejection,

SCO launched a highly public campaign, claiming that Linux infringed SCO's alleged UNIX rights. SCO sued IBM and others, and sent threatening letters to Novell and more than 1,000 other Linux users. Novell responded that SCO had failed to provide "meaningful notice of any allegedly infringing Linux code," and that UNIX copyrights were owned by Novell, not SCO. Other Linux users complained about SCO's vague claims. Merrill Lynch noted that "nearly all the articles and papers published in connection with this very public dispute categorically reject SCO's allegations of intellectual property ownership and infringement," and "SCO was even fined last year by a German Court for continuing to claim that Linux violated SCO's intellectual property." Industry analysts also reacted skeptically, noting that SCO's claims were "uniformly without merit."

29. SCO then sued Novell for "slandering" the title to copyright SCO claims to own. As this Court is aware, the Utah District Court categorically rejected those claims. SCO takes great pains to sub-divide its problems on appeal, arguing that a victory on any subdivision will turn the company around. (Opp. at 10-15.) Nothing could be further from the truth. For SCO's SCOsource "sue Linux users" business model to work, SCO must defeat every challenge it faces. That precipitously uphill battle includes at least the following insurmountable obstacles:

- *SCO must show it owns the SVRX copyrights.*

30. As noted above, the APA excludes "all copyrights" from transfer. Amendment No. 2 suggests only that SCO might obtain the copyrights it "requires." SCO cannot persuasively articulate why it "requires" any copyrights now — 14 years after the APA was signed — and cannot point to any document that ever actually transferred copyrights to Santa Cruz or SCO from Novell.

31. In the hopes of obscuring that stark reality, SCO offered testimony from various witnesses who claim that, despite the explicit exclusion of "all copyrights" from the APA, the parties intended to transfer UNIX and UnixWare copyrights to Santa Cruz. (Opp. at 23.) None of these witnesses was familiar with the drafting of the actual APA language, and none had any familiarity with Amendment No. 2. In opposition, Novell presented testimony from three people

who were actually involved in the drafting and negotiation of the APA and its amendments. Each testified that copyrights were deliberately excluded from the transfer to protect Novell's SVRX royalty stream and other interests. The only SCO witness who recalled drafting the APA or its amendments admitted in a sworn declaration that SCO's claim that it had acquired ownership of the UNIX copyrights was "incorrect" and that "neither Santa Cruz nor Novell ever identified the specific copyrights . . . for which a transfer of ownership was 'required.'"

32. After an exhaustive survey of evidence, the district court concluded that "SCO has not provided evidence from witnesses on the Santa Cruz side of the transaction with respect to their review of the asset schedules. In fact, there is no evidence from any of Santa Cruz's outside counsel and very little evidence from Santa Cruz's in-house legal department regarding the drafting of the APA." The district court found that the APA, as originally executed, unambiguously excluded "all copyrights" from transfer. The district court also found that the APA, as amended by Amendment No. 2, was not intended to transfer copyrights and did not meet the standards for a written transfer of copyright imposed by 17 U.S.C. § 204(a). To prevail against those rulings, SCO must overcome the plain language of the agreements and the testimony of those most familiar with the drafting of that language.

- *SCO must show that Linux infringes those SVRX copyrights.*

33. From the start, Novell has challenged SCO to demonstrate its dubious claim that Linux infringes enforceable SVRX copyrights. At every turn, SCO has failed to do so. SCO's CEO Darl McBride originally claimed there were "millions of lines" of infringing code in Linux. The Utah District Court has shown considerable skepticism toward those claims to date, striking the vast majority of SCO's infringement case against IBM. What is left in *SCO v. IBM* is roughly 300 lines of code, less than one 5,000th of a percent of the Linux kernel. IBM's pending motions for summary judgment will likely dispatch that tiny remainder of SCO's infringement case.

- *SCO must show it has the contractual authority to pursue IBM.*

34. The SVRX royalties were critical in bridging the gap between what Novell wanted to receive under the APA and what SCO could afford to pay. To protect those royalties, Novell retained broad powers concerning SVRX license administration. Novell retained "sole discretion" to require SCO to "amend, supplement, modify or waive any right" under "any SVRX License" in "any manner or respect," and to waive such rights on SCO's behalf if SCO failed to do so. SCO must show that Novell's broad, exclusive discretion somehow does not extend to invalidate SCO's supposed revocation of IBM's paid-up SVRX license — a license which is itself "irrevocable" by its express terms.

- *SCO must prevail in the SUSE arbitration.*

35. SCO entered into a "UnitedLinux" joint venture with SUSE (later merged with Novell), through which it gave SUSE (and other major Linux vendors) a "worldwide and perpetual license" to distribute and sub-license Linux. To pursue any copyright claims against Novell and any other UnitedLinux licensee, SCO will need to somehow avoid the plain language of the UnitedLinux license and prevail at the currently-stayed SUSE arbitration.

- *SCO will need to prove its purported damages.*

36. SCO claims $135-$216 million in damages from Novell and over $1 billion from IBM. A full rebuttal of these astounding figures exceeds the boundaries of this brief. It bears at least noting that, in 2003, SCO purported to license to Sun the very same rights it claims are otherwise worth billions of dollars — the right to release an open-source operating system SCO claims is based on its copyrighted code. That license cost Sun just $10 million, not $1 billion.

IV. THERE ARE NO UNUSUAL CIRCUMSTANCES

37. The Debtors argue that "unusual circumstances" relieve the Court of granting the otherwise mandatory relief the Motions seek if the Court finds "cause" under section 1112(b)(1). In essence, the Debtors argue that these Cases present "unusual circumstances" because they have equity in their alleged billions of dollars of claims against Novell and others and because

other creditors are not clamoring for conversion or support the Debtors' opposition. These grounds do not pan out upon inspection.

38. *First*, the Debtors have not established that they have equity in the form of billions of dollars of claims. All that is certain is that the Debtors lost on their key claims against Novell at trial and that the Novell litigation is now on appeal to the Tenth Circuit. At most, everything else about the Debtors' claims is speculative. If any conclusions can be drawn about those claims, they undercut rather than favor the Debtors. After all, the most obvious fact at the moment is that Novell *won*. Furthermore, if the Debtors' prospects for recovering billions of dollars were so marvelous, they would have attracted investment and even confirmed a plan based on the potential litigation outcome (as they have tried unsuccessfully to do) long ago.

39. *Second*, the documents in Exhibit 1 not only are hearsay prepared in response to undisclosed communications from the Debtors, but they do not expressly support the Debtors' opposition to the Motions. Generally, all they say is that the authors like the Debtors' products. However, to the extent that the interests of customers are relevant to the Motions, there is another solution instead of denying the Motions. If the relevant parts of the Debtors' business really hold some promise for some profit some day, a chapter 7 trustee will be able to sell them for the benefit of the estate and those customers. Indeed, it may be the best thing for those customers were these parts of the business divorced from the frivolous litigation that has consumed the Debtors for the last six years.

40. The Debtors' citations to various cases to support their position are inapposite. For example, in *In re Orbit Petroleum, Inc.*, 395 B.R. 145 (Bankr. D.N.M. 2008), the Court found "unusual circumstances" for a Debtor that had proposed a full payment plan based upon a sufficient loan from its parent company. Here, there is no plan and, despite the Debtors' assertions that their claims will make everyone, creditors and shareholder alike, "wealthy," no demonstrated source of funding (reflecting that third-parties have no such confidence in the

Debtors' prospects).[14] Moreover, the debtor in that case had been in chapter 11 only three months when the motion to dismiss or convert was filed, not the 20 months that have passed in this case.

41. Similarly, in *In re New Towne Development, LLC*, 2009 Westlaw 1110434 (Bankr. M.D. La. April 24, 2009), a case arising from intra-company disputes that was begun by involuntary petition, the court found significant equity in the debtor's real property after expert testimony by appraisers. That case differs from this one in that it was only a month old when the Court ruled on the motion to dismiss or convert and it involved an asset – real property – in which there are recognized standards for determining whether there is equity. These Cases, by contrast, are nearly two years old and the Debtors' claim that it has equity in its principal asset, its alleged claims, is inherently speculative, as well as contrary to the result in the district court. Notably, the *New Towne* court also commented that it would have dismissed the case as a bad faith filing in the first instance had it been commenced by a voluntary petition by the debtor. Hence, if there were unusual circumstances in that case, it clearly was just barely so.

42. In short, it is one thing to claim "unusual circumstances" when dealing with a young, untested case where there is demonstrable value and even a plan; it is another when, as in these Cases, the proceeding is aged by bankruptcy standards, has failed to produce a confirmable plan with essentially the same pitch as the Debtors have been making since the Cases commenced, and depends on a speculative asset. There are no "unusual circumstances" here. There is only an attempt to speculate at the creditors' expense. After all, if the Debtors' rosy dreams about how the litigation will end prove mistaken, who will compensate the creditors, Novell included, for loss in their recovery from these Cases that further diminution of the estates will cause? Section 1112(b)(1) prohibits that.

[14] The Court will recall that the SNCP Plan also involved loans, but the availability and terms of those loans were undisclosed and unsubstantiated. The SNCP Plan therefore died a well-deserved death.

V. GROSS MISMANAGEMENT

43. In the Motion, Novell argued that there was cause for conversion of the Cases based on gross mismanagement, consisting of the Debtors' failure to accomplish anything in these Cases except waste money in their pursuit of retaining control of the litigation. The Debtors' response is little more than to claim that what happened wasn't really so bad and that in any case, they meant well.

44. But as the Debtors themselves acknowledge, their time at the wheel has been characterized by "unhappy circumstances." To review the bidding, the Debtors: (1) brought the York Sale Motion, which was premature not only in that the Debtors did not know what they had to sell, but lacked any definitive documentation with York; (2) brought the York Compensation Motion, which would have made a substantial gift of the Debtors' limited cash to York and which the Debtors have yet to abandon; (3) brought the SNCP Plan, which again was based on incomplete (indeed, virtually nonexistent) documentation and lacked any evidence of the financial wherewithal of SNCP; (4) brought the SNCP Compensation Motion, which, like the York Compensation Motion, was designed to entice SNCP to help them put *some* plan in front of the Court, no matter how skeletal, by giving SNCP a very large upside just for being there; and (5) brought the Amended Plan and the Auction Sale Motion to beat the exclusivity deadline that it had promised it would meet, but which proved to be without substance.

45. These proceedings have cost the estate and the parties wasted time and wasted dollars. None of them contributed towards prosecution of the litigation which, by the Debtors' admission in the Opposition, was *the* reason they filed these Cases. A chapter 7 trustee could have accomplished everything that the Debtors could have accomplished with the litigation without wasting other estate resources. After all, the estate had its litigation lawyers on a contingency arrangement, and they had every incentive to see the litigation through as well.[15]

[15] Creating a straw man that the moving parties are arguing that the Cases never should have been brought to protect the litigation to begin with, the Debtors tout how they have reduced Novell's claim in the litigation. But the Motions make no such argument. More importantly, that result was accomplished in the litigation, not in these Cases. A chapter 7 trustee represented by counsel could have accomplished the same thing.

46. Finally, to top things off, underscoring how these Cases will continue to be managed if the Court denies the Motions, the Debtors have gone to the expense of preparing and filing objections to the claims of Novell, SUSE, IBM and Red Hat in connection with the Opposition. Yet, it has been clear all along that the Debtors eventually would do so. The question, therefore, is why spend money for those filings now merely to emphasize to the Court that those claims are disputed for purposes of the Motions? If the Court leaves current management in charge, this latest decision further shows, the beat will just go on: management will continue to make bad choices in its desire to hang on to personal control of the litigation. By comparison, a neutral – a chapter 7 trustee – should bring an unbiased eye towards evaluating the litigation. In the meantime, the Debtors' money-losing operations will cease.

47. That the Debtors may have meant well does not improve what must be a harsh assessment of their poor judgment. Nor does it put back in the creditors' pockets the money the Debtors have wasted in the Cases and will continue to waste if their management is left in charge.

VI. NATURE OF THE RELIEF

48. Based on the Motions and the Opposition, and Novell's discussion in this reply, Novell believes that there is "cause" to convert the Cases as the Motions seek. If the Court agrees, it *must* convert, as the Motions request, dismiss, or provide some other remedy.

49. The Debtors beg the Court to do anything but convert based on their theory that a chapter 7 trustee will, in essence, sell out the estate for a *de minimis* settlement. The Court should reject that argument out of hand. The Debtors also contend that everyone else will be better off with anything but conversion. Much of this argument depends on the very reasoning that the Court will have rejected in finding "cause" (e.g., that the Debtors will win big in the litigation and that other creditors and customers favor and will be happier with some other result). Here, Novell will offer just a few comments on the other possible relief urged by the Debtors: the appointment of a chapter 11 trustee, the appointment of an examiner, and dismissal.

50. *Chapter 11 Trustee*. A chapter 11 trustee would be a neutral just like a chapter 7 trustee. To that extent, such an alternative to the appointment of a chapter 7 trustee neither benefits nor harms the Debtors or Novell and the other moving parties. But Novell believes that conversion to a chapter 7 is more appropriate because it believes that it has shown that the rest of the so-called business will just continue to lose money. There simply is no reason to postpone shutting down these wasteful operations (including their compensation to management). A chapter 7 trustee can always seek to employ former management or key employees to the extent he or she needs them for advice on the litigation or how to sell the other assets (if they are saleable).

51. *Examiner*. The appointment of an examiner completely misses the point. What is needed is to shut down the unprofitable operations and a neutral to assess the litigation as it goes forward; that is, what is needed is for someone *to be in charge* who is not burdened by current management's baggage and desire to stay in control of the litigation by keeping up the appearance of real non-litigation business activities. An examiner does not fit the bill.

52. *Dismissal*. Perhaps the only appropriate remark by Novell about this radical suggestion — one even Novell did not make in its Motion — is that it illustrates again the point that management of the Debtors is concerned above everything else with remaining in control of the litigation. As the Motion shows, that recipe has failed miserably in these Cases.

VII. CONCLUSION

53. Nothing in the Opposition undercuts the demonstration by Novell and the other parties bringing the Motions that it is time to change the course of these Cases by putting a neutral in charge and stemming the Debtors' continuing losses. Indeed, all the Opposition does is make it more clear that as long as current management remains, there will be no improvement in the handling of these Cases.

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