

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:

The SCO GROUP, INC., et al.,

Debtors.

Chapter 11

Case No. 07-11337 (KG)

(Jointly Administered)

Hearing Date: June 15, 2009 at 2:00 p.m.

Objection Deadline: June 15, 2009 at 10:00 a.m.

Re: Docket No. 784

**OBJECTION OF INTERNATIONAL BUSINESS MACHINES CORPORATION  
TO DEBTORS' MOTION TO FILE APPENDIX UNDER SEAL AND REQUEST TO  
STRIKE ANY ARGUMENT BASED ON SUCH DOCUMENTS**

IBM,<sup>1</sup> a creditor and equity security holder in these Chapter 11 cases, by its undersigned counsel, submits this objection to the Debtors' motion (the "Motion") [Docket No. 784] to file under seal an appendix to the Debtors' response<sup>2</sup> to motions to dismiss or convert and respectfully requests that the Court preclude the filing of the confidential documents and strike from the Debtors' Response any arguments based on such documents. In support thereof, IBM states as follows.

**PRELIMINARY STATEMENT**

The Debtors seek to file under seal a number of unidentified confidential IBM documents. The filing of these documents, as to which inadequate identifying information is provided, is unnecessary to resolution of the Motion to Convert to which they purportedly relate. Moreover, the Debtors' application violates the protective order pursuant to which the documents in question were produced. Thus, the Debtors' Motion should be denied. Any

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<sup>1</sup> Capitalized terms used in this memorandum have the meaning ascribed to them in the *Motion of International Business Machines Corporation for an Order Converting the Debtors' Chapter 11 Bankruptcy Cases to Cases Under Chapter 7 of the Bankruptcy Code* (the "Motion to Convert") [Docket No. 751].

<sup>2</sup> *Debtors' Response to the Motions to Dismiss or Convert Filed by United States Trustee, International Business Machines Corporation, and Novell, Inc.* (the "Response") [Docket No. 778].

argument based on confidential IBM documents should be stricken and not considered as part of the Debtors' Response.

### ARGUMENT

1. IBM, Novell and the U.S. Trustee have all separately moved to convert these cases to proceedings under Chapter 7. In support of their opposition to those motions, the Debtors seek to file under seal an appendix that purportedly "cites numerous IBM internal documents that IBM designated as confidential in the *SCO v. IBM* litigation." (Mot. ¶ 9.) The Debtors' Motion should be denied for at least the following reasons.

2. First, the Debtors failed to serve the appendix in question on IBM, as required by the rules of this Court. See Local Bankruptcy Rule 2002-1(b) (requiring service on "all parties whose rights are affected by the motion"). While we can guess as to the contents of the appendix, Debtors' Response and Motion fail to adequately identify the documents at issue. For this reason alone, the Debtors' Motion should be denied.

3. Second, the Debtors do not say, in either their Motion or Response, the reason they need to file the appendix. Presumably, they intend to support their argument on the merits of their disputed claim against IBM described in section I.A.5 of the Response. The Debtors also do not say, in either their Motion or Response, how the merits of their claim against IBM is relevant to their opposition to the Motion to Convert. Presumably, they intend to argue the merits of litigation pending in the Utah District Court to support their argument that a victory in that litigation would provide grounds to allow the Chapter 11 cases to continue. But they never quite say. The Debtors should not be permitted to require either IBM or this Court to divine some connection between the unidentified documents in the appendix, the merits of the Utah litigation and the viability of the Debtors' Chapter 11 cases to show that the proffered unidentified evidence is relevant. The Debtors must make the

connections and the showing. They have not done so, and on that ground alone, the Debtors' Motion should be denied.

4. However, even giving the Debtors' the benefit of the doubt and presuming the connections noted above, the proffered unidentified evidence is not relevant to the Motion to Convert. Although the Response promises a quick decision from the Court of Appeals for the Tenth Circuit in the Novell litigation, it does not and cannot make any such promise for the IBM litigation. The Utah District Court has not yet decided motions for summary judgment in the IBM litigation. If the District Court does not grant summary judgment, trial is many months, if not years, away. Appeals would likely follow. Using as a rough guide the Novell litigation and the Debtors' prediction of when the Court of Appeals will rule, it seems unlikely that an appellate decision in the IBM litigation would come sooner than two years from now. The outcome of litigation against IBM in two years or so is just not relevant to a Motion to Convert the Debtors' Chapter 11 cases now.

5. Third, even if (contrary to fact) the Debtors had provided IBM with the documents and they were relevant to IBM's Motion to Convert, the Debtors' Motion should be denied because it violates the protective order pursuant to which the documents were produced, a file-stamped version of which is attached hereto as Exhibit A. The Protective Order only permits disclosure of the confidential documents as part of the Utah action, not in unrelated proceedings such as here:

“All CONFIDENTIAL INFORMATION, and all copies, excerpts and summaries thereof and material containing information derived therefrom, filed with the Court, submitted to the Court in connection with a hearing or trial, or produced or served either by a party or by a non-party, to or for any of the other parties, shall be governed by this Protective Order and **used only for the purposes of this Action** and not for any other purpose or function, including without limitation any business, patent prosecution, competitive or governmental purpose or function.”

(Protective Order ¶ 2) (emphasis added).

6. The Protective Order further restricts access to the confidential documents to: “the Court . . .” (defined as “encompassing the trial court that issued this Order and any appellate court that hears this Action on appeal”); “Counsel . . .”; “Stenographers and videographers . . .”; “Litigation support services . . .”; “Any individual who previously had rightful access . . .”; and witnesses. (Protective Order ¶¶ 1, 4.) The Protective Order provides for additional access only if “the Court specifically allows disclosure, after application by the party seeking such disclosure” or “[IBM] specifically and in writing allows disclosure”. (Protective Order ¶ 4.)<sup>3</sup> In submitting its Motion, the Debtors’ violated both provisions, giving rise to another reason to deny their Motion.

7. In addition to denying the Debtors’ Motion, the Court should strike from the Debtors’ Response any proposition purportedly based on documents submitted in violation of the protective order. E.g., In re Biovail Corp. Sec. Litig., 247 F.R.D. 69, 70-71 (S.D.N.Y. 2007) (finding that disclosure of confidential documents in another litigation “[o]bviously . . . violated the [protective order]” and ordering factual assertions made on the basis of the confidential documents redacted from the complaint and affidavit).

8. If the Debtors are permitted to file the confidential documents, they should be filed under seal.

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<sup>3</sup> Courts have held that protective orders with similar language prohibit disclosure of confidential information in separate proceedings. See In re Biovail Corp. Sec. Litig., 247 F.R.D. 69, 70 (S.D.N.Y. 2007) (disclosure limited to “this Action”); On Command Video Corp. v. Lodgenet Entertainment Corp., 976 F.Supp. 917, 922 (N.D.Cal. 1997), 976 F.Supp. at 928 (disclosure allowed only “in this litigation”); Wolters Kluwer Fin. Servs. Inc. v. Scivantage, 07 CV 2352(HB), 2007 WL 1498114, at \*1 (S.D.N.Y. May 23, 2007) (disclosure prohibited in “any other litigation proceeding”).

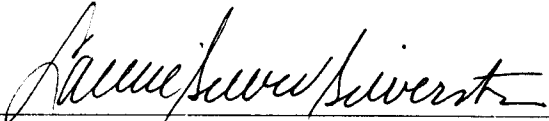
**CONCLUSION**

For the foregoing reasons, IBM respectfully requests that the Court deny the Debtors' Motion to file under seal, preclude any filing of the confidential IBM documents in question and strike from the Debtors' Response any arguments based on confidential IBM documents.

Dated: June 12, 2009

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