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 DEBTORS' MOTION FOR AN ORDER ESTABLISHING SALE AND BID PROCEDURES AND RELATED RELIEF

Novell, Inc., and its wholly-owned subsidiary, SUSE Linux GmbH (together "Novell"), hereby submits this objection (the "Objection") to Debtors' Motion for an Order (I) (A) Establishing Sale and Bid Procedures, (B) Approving Form of Asset Purchase Agreement, and (C) Approving the Form and Manner of Notice of Sale; and (II) Approving (A) Sale of Certain Assets Free and Clear of Interests and (B) Assumption and Assignment of Executory Contracts and Unexpired Leases (filed February 4, 2009) (the "Sale Motion").

1. **Introduction.** The Sale Motion seeks the Court's authority for debtors and debtors in possession The SCO Group, Inc. and SCO Operations, Inc. (together, the "Debtors" or "SCO") to sell a substantial portion (if not substantially all) of the Debtors' assets. It suffers from numerous important defects, starting with its virtual elimination of creditor suffrage in these chapter 11 cases. Not surprisingly, many of the problems with the Sale Motion are similar to those afflicting the Debtors' Motion for Order (I) Scheduling Confirmation Hearing [etc.] (filed March 11). (*See, e.g.,* Novell's Objection to the Debtors' Motion for Order (I) Scheduling Confirmation Hearing [etc.] (filed March 26, 2008).)

2. **Sub Rosa Plan**. Although the Sale Motion purports to be in support of the Debtors' Second Amended Joint Plan of Reorganization (the "Amended Plan" or "AP"), nothing in the Sale Motion or the Amended Plan conditions the proposed sale on confirmation of the Amended 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. This renders the proposed sale a *sub rosa* plan, limiting the choices of the Debtors and, more importantly, their creditors ever after if the Amended Plan is not confirmed.

3. Sales of substantial assets of the estate under Section 363(b) of the Bankruptcy Code must be "closely scrutinized" because of the risk that a sale outside of a plan of reorganization may deprive parties of substantial rights inherent in the plan confirmation process. Accordingly, the Debtors bear a "heightened burden of proving the elements necessary for authorization." *In re Channel One Comm., Inc.*, 117 B.R. 493, 496 (Bankr. E.D. Mo. 1990) (citing *Indus. Valley Refrigeration & Air Conditioning Supplies, Inc.*, 77 B.R. 15, 17 (Bankr. E.D. Pa. 1987); *In re Woods*, 215 B.R. 623, 626 (BAP 10th Cir. 1998), *aff'd* 173 F.3d 770 (10th Cir. 1999), *cert. denied sub nom Woods v. Kenan*, 528 U.S. 878 (1999) (citing cases and quoting Collier on Bankruptcy ¶ 363.02[4], at 363-19 (Lawrence P. King ed., 15th ed. rev. 1997) (sale by chapter 11 trustee under confirmed plan permissible because plan protections already honored). *See DDJ Capital Management, LLC v. Fruit of the Loom, Inc. (In re Fruit of the Loom, Inc.)*, 274 b.R. 631 (D. Del. 2002) (sale of substantially all assets permissible because closing conditioned on confirmation of related plan).

4. The Debtors attempt to justify the Sale Motion on the grounds that it is vital to the Amended Plan because the sale will provide funds necessary for the Amended Plan's focus of continuing litigation against Novell and others. (*See* Sale Motion 2-3.) However, even if otherwise sustainable, this rationale fails for at least two reasons.

5. *First*, as just noted, the Sale Motion does not condition the proposed sale on confirmation of the Amended Plan. Thus, the Debtors may still sell most of their assets even if they do not need the funds for the Amended Plan because the Court does not confirm the latter. Under those circumstances, however, the Debtors will have channeled the estate into a limited array of possible disposition of these cases, whether through a plan or otherwise, since the only real remaining assets will be cash from the sale and the litigation claims it will retain.

6. *Second*, the Debtors effectively admit that the sales they contemplate are not essential to the Amended Plan. They assert they will be able to proceed with the Amended Plan *even if they fail to sell the assets.* (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."); Disclosure Statement in Connection with Debtors' Amended Joint Plan of Reorganization (the "Amended Disclosure Statement" or "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.").)

7. The absence of any real justification for a sale outside a plan is exacerbated because the Sale Motion, aiming at an April 2009 sale, effectively allows only a limited exposure and due diligence period. *See In re Castre*, 312 B.R. 426, 428 (Bankr. D. Colo. 2004) (explaining the importance of marketing a 363 sale). In order for a sale under Section 363 of the Bankruptcy

Code to be expedited, the Debtors must establish a compelling justification. *See*, *e.g.*, *In re Beker Indus. Corp*., 89 B.R. 336, 339 (S.D.N.Y. 1988) (denying sale where, although reorganization plan was not imminent, there was an "absence of any compelling circumstances permitting a sale"). But there is no evidence of any compelling circumstances here. The only "need" for a sale is the Debtors' desire to have more money to prosecute claims against Novell and others (with or without a plan). (*See, e.g.,* Sale Motion 3, ¶ 4.) That purported reason does not require any immediate sale of the assets. Hence, the sale may needlessly sacrifice value for creditors, further constraining their options in these cases.

8. In short, the Debtors do not meet the standard for a sale of substantially all of their assets outside a plan. The creditors should not be stripped of choices if the Debtors cannot confirm their Amended Plan under the false guise of enhancing the plan.

9. **Subject Assets and Valuation Unclear.** The Sale Motion and appended exhibits do not precisely identify what assets the Debtors are proposing to sell. Exhibits A-1 and A-2 to the form of Purchase and Sale Agreement that is Exhibit A to the Sale Motion say, in essence, only that the Debtors will be selling certain businesses. The assets involved themselves are not specifically listed. Without that information, it is not possible for creditors or the Court to determine whether the sale price is acceptable; indeed, it may not even be feasible for potential bidders to determine whether to place a competitive bid. In that regard, the Sale Motion also does not discuss the basis for the Debtors' proposed minimum bids, either, making it even more difficult for the creditors to evaluate the proposed sales. Understandably, the Debtors will not want to publicize any actual valuation they have in advance of an attempt to sell the property, but they should provide whatever information they reasonably can about the basis of their valuation.

10. Moreover, as with the Debtors' "emergency" sale motion a year ago, the Sale Motion's imprecision about what is being sold raises the question whether the Debtors are purporting to sell rights that are still in dispute in the litigation between Novell and the Debtors in the litigation now on appeal to the 10th Circuit. Clearly, the Debtors mean to retain control over the litigation with Novell as such. But that does not mean that they could not "share" the underlying rights in some way with a buyer. A debtor cannot sell another's property. *See Cincola v. Sharffenberger*, 248 F. 3d 110, 121 (3d Cir. 2001) (bankruptcy authorized the sale of property of the estate, as defined in section 541 of the Bankruptcy Code). When title to assets disputed, a bankruptcy court may not allow the sale of property as "property of the estate" without first determining whether the debtor in fact owns the property. *See In re Rodeo Canon Dev. Corp.*, 362 F.3d 603, 608 (9th Cir. 2004), withdrawn per settlement, 2005 U.S. App. LEXIS 3802 (9th Cir. 2005) (property could not be sold free and clear of liens, claims and encumbrances when debtor's title was in dispute).

11. Moreover, this underlying question must be decided before the property can be sold free and clear under Section 363(f). *See In re Clark*, 266 B.R. 163, 172 (9th Cir. B.A.P. 2001) (sale free and clear of claims denied because not property of the estate); *Gorka v. Joseph (In re Atl. Gulf Cmtys. Corp.)*, 326 B.R. 294 (D. Del. 2005) (sale of real property under section 363 not free and clear of claims because title in dispute); *In re Claywell*, 341 B.R. 396 (Bankr. D. Conn. 2006) (sale disallowed pending resolution of debtor's ownership in property).

12. Perhaps clarification of what the Debtors will be selling will not be easy, but easy or not, it must be done.

13. **Liens and Interests Unspecified.** The Debtors ask the Court to approve the sale free and clear of liens, claims and interests. But nowhere do the Debtors specify what specific liens,

claims and interests are at stake. Thus, it is not possible for the affected parties to know that their rights are implicated so that they may protect their interests. Such notice fails to satisfy due process. *In re Takeout Taxi Holdings, Inc.*, 307 B.R. 525, 531-33 (Bankr. E.D. Va. 2004) (sale free and clear is a powerful tool for which notice to affected creditors specifically identifying their interests at stake is necessary to satisfy due process).

14. **Bid Protections Unjustified.** The Sale Motion asks the Court to authorize an expense reimbursement of $30,000 and a breakup fee of 3% of the purchase price for any stalking horse bidder. Again, the Debtors have failed to justify the need for any such terms.

15. The Court must carefully consider the propriety of any "bid protections." In the Third Circuit "the allowability of breakup fees, like that of other administrative expenses, depends on the prospective purchaser's ability to show that the fees were actually necessary to preserve the value of the estate." *Calpine Corp. v. O'Brien Envtl. Energy Inc.*, 181 F. 3d 527, 535 (3d Cir. 1999); *see also In re Beth Israel Hosp. Ass'n of Passaic*, 207 WL 2049881 at 12 (Bankr. D. N.J. 2007) (citing *In re O'Brien Envtl. Energy, Inc.*, 181 F.3d at 535). In the *Beth Israel* case, the Bankruptcy Court examined the record before it to determine whether the stalking horse expanded any efforts to preserve the value of the debtor's estate. The Court found that the facts did not show that the stalking horse's bid for the debtor's assets was a catalyst for a higher bid. *Id*. at 12-13.

16. As yet, there is no evidence that the Debtors must offer bid protections to attract bidders. Indeed, they evidently think there already is some interest in the assets, for they have set substantial minimum bid prices ($6 million altogether). Moreover, there is no requirement in the Sale Motion that any sale be for all cash. That being so, it may be problematic how the Debtors will determine what the purchase price is for the purpose of awarding the 3% breakup

fee. Certainly, the Debtors shed no light on that question. It is, therefore, impossible to tell whether the 3% is a reasonable fee even if a breakup fee might otherwise be justifiable.

17. **Stalking Horse Bidder.** The Sale Motion contemplates a potential stalking horse bidder that would get the benefit of the bid protections. Moreover, that bidder might already be in negotiations with the Debtors, giving it a substantial advantage over other potential bidders. If there is a current stalking horse bidder in the wings, the Debtors should disclose that fact and the bidder's identity and background. Indeed, if the Debtors already have competing bidders, they should disclose all of them. The sale should be as transparent as possible consistent with reasonable needs for confidentiality to maximize the sale price.

18. **Conclusion.** The Sale Motion is neither necessary nor adequately presented. It should be denied.

Dated: February 18, 2009
Wilmington, Delaware

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