IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

Hearing: July 27, 2009 at 9:00 a.m. (prevailing Eastern time)

DEBTORS' RESPONSE TO OBJECTIONS AND OPPOSITIONS OF NOVELL AND INTERNATIONAL BUSINESS MACHINES CORPORATION TO THE DEBTOR'S MOTION FOR AUTHORITY TO SELL PROPERTY OUTSIDE THE ORDINARY COURSE OF BUSINESS FREE AND CLEAR OF INTERESTS AND FOR APPROVAL OF ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES IN CONJUNCTION WITH SALE

The above-referenced debtors in possession (collectively, the "Debtors"), hereby submit their response to the objections and oppositions that were filed by Novell (the "Novell Objection") and International Business Machines Corporation ("IBM") (the "IBM Objection") (collectively, the "Objections") in response to the *Debtors' Motion for Authority to Sell Property Outside the Ordinary Course of Business Free and Clear of Interests and for Approval of Assumption and Assignment of Executory Contracts and Unexpired Leases in Conjunction with Sale* (the "Motion").[2] It is telling that the only two creditors opposing the Motion are those that are defendants in the lawsuits filed by one of the Debtors in which the parties collectively have spent many tens of millions of dollars in litigating claims. The Objections must be seen for what

[1] 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.

[2] Unless otherwise noted, all defined terms used herein shall have the same meaning as used in the Motion.

they are: an attempt to cut-off the claims in litigation regardless of the effect on the creditors, customers, employees and shareholders of the Debtors.

Pursuant to the Motion, the Debtors request the Court to approve a transaction that will enable payment in full of allowed claims, including the establishment of an effective surety for the disputed claim of Novell. Subject to the Court's approval and following the closing of the sale, the Debtors plan to seek the dismissal of these chapter 11 Cases and preserve, post-bankruptcy, business assets and litigation claims that provide meaningful prospects for substantial returns on shareholder equity. The proposed sale is good for creditors, good for the Debtors and good for their customers, employees and shareholders.

IBM and Novell suppose and argue, without support, that in proposing this sale, the Debtors' management is concerned singularly about itself. In fact the converse is true. IBM and Novell are interested only in putting SCO out of business so it cannot pursue its legal claims against them.

Certain of Novell's and IBM's allegations are not well-founded – as will be reflected by evidence at the hearing on this motion – and serve only to sling mud on the Debtors and the proposed purchaser, unXis, Inc. ("unXis"), and undermine their mutual good faith efforts to effectuate a sale that will provide for the payment in full of all creditor claims and the Debtors' emergence from bankruptcy.

On the other hand, certain of the objection points raise legitimate questions concerning the Purchase and Sale Agreement (the "PSA"). The Debtors and unXis themselves identified a few terms of the proposed sale and PSA that warranted amendment, including some points raised in the Objections. These amendments are described below and referred to as "PSA

Amendments." The Debtors will request the Court to approve the PSA Amendments when they seek the approval of the Motion.

Finally, some of the points raised by the Objections are best addressed at the hearing on the Motion, and will be so addressed at that time.

For the reasons stated in the Motion and herein, and after the Court has considered all of the evidence presented at the scheduled July 27, 2009 hearing, the Objections should be overruled and the Motion granted.

PSA AND PSA AMENDMENTS

UnXis proposes to acquire the Debtors' Unixware and Open-Server business and related assets for a purchase price stated in the PSA that will pay or make adequate provision for all allowed claims against the Debtors' estates, while preserving the Debtors' Mobility applications and Litigation Claims for the benefit of the Debtors' equity holders. The proposed purchase price is $5.25 million, consisting of the following: (a) a $250,000 deposit, plus (b) $2.15 million in the form of a letter of credit to be drawn at Closing (the "Letter of Credit-Balance"); plus (c) the Letter of Credit-Sun to be posted at Closing in the amount of $2.85 million;[3] together with additional consideration in the form of assumption of certain liabilities at Closing, defined as the Assumed Liabilities, which the Debtors project at $150,000.

The Debtors, unXis, IBM, and Novell all agree that certain provisions of the PSA require amendment or clarification. The Debtors and unXis are finalizing an Amendment to the PSA

[3] The Letter of Credit-Sun is being posted in favor of the Debtors as surety for the Final Judgment in Novell's favor, on the appeal of which the Tenth Circuit is expected to rule shortly. Novell misleadingly argues that the $2.85 million amount of the Letter of Credit-Sun is insufficient because it falls short of the current judgment amount. *See* Novell Objection, p. 7. Novell fails to mention that the Debtors are already holding approximately $625,000 specifically for Novell, which, when coupled with the $2.85 million Letter of Credit-Sun, provides the amount needed to pay Novell in full in the event that the Debtors' appeal to the Tenth Circuit on that issue fails.

(the "PSA Amendment") which, as of filing of this Response is in a working draft state and which is projected to be signed by the Debtors and unXis and filed with the Court prior to the hearing. The PSA Amendment will address the following concerns as articulated in the Objections and as noted independently by Debtors and unXis:

1. Timing; Termination Date & Letter of Credit Balance. The PSA Amendment will extend the Termination Date (the last day to close the transaction) from September 13, 2009 to September 30, 2009. The PSA Amendment will also clarify the deadline by which the Letter of Credit-Balance must be posted. Section 3.2 of the PSA provided that the Letter of Credit-Balance must be posted on or before the 5th Business Day after entry of the Sale Order. The PSA Amendment will change this to require that the Letter of Credit-Balance must be posted by the sooner of that time or in any event by Closing. The PSA Amendment also will provide that unXis may pay $2.15 million in immediately available funds at closing, instead of posting the Letter of Credit-Balance.

2. Purchase Price & Assumed Liabilities. The PSA Amendment will confirm the calculation of the Purchase Price as of the contract date, including the Debtors' projected $150,000 in Assumed Liabilities, and will also confirm that unXis has the continuing right to direct changes in the Assumed Liabilities within the time periods ending at the hearing, as provided in Section 7.1(c) of the PSA.

3. Clarification regarding the Novell APA. The PSA Amendment will further confirm the parties' decision that the Novell APA is not being assumed or assigned.

4. Letter of Credit-Sun and Appeal. The PSA Amendment will provide minor clean-up in two respects. The August 31, 2009 date projected for a ruling from the Tenth Circuit on the appeal from Novell's Judgment (the "Appeal") will be extended to September 30, 2009. The

Debtors are advised by the Tenth Circuit clerk's office that appellate decisions have been issued on matters heard the same day as the Appeal, and since Judge McConnell heard the Appeal, intends to retire from the bench on August 31st, and plans to issue opinions on his matters before he retires, the Appeal should be decided by August 31st. In addition, the PSA Amendment will revise the draw or retention contingencies relating to the Letter of Credit-Sun to address specifically the monetary damages portion of the Judgment (there are other aspects of the Judgment and Appeal that have no relevance to the Letter of Credit-Sun). Also, the PSA Amendments will extend from December 31, 2009 until June 30, 2010, the outside date by which the Letter of Credit-Sun must be drawn, if at all.

5. Transfer of Retained SCO Rights. The PSA Article 12 language drew close scrutiny in the Objections. The Objections addressed scenarios and circumstances that are different from those the Debtors and unXis intended to address in the PSA. The PSA Amendment therefore will amend Article 12 of the PSA, to remove uncertainties regarding insolvency events and alleged "ipso facto" clauses. The PSA Amendment will also clarify the parties' original intent by stating that the license granted to unXis in Section 12.1 confers on unXis the status, rights and protections afforded to a licensee under §365(n) of the Bankruptcy Code.

LEGAL STANDARD FOR SALE OUTSIDE THE ORDINARY COURSE OF BUSINESS

Giving effect to the proposed amendments included in PSA Amendment summarized above, and as noted below in addressing other issues Novell and IBM raised, there is no basis for the bad faith and fairness arguments in the Objections. As noted in the Motion, sales of assets outside the ordinary course of business are governed by section 363(b) of the Bankruptcy Code and Bankruptcy Rule 6004(f). The use, sale, or lease of property of the estate, other than in the

ordinary course of business, is authorized when there is a sound business justification for such action. *See Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070 (2d Cir. 1983). Both Novell and IBM acknowledge this point. *See* Novell Objection at p. 11; IBM Objection at p. 10.

The Objections wrongly assert that the Debtors have a burden to "prove," in the Motion, why the Court should approve the sale. Rather, the Debtors' responsibility to introduce evidence in support of the Motion arises at the hearing, and the Debtors will bear and discharge this burden at the hearing. The Debtors will provide ample evidence to meet each one of the predicates or requirements that need to be established or satisfied in order to approve a sale outside the ordinary course of business, including those that this Court identified in *In Exaeris, Inc.*, 380 B.R. 741, 744 (Bankr. D. Del. 2008): (1) there is a sound business purpose for the sale; (2) the proposed sale price is fair; (3) the debtor has provided adequate and reasonable notice; and (4) the buyer acted in good faith.

Both IBM and Novell argue that none of these four requirements have been met. At the Sale Hearing, the Debtors will satisfy their burden of proof on each point.

1. Sound Business Purpose

As this Court knows, the Debtors have been attempting to effectuate a sale of their assets throughout these chapter 11 cases. The signing of the PSA was anything but an eleventh hour and fifty-ninth minute attempt to stave off conversion of these cases or the appointment of a chapter 11 trustee. In the months preceding the June 15, 2009 hearing on the motions to convert, the Debtors had been in intensive and continuing negotiations on four separate transactions. These, summarized for the Court in testimony taken on June 15th, followed a number of earlier attempts to achieve new capitalization or a sale of assets. Ultimately, the Debtors approved and

moved forward with the proposed sale to unXis now before the Court because it was and is the best deal available for the Debtors and their creditors as well as their customers, employees and shareholders.

Novell contends that the "last minute gambit" of the PSA (Novell Objection Section 6) somehow demonstrates that the proposed sale is nothing but a "...headlong and heedless attempt to avoid conversion and loss of control of the Litigation." Actually, not. The timing within which the PSA was finalized, approved and filed demonstrates that it came together in its own time, albeit a time-frame that bumped against a deadline – the June 15 hearing. The Debtors had been working on various transactions well in advance of June 15, and while that hearing date had nothing to do with the Debtors' longstanding efforts to effectuate a transaction, the fact is that the unXis deal ripened when it did, and it should come as no surprise that the Debtors and unXis saw good reason to complete the PSA if possible prior to a hearing on conversion. Nothing captures attention quite like a deadline with possible consequences. Motions to convert fit this bill. The timing was inconvenient, but ultimately propitious, since the PSA was in fact completed.

IBM and Novell are not interested in the welfare of the creditor body at large or the Debtors' shareholders. They have accused the Debtors' management of misusing these cases, and sought to convert these cases to chapter 7 as a litigation strategy to benefit themselves, at the direct expense of the Debtors, and particularly their shareholders. In fact, the Debtors' management continues to address and perform their fiduciary duties to all creditors and all shareholders. In stark contrast, IBM and Novell are out for themselves and seek only to avoid the consequences of their wrongful exploitation of the UNIX computer code for the benefit of

their LINUX-related business. It is telling that with one possible minor exception, no other creditor has filed an objection to the sale.[4]

Overall, IBM and Novell are disingenuous in criticizing the Debtors for seeking to retain litigation rights. SCO Group's principal business and prospects were devastated by the taking of its intellectual property, which IBM bundled in a competing free product that is critical to its business, while Novell pronounced that SCO does not own the intellectual property in question and sought to waive SCO's own infringement claims to SCO's further detriment. It is absolutely appropriate, arguably absolutely necessary, for the Debtors to take actions to clarify and enforce their intellectual property rights, enjoin violations, and recover damages. Novell has done this is suing Microsoft, by way of example. Novell, IBM and SCO Group each have spent tens of millions of dollars litigating these claims, and the litigation has been widely followed, precisely because much is at stake.

At the July 27th hearing, the Debtors will provide evidence from which "the Court can make an informed decision on the relationship of the sale price to the value of the assets being sold," and why there is a sound business purpose for the sale. *Exaeris*, 380 B.R. at 744-45.

2. Proposed Sale Price is Fair

IBM focuses its primary objections to the sale price on the Letter of Credit-Sun terms,[5] and the Closing and termination provisions, all of which IBM contends are unfair.[6] As is well

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[4] An ostensible objection to the Motion was received from a company named Ms M/S Sunray Computers Pvt. Ltd. that is organized under the laws of India. It really does not object to the sale. Rather, it merely asserts, albeit belatedly and long after the bar date, a very old claim against the Debtors' predecessors.

[5] IBM made reference to the testimony of Mr. Stephen Norris, the designated witness for unXis at its Rule 30(b)(6) deposition, and that he did not provide specifics regarding the sources of capital for the PSA closing. *See* IBM Objection, p. 9. Respectfully, that is a closing issue, not one as to whether the sale price is fair.

known and as will be shown again at the hearing on the Motion, the Debtors have been diligently trying to sell their assets throughout the pendency of these cases. The terms the Debtors were able to obtain from unXis are the best available, reached after thoroughly testing the market for a higher or better deal, and by pursuing potential sales with various other potential purchasers and investors.

IBM contends that the Debtors were held hostage by last minute negotiations and the absolute need to produce an agreement on any terms. This misrepresents the nature of the negotiations. The last minute negotiations on the PSA were not about price at all, but rather, concerned the Retained Rights and divestiture events. The price was negotiated well in advance.

IBM suggests that the PSA is unfair as relates to the Letter of Credit-Sun, in that it provides for a lower purchase price if higher value assets are conveyed (in other words, if the litigated copyrights and contract rights turn out not to be owned by Debtors). This mischaracterizes the transaction. The consideration for shareholders is the same. The Letter of Credit–Sun addresses the uncertainty everyone has had and continues to have as to the extent of Debtor liabilities (because of the monetary damages under the Novell judgment). The Letter of Credit-Sun is a device that protects Novell's claim and shareholder equity whether the $2.5 million Novell judgment is affirmed or reversed. This allows the transaction to close, which confers value on Debtors' shareholders.

As to objections relative to the posting of letters of credit by closing and the termination of the Letter of Credit-Sun on December 31, 2009 if it is not drawn by that date, the PSA Amendment addresses those concerns as summarized above.

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[6] Novell simply argued that the question of price remains unsettled as the "Debtors negotiated from desperation."

3. Debtors Have Provided Adequate and Reasonable Notice of Proposed Sale

It appears that only Novell objects to the adequacy of the sale notice as IBM did not raise the issue. This argument is baseless as the Debtors have complied with the notice requirements of Bankruptcy Rules 2002 and 6004. Specifically, the Motion includes a copy of the PSA, it sets forth terms of the proposed sale, and it was served on all parties required.

Novell implies that the PSA may not have been completed on the afternoon of June 15th, because "crucial" schedules and exhibits were not delivered to Court with the signed PSA itself. Novell cites statements concerning the status of exhibits and schedules at the time the PSA was presented on June 15th (the PSA exhibits and schedules "would be ready shortly, perhaps even before the hearing concluded. Indeed, the Debtors said, they [sic] copies should be available in minutes" (Novell Objection Section 6, quoting 6/15 Tr. 9:24-10:3). Novell quotes a statement that the document "was still being copied" because it had just been signed and was "enormous" (citing to 7/15 Tr. 7:23-8:4).

The remarks quoted in the sentence immediately above actually pertained to a report about copying the PSA itself (6/15 Tr. 7:17-8:1). Testimony at the June 15th hearing focused on the fact that negotiations and drafting were complicated by the need to describe accurately which assets were being sold and which were not (6/15 Tr. 39:8-41:5); and that scheduling was elaborate and had been very difficult (6/15 Tr. 42:12-24); and that it was conceivable that later clean-up might be required (6/15 Tr. 52:1-23). The Debtors did not mislead the Court or the parties about the status of schedules.

Novell complains that schedules and exhibits were delivered late and that the "Debtors could not state positively whether the crucial Novell-Santa Cruz APA that was at the heart of the litigation was to be assumed or not (it was not). (Novell Objection Section 9). The fact is that

the Novell APA was never listed as an assumed asset in the PSA or in any schedules. The schedules and exhibits were being developed simultaneously with the PSA. The PSA states what is being sold and what is not, and provides that the list of contracts to be assumed by unXis may change at the direction of unXis.

The Debtors believe that the PSA would not have been executed without agreement on all material terms. The PSA itself is crucial as to material terms. The schedules and exhibits identify various details so as to elaborate on and give further effect to the substance of PSA. As it turned out, there were some inconsistencies in the scheduling - considered minor by the parties - and these were being noted and fixed on June 15th and for a time thereafter.

Novell's question about whether the Novell APA was to be assumed was a fair one. It prompted a careful second look by the Debtors and unXis, to ensure that they had gotten it right the first time. They did, and confirmed that information for Novell. The bottom line is that the Debtors have made clear that the Novell-Santa Cruz APA is not being assumed and is not part of the sale.

As to particular notice issues raised by Novell, none have merit. First, if the Debtors seek to have their chapter 11 cases dismissed after a sale, then they will bring that before the Court with an appropriate motion, which itself will be noticed to all creditors. Second, there is no requirement in the rules or §363 requiring a sale motion to set forth "substantiated projections of debts to be paid and the results of future operations." Novell Objection, p. 11.

The notice of the proposed sale and of the purchased assets was certainly adequate as to Novell as can be seen by the vigorous objection that it filed.

4. Buyer (and the Debtors) Have Acted in Good Faith

The major thrust of IBM's Objection seems to be that the sale is not in good faith, primarily in two ways: a) the so-called "poison pill provision" in the Purchase and Sale Agreement, and b) "undisclosed payments" in connection with the proposed sale. Neither of these arguments has merit.

a. There is no Poison Pill

As noted above, the PSA Amendment will clarify Article 12 of the PSA and resolve the so-called poison pill problem that IBM identified by eliminating "ipso facto" consequences.

b. No Payments Requiring Disclosure Have Been Made

IBM mistakenly argues that "discovery has unearthed undocumented payments by the Debtors' affiliates in connection with the PSA that have not been previously disclosed to the Court." IBM Objection at p. 16. This is a red-herring asserted by IBM simply to make it appear that the Debtors have done something improper. The Debtors have made all disclosures required, both to the Court and to the creditors of these estates.

First, neither of the Debtors made any of the payments of which IBM complains. Rather, the payments in question were made in 2008 by non-debtors: (a) a $100,000 payment by a non-debtor Japanese subsidiary, SCO Japan, Ltd., for work Stephen Norris Capital Partners, LLC performed in connection with studies and analysis of the BRICMEA emerging markets,[7] and (b) $100,000 by Darl McBride *from his own personal funds* to Mr. Stephen Norris as payment to Mr. Norris for his efforts in helping to put together a group of investors, possibly to acquire some or all of the Debtors' assets or to further other business opportunities.[8] *No property of the estate*

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[7] BRICMEA stands for Brazil, Russia, India, China, Middle East, and Africa.

[8] Mark Robbins, the person who introduced Mr. McBride to Mr. Norris and who held himself out loosely as Mr. Norris's partner, had promised to repay Mr. McBride for the $100,000 Mr. McBride advanced to Mr. Norris. Separately, Mr. McBride loaned Mr. Robbins directly

was or is at issue. Nothing improper was done.[9] The estates were not depleted, and if anything, gained value by the services performed.

Second, the payments in question had nothing to do with the proposed sale to unXis that is before the Court. This is important because the deposition testimony was clear, and the evidence produced at the hearing will be clear to the Court, that while Mr. Robbins first introduced Mr. Norris to Mr. McBride at the end of 2007, Mr. Robbins had nothing to do with the services provided by Mr. Norris (other than, perhaps, the proposal by a different group of investors much earlier in the case), and most importantly, with the present transaction with unXis. IBM refers to the Disclosure Statement that the Debtors filed in January of 2009. *See* IBM Objection, p. 9. IBM fails to mention, however, that Mr. Robbins' alleged fraudulent activity first came to light in late January, 2009, after the filing of the Disclosure Statement. IBM's argument to the contrary notwithstanding, as a matter of law, anything unsavory that Mr. Robbins, who had nothing to do with unXis or the instant transaction, is alleged to have done does not call into question Debtors' disclosures or the good faith of the Debtors or the proposed sale.

For all of the foregoing reasons, and in light of the evidence that the Debtors anticipate presenting to the Court on July 27, 2009, the Debtors respectfully request entry of an order granting the relief requested in the Motion, as well as granting any other and further relief the Court deems just and proper, and overruling both the Novell Objection and the IBM Objection.

Dated: July 22, 2009

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nearly $200,000 unrelated to anything pertaining to the Debtors. Mr. Robbins has not repaid any of these amounts to Mr. McBride.

[9] In fact, in his deposition, Mr. Norris testified that he was not retained as a consultant by the Debtors, he has never been paid a penny by the Debtors, and neither Debtor has ever made him any promise of compensation.

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