

# CRAVATH, SWAINE & MOORE LLP

WORLDWIDE PLAZA  
825 EIGHTH AVENUE  
NEW YORK, NY 10019-7475

TELEPHONE: (212) 474-1000  
FACSIMILE: (212) 474-3700

CITYPOINT  
ONE ROPEMAKER STREET  
LONDON EC2Y 9HR  
TELEPHONE: 44-20-7453-1000  
FACSIMILE: 44-20-7860-1150

WRITER'S DIRECT DIAL NUMBER

(212) 474-1978

ROBERT D. JOFFE  
ALLEN FINKELSON  
RONALD S. ROLFE  
PAUL C. SAUNDERS  
DOUGLAS D. BROADWATER  
ALAN C. STEPHENSON  
MAX R. SHULMAN  
STUART W. GOLD  
JOHN W. WHITE  
JOHN E. BEERBOWER  
EVAN R. CHESLER  
MICHAEL L. SCHLER  
RICHARD LEVIN  
KRIS F. HEINZELMAN  
B. ROBBINS KIESSLING  
ROGER D. TURNER  
PHILIP A. GELSTON  
RORY O. MILLSON  
FRANCIS P. BARRON  
RICHARD W. CLARY  
WILLIAM P. ROGERS, JR.  
JAMES D. COOPER  
STEPHEN L. GORDON  
DANIEL L. MOSLEY  
GREGORY M. SHAW

PETER S. WILSON  
JAMES C. VARDELL, III  
ROBERT H. BARON  
KEVIN J. GREHAN  
STEPHEN S. MADSEN  
C. ALLEN PARKER  
MARC S. ROSENBERG  
SUSAN WEBSTER  
DAVID MERCADO  
ROWAN D. WILSON  
PETER T. BARBUR  
SANDRA C. GOLDSTEIN  
THOMAS G. RAFFERTY  
MICHAEL S. GOLDMAN  
RICHARD HALL  
ELIZABETH L. GRAYER  
JULIE A. NORTH  
ANDREW W. NEEDHAM  
STEPHEN L. BURNS  
KATHERINE B. FORREST  
KEITH R. HUMMEL  
DANIEL SLIFKIN  
JEFFREY A. SMITH  
ROBERT I. TOWNSEND, III  
WILLIAM J. WHELAN, III

SCOTT A. BARSHAY  
PHILIP J. BOECKMAN  
ROGER G. BROOKS  
WILLIAM V. FOGG  
FAIZA J. SAEED  
RICHARD J. STARK  
THOMAS E. DUNN  
JULIE SPELLMAN SWEET  
RONALD CAMI  
MARK I. GREENE  
SARKIS JEBEJIAN  
JAMES C. WOOLERY  
DAVID R. MARRIOTT  
MICHAEL A. PASKIN  
ANDREW J. PITTS  
MICHAEL T. REYNOLDS  
ANTONY L. RYAN  
GEORGE E. ZOBITZ  
GEORGE A. STEPHANAKIS  
DARIN P. MCATEE  
GARY A. BORNSTEIN  
TIMOTHY G. CAMERON  
KARIN A. DEMASI  
LIZABETHANN R. EISEN  
DAVID S. FINKELSTEIN

DAVID GREENWALD  
RACHEL G. SKAISTIS  
PAUL H. ZUMBRO  
JOEL F. HEROLD  
ERIC W. HILFERS  
GEORGE F. SCHOEN  
ERIK R. TAVZEL  
CRAIG F. ARCELLA  
TEENA-ANN V. SANKOORIKAL  
ANDREW R. THOMPSON  
DAMIEN R. ZOUBEK  
LAUREN ANGELILLI  
TATIANA LAPUSHCHIK  
ERIC L. SCHIELE  
ALYSSA K. CAPLES  
JENNIFER S. CONWAY  
MINH VAN NGO

SPECIAL COUNSEL  
SAMUEL C. BUTLER  
GEORGE J. GILLESPIE, III

July 21, 2009

In re The SCO GROUP, INC., et al.  
Case No. 07-11337 (Bankr. D. Del.)

Dear Judge Gross:

This firm represents International Business Machines Corporation (“IBM”) in the Chapter 11 cases of The SCO Group, Inc. and SCO Operations Inc. (collectively “SCO” or the “Debtors”). We write on behalf of IBM and Novell to request the Court’s assistance in connection with the upcoming (July 27) hearing on the motions of IBM, Novell and the U.S. Trustee to convert Debtors’ Chapter 11 cases to Chapter 7 cases, and Debtors’ motion for authority to sell property outside the ordinary course of business.

## 1. Discovery

In anticipation of the hearing, IBM asked the Debtors to produce pertinent documents and to make their witnesses available for deposition. While the Debtors agreed to produce certain documents, they have in fact produced very few documents, and they have refused to produce important categories of documents. Specifically, the Debtors have declined to produce—from the files of their witnesses—all documents concerning (1) communications between/among the Debtors and unXis, Stephen Norris or Stephen Norris Capital Partners; (2) offers or bids to acquire, or expressions of interest in acquiring, any or all of the Debtors’ assets; (3) the Debtors’ financial and other performance post petition; and (4) the Debtors’ efforts toward, and prospects for, rehabilitation. We respectfully request that the Court require the Debtors to produce these documents. They are plainly relevant to the issues presented, and given the small number of persons whose files would need to be searched, there is no basis for the Debtors’ declining to produce them. That is especially so since we have discovered through non-documentary means that the Debtors’ affiliates made a series of undisclosed payments to the proposed buyer (Mr. Norris) indicating that the proposed sale is not in good faith. These payments and the Debtors’ dealings with the buyer require full discovery.

The Debtors have also declined to make two of their witnesses available for deposition: Ryan Tibbitts, the Debtors' General Counsel, and William Broderick, the Debtors' Director of Software and Licensing. The Debtors refuse to make these witnesses available for deposition on the grounds that their proposed testimony is straightforward and they were deposed in other SCO litigations. While the testimony of these witnesses may appear straightforward to SCO, it is not straightforward to IBM or Novell. SCO disclosed only the very general subjects on which these witnesses are supposedly going to testify. SCO refuses to identify the precise points it intends for them to make. The fact that Messrs. Tibbitts and Broderick have been deposed before is no help. The broad scope of their prior deposition testimony obscures the purpose of their proposed role here; that testimony did not cover all of the subjects they are expected to address here; and the testimony is not available to all concerned (e.g., the U.S. Trustee). We respectfully request the Court to require the Debtors to (1) specifically identify the precise points it intends for Messrs. Tibbitts and Broderick to make; and (2) produce them for deposition in advance of the hearing or forego calling them as witnesses.

## 2. The Debtors' Proposed Mini-Trial

The Debtors assure IBM and Novell that they do not intend for the Court to hold a mini-trial of their claims against IBM, Novell, Red Hat and AutoZone or their counterclaims against the Debtors. The Debtors agree with us that none of these claims can or should be tried at the hearing and that nothing that happens at the hearing can or should have any preclusive effect on these claims or the issues to which they relate. At the same time, however, the Debtors insist on calling two live witnesses (Mr. Tibbitts and Mr. Broderick) and submitting four reports from a purported expert (Dr. Botosan) to address the supposed strength of their claims. We respectfully request that the Court preclude the presentation of evidence in this Court about SCO's claims against IBM, Novell, Red Hat and AutoZone.

An uncertain, distant recovery in a pending litigation has no bearing on whether SCO has "a reasonable likelihood of rehabilitation". A reasonable likelihood of rehabilitation may not be merely speculative. In re Great Am. Pyramid Joint Venture, 144 B.R. 780, 792 (Bankr. W.D. Tenn. 1992); In re Imperial Heights Apartments, Ltd., 18 B.R. 858, 863-64 (Bankr. S.D. Ohio 1982); see also In re Lakewood Partners, No. 93-16851F, 1994 Bankr. LEXIS 1291, at \*8-9, 19, n.13 (Bankr. E.D. Pa. Jul. 26, 1994). No matter the strength of the presentations that SCO proposes to make, SCO's potential recovery against IBM, Novell, Red Hat and AutoZone is speculative. As to recovery against IBM, that is true even apart from the fact that SCO's case against IBM is foreclosed by the Utah Court's decision in The SCO Group, Inc. v. Novell, Inc., 2:04-CV-139 (D. Utah), dated Aug. 10, 2007. To recover against IBM, SCO must at a minimum: (i) obtain a reversal of the Utah Court's decision in SCO v. Novell; (ii) prevail at a trial in the Novell case upon any remand; (iii) survive summary judgment on grounds independent of those at issue in the Novell case; (iv) establish IBM's liability in an unscheduled trial; (v) establish that IBM was the proximate cause of damages sufficient to rehabilitate SCO's business (after offsetting any damages due to IBM pursuant to IBM's counterclaims against SCO); and (vi) if successful, survive an appeal by IBM.

Moreover, the testimony of two fact witnesses and several expert reports could not possibly paint an accurate picture. That would require many more witnesses and a rebuttal by IBM, Novell, RedHat and AutoZone of SCO's claims and the counterclaims against it. Such a showing would entail the very kind of mini-trial that even SCO acknowledges would be inappropriate. There are far better ways for the Court to take account of SCO's claims and the counterclaims against it, if the Court considers them relevant. To the extent the Court wishes to inform itself of the nature of the claims in suit, there is an ample supply of public material on the subject. The Court could, for example, review the pleadings and summary judgment filings.

### 3. Shape of the Hearing

In an effort to streamline the July 27, hearing, IBM and Novell proposed that the parties agree to a structure for the hearing. We respectfully submit that the Court should adopt the following proposals in the interests of judicial economy and convenience to the parties.

*Structure of the Hearing.* IBM and Novell propose that the hearing should be structured to divide time equally between (i) the Debtors and (ii) IBM and Novell, allowing the parties to allocate their time as they see fit between opening statements, examination of witnesses, and closing arguments. We believe 3 hours per side is sufficient. The Debtors should proceed first in opening, examining witnesses and closing, followed by IBM and Novell.

*Order of Witnesses.* The Debtors have identified six live trial witnesses: Darl McBride, Ryan Tibbitts, William Broderick, John Hunsaker, Ken Neilson and Rene Beltran. SCO intends to call Dr. Christine Botosan only by way of her expert reports; SCO has stated that it will not be calling Dr. Cargill or Chad Kemp. IBM and Novell have identified the same witnesses as SCO plus Stephen Norris and any witness necessary to rebut SCO's evidence about the strength of its case against IBM, Novell, RedHat and AutoZone (should the Court allow such evidence). Given the overlap in the parties' witness lists, we respectfully request that the Court establish the order of examination as follows: (1) Darl McBride; (2) Ken Nielsen; (3) Jeff Hunsaker; (4) René Beltran; (5) William Broderick; (6) Ryan Tibbitts; and (7) Stephen Norris. While we are open to an alternate order (should SCO wish to propose one), it serves the interests of all involved to establish an order of examination that does not differentiate between the Debtors' case on the sale motion and the case of IBM, Novell and the U.S. Trustee on the conversion motions and allows the parties more precisely to plan and to budget the examinations.

*Exhibits.* Finally, we propose that the parties exchange exhibits to be used at trial (other than for cross examination purposes only) as follows: the Debtors, no later than Wednesday, July 22, 2009, at noon; and IBM and Novell no later than Thursday, July 23, 2009, at noon. We further propose that the parties disclose objections to the other side's exhibits no later than Friday, July 24, noon, and that any exhibits not objected to be deemed admitted into evidence (without the need to be introduced by a witness).

\* \* \*

For the foregoing reasons, we respectfully request that the Court enter an order providing for the relief described herein. We respectfully request that the Court schedule a teleconference as soon as possible to resolve these issues.

Respectfully submitted,

Richard Levin

BY HAND

The Honorable Kevin Gross  
United States Bankruptcy Judge  
824 North Market Street, 6th Floor  
Wilmington, DE 19801

Copy to:

Arthur J. Spector, Esq.  
BERGER SINGERMAN, P.A.  
350 E. Las Olas Blvd., 10th Floor  
Fort Lauderdale, FL 33301

Adam A. Lewis, Esq.  
MORRISON & FOERSTER LLP  
425 Market Street  
San Francisco, California 94105-2482

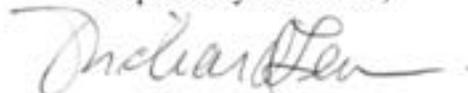
Joseph J. McMahon Jr., Esq.  
United States Dep't of Justice Office of United States Trustee  
J. Caleb Boggs Federal Building  
844 King St., Suite 2207, Lockbox 35  
Wilmington, DE 19801

BY EMAIL

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BERGER SINGERMAN, P.A.  
350 E. Las Olas Blvd., 10th Floor  
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Adam A. Lewis, Esq.  
MORRISON & FOERSTER LLP  
425 Market Street  
San Francisco, California 94105-2482

Joseph J. McMahon Jr., Esq.  
United States Dep't of Justice Office of United States Trustee  
J. Caleb Boggs Federal Building  
844 King St., Suite 2207, Lockbox 35  
Wilmington, DE 19801

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