IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	
The SCO GROUP, INC., et al.,	Chapter 11
Debtors.	Case No. 07-11337 (KG) (Jointly Administered)
	Hearing Date: July 27, 2009 at 9:00 a.m. prevailing Eastern Time
	Objection Deadline: July 20, 2009 at 4:00 p.m. prevailing Eastern Time
	Related Docket No. : 815

OBJECTION OF INTERNATIONAL BUSINESS MACHINES CORPORATION IN RESPONSE TO 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 SCO Group, Inc. ("SCO Group") and SCO Operations, Inc. ("Operations", and, collectively with SCO Group, "SCO" or the "Debtors"), the debtors and debtors in possession, filed their "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," on June 22, 2009 (the "Motion").

International Business Machines Corporation ("IBM"), a creditor and stockholder in these Chapter 11 cases, objects to the Motion based on the deficiencies in the record for approval of the Motion and in the underlying Purchase and Sale Agreement.

I. FACTS

A. The Purchase and Sale Agreement

1. *The Purchase and Sale Agreement*. The Motion seeks, among other things, authority to sell the "Purchased Assets" (as defined below) free and clear of interests and claims in a private sale under and in accordance with the Purchase and Sale Agreement dated June 15, 2009 (the "PSA"), by and among SCO Group, Operations, SCO Global, Inc. (collectively, SCO Group, Operations and SCO Global, Inc., the "Sellers") and unXis, Inc. (the "Purchaser").

2. *Purchased Assets*. Under the PSA, the "Purchased Assets" are defined to include:

(i) substantially all of the Debtors' assets related to the UNIX and OpenServer business,

(ii) certain of the Debtors' nondebtor subsidiary companies (the "Purchased Subsidiaries"),

(iii) certain of the Debtors' mobile platform products, other than certain Mobility applications (including the Debtors' "Me Inc." technology and products),

(iv) all right, title and interest of the Sellers in and to the rights of SCO Group, if any, with respect to certain agreements between AT&T Technologies, Inc. and IBM and certain agreements between AT&T Technologies, Inc. and Sequent Computer Systems, Inc. (collectively, the "Litigated Contract Rights"), in each case as finally determined in the litigation pending in the United States District Court for the District of Utah (the "Utah Court") between SCO Group and Novell, Inc. ("Novell") and presently on appeal

before the United States Court of Appeals for the Tenth Circuit (the "Novell litigation") and subject to certain provisions of the PSA relating to SCO Group's retention of rights,

(v) all right, title and interest of the Sellers in and to all copyrights the ownership of which is claimed by SCO Group in the Novell litigation (the "Litigated Copyrights"), as finally determined in the Novell litigation and subject to certain provisions of the PSA relating to SCO Group's retention of rights, and

(vi) all rights to recover past, present and future damages from third parties for the breach, infringement or misappropriation, as the case may be, of any of the foregoing. (Mot. ¶ 4; PSA § 2.2.)

3. *Excluded Assets and the Retained SCO Rights*. The PSA provides for the Debtors to retain, inter alia,

(i) certain Mobility applications, including the Debtors' "Me Inc." technology and products, (PSA at Ex. D.); and

(ii) the "Retained SCO Rights," defined as:

(a) all right, title and interest in and to the "Pending SCO Litigation Claims" (which are the pending actions against Novell, IBM, AutoZone and Red Hat), and

(b) "such right, title and interest in and to the Litigated Copyrights and the Litigated Contract Rights as are finally determined in the Novell Litigation to have been owned by SCO Group as [sic] the Closing Date."

(PSA § 12.1.) The PSA provides that the proceeds of any of the claims under the Retained SCO Rights will not be transferred to the Purchaser under any circumstances and shall be free of any claim of Purchaser. (PSA at § 12.1.) The Motion describes the reason for the Retained SCO Rights provision as follows:

> SCO Group retains its claims . . . for the purposes of continuing the pending litigation and also asserting claims against third parties on the grounds that the Linux operating system and Linux-based products infringe those rights.

(Mot. ¶ 7.)

4. *Excluded Liabilities*. The PSA provides that "the Purchaser shall not assume [or] be liable for" any Excluded Liabilities, including any liabilities (i) in connection with any "Action," including "the Novell litigation, the IBM Litigation, the AutoZone Litigation and the Red Hat Litigation" and (ii) for "SVRX Royalties under any Contracts that are determined in any Action to be SVRX Licenses as a result of a final determination in the Novell Litigation that SCO Group is the owner of the Litigated Copyrights." (PSA §§ 2.5(g), (h).)

5. *The Base Purchase Price*. In exchange for the Purchased Assets, the Purchaser will pay the Debtors $2.4 million, consisting of a $250,000 deposit plus $2,150,000 payable by delivery of a letter of credit (the "Letter of Credit-Balance") at closing. (Mot. ¶ 5.)

6. *The Letter of Credit-Sun*. In addition, the Purchaser will post a $2,850,000 letter of credit (the "Letter of Credit-Sun") for the benefit of the Debtors to provide for the payment through escrow of Novell's judgment against SCO Group arising from the Novell litigation (the "Novell Summary Judgment"). The PSA provides that if the Novell Summary Judgment "is affirmed in whole or in part by the United States Court of Appeals for the Tenth Circuit" on or before August 31, 2009, then the Letter of Credit-Sun shall be drawn to pay the amount owing to Novell. (PSA § 3.3(a).) The PSA also provides that if the Novell Summary

Judgment is "reversed and/or remanded in whole or in part" on or before August 31, 2009, then the escrow agent shall continue to hold the Letter of Credit-Sun and that it may not be drawn until the United States District Court for the District of Utah rules on the remand. (PSA § 3.3(b).) (The PSA does not describe the treatment of the Letter of Credit-Sun if the Novell Summary Judgment is affirmed in part and reversed or remanded in part.) The PSA also provides that the Purchaser may elect at its sole discretion to require the Debtors to seek further appellate review, which the "Purchaser shall direct and control" (PSA § 3.3(a)), and if the Novell litigation is returned to the District Court, the Purchaser shall direct and control the litigation while the Letter of Credit-Sun is in effect and subject to being drawn. (PSA § 3.3(b).) Finally, if the Court of Appeals does not rule by August 31, 2009 or if the Letter of Credit-Sun is not drawn by December 31, 2009, then the Letter of Credit-Sun terminates. (PSA § 3.3(c).)

7. *Additional Assets*. In addition, the PSA grants the Purchaser additional rights and assets in the future without additional consideration:

(i) If "the rights of Sellers or of any Purchased Subsidiary to the Company Technology [technology and intellectual property used in the operation of the UNIX business, including the Litigated Copyrights, by any Seller and/or by any Purchased Subsidiary] and related Purchased Assets are expanded through Sellers' appeal of prior rulings in the Novell Litigation, and subsequent trial or other proceedings, those expanded rights will also be transferred to Purchaser as part of this] transaction (including subject Article XII hereof [relating to SCO Group's retention of rights described below]) without further payment by Purchaser." (PSA § 2.2.), and

(ii) If the Debtors are unable to sell the "Java Patents" (as defined in the PSA) by December 31, 2009, then they are assigned to the Purchaser as of January 1, 2010 without further consideration. (PSA § 2.3.)

8. *The Later Transfer of the Retained SCO Rights*. The PSA also provides for the later transfer to the Purchaser of the SCO Retained Rights, under specified circumstances:

> (a) All right, title and interest of Sellers and their affiliates (including any rights as a licensee) in and to the Litigated Copyrights and the Litigated Contract Rights immediately and automatically become vested in, owned by, and assigned and transferred to the Purchaser, without any further act or deed or consideration being required of the Purchaser, upon the first to occur of any of the following:
>
> (i) A final, non-appealable determination is made in the Novell litigation that none of the Litigated Copyrights are owned by SCO Group,
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> . . .
>
> (iv) Prior to confirmation and substantial consummation of a plan of reorganization in the Chapter 11 Cases, the Bankruptcy Court enters an order in the Chapter 11 Cases converting either of the Chapter 11 Cases to a case under Chapter 7 of title 11 of the United States Code, (b) [sic] appointing a Chapter 11 trustee in the Chapter 11 Cases, or (c) appointing an examiner having enlarged powers beyond those set forth under Bankruptcy Code section 1106(a)(3) in the Chapter 11 Cases; . . . and
>
> . . .
>
> (vii) the tenth anniversary of the Closing Date.

(PSA § 12.4.)

9. *Timing of the Closing*. The Closing will take place "on the Business Day selected by Purchaser that is after the Sale Order is entered and in any event by no later than the Termination Date, or such other date as Sellers and Purchaser shall mutually agree, subject to satisfaction of all conditions to Closing . . . ." (PSA § 4.1.) The "Termination Date" is defined as the date that is 90 days from the date of the PSA (Monday, September 14, 2009) or such later

date as the Debtors and the Purchaser agree. (PSA § 1.1.) The PSA does not require the Purchaser to close as promptly as practicable after the Sale Order is entered.

10. *Deposit, Termination and Liquidated Damages Provisions*. The PSA acknowledges the Purchaser's $250,000 cash deposit concurrently with the execution and delivery of the PSA. (PSA § 3.1.) The Debtors may terminate the PSA under specified circumstances, including with the Purchaser's consent, if the Court does not approve the PSA or if a Governmental Authority enjoins the sale. (PSA § 4.4.) If the PSA is terminated under any of these circumstances, the Purchaser has no liability to the Debtors and is entitled to a return of the $250,000 deposit. (PSA § 3.2(b), (d).) In addition, the Debtors may terminate if the Purchaser breaches the PSA, including by failing to close. (PSA § 4.4(f).) In that case, the Debtors "shall be entitled to receive the Cash Deposit [of $250,000] as liquidated damages and not as a penalty as Sellers' sole and exclusive remedy as a result of such termination." (PSA §4.6(c).) The Purchasers would have no other liability to the Debtors or the estates.

B. Testimony about the Negotiation of the Purchase and Sale Agreement

11. The discovery that IBM has taken over the past two weeks reveals previously undisclosed facts that are inconsistent with the full disclosure requirements and fiduciary duties imposed on a Chapter 11 debtor in possession and imply that the transaction is no more real than the previous transactions the Debtors have proposed in these Chapter 11 cases. Because discovery has not yet been completed and not all final deposition transcripts are complete, IBM reserves the right to supplement this Statement and to present evidence at the hearing on the Motion in addition to the matters set forth below.

12. *CEO Darl McBride's Payments to Stephen Norris*. It appears that the Debtors' CEO Darl McBride made payments from his own personal funds to or for the benefit of Stephen Norris, apparently in connection with the pending sale and prior, unsuccessful attempts

to obtain a buyer for the Debtors' assets. According to Mr. McBride's deposition testimony, he made the payment or payments through Mark Robbins, whom he knew socially and who said he would "backstop", through his company AIP, any deal with Mr. Norris. (McBride Dep. Tr. 35:13-19, 42:1-18, 83:18-23.[1]) Mr. McBride claimed he loaned Mr. Robbins $300,000, $100,000 of which went to Mr. Norris. (McBride Dep. Tr. 84:18-21, 86:18-23, 87:14-24.) McBride insisted this was a loan to Mr. Robbins and not a payment to Mr. Norris related to the Debtors, but he produced no documentation supporting the claim that it was a loan or otherwise reflecting the transaction. (McBride Dep. Tr. 84:4-19, 88:19-23.)

13. For his part, Mr. Norris testified that he received $200,000 from affiliates of the Debtors. He testified that Mr. Mc Bride paid him the first $100,000 for Mr. Norris's work in helping the Debtors look for buyers and that the Debtors' German affiliate paid him the second $100,000 as a consulting fee in or around the fall of 2008. (Norris Dep. Tr. 56:4-56:21, 60:24-61:16.) Mr. Norris admitted that the first $100,000 was not paid under a written agreement. (Norris Dep. Tr. 59:19-60:6.) He claimed, however, that he had a consulting agreement with the German entity for the second $100,000, although he has not produced a copy. (Norris Dep. Tr. 60:24-62:10.) Mr. Norris also admitted that the German affiliate paid for travel he took to Europe. (Norris Dep. Tr. 64:13-17.) None of the German affiliate's payments appear to have been disclosed previously to this Court. (Norris Dep. Tr. 60:24-62:10.) Mr. Norris testified that he might also seek additional compensation for his work on the PSA. (Norris Dep. Tr. 65:15-22.)

[1] Citations to depositions are to the rough versions as final transcripts were not completed in time to be used in connection with this memorandum, and not all depositions have yet been taken. IBM will offer pertinent deposition testimony at trial if and as necessary.

14. Of course, the very involvement of Mr. Robbins in introducing Mr. McBride to Mr. Norris calls into question the good faith of the contemplated transaction. In its January 8, 2009, disclosure to the Court, the Debtors represented that Mr. Robbins—Mr. Norris's "partner"—had "extensive experience in structured finance and private equity as co-founder and managing partner of Peninsula Advisors" and "served as Investment Director and lead negotiator with several leading financial institutions." (Disclosure Statement in Connection With the Debtors' Amended Joint Plan of Reorganization (filed January 8, 2009), at 20.) [Docket No. 655] And Mr. Robbins first introduced Mr. Norris to the Debtors, laying the foundation for the PSA. (See Norris Dep. Tr. at 34:19-35:17; see also McBride Dep. Tr. at 35:6-16.) But both Mr. McBride and Mr. Norris have testified that they believe Mr. Robbins to be involved in fraud. (McBride Dep. Tr. 62:6-15; Norris Dep. Tr. 45:21-48:16.) Mr. Norris "had come to find out and pretty definitively that Robbins had been lying to everyone and misrepresenting essentially everything to everyone and had probably engaged in a whole variety of frauds." (Norris Dep. Tr. 46:20-24.)

15. *Financing for the PSA Transaction*. Mr. Norris claimed that he had fairly firm plans to line up capital for the transaction proposed under the PSA, but he did not provide particulars. (Norris Dep. Tr. 92:14-93:7.) He admitted, however, that he has no executed agreements from anyone to invest in this transaction, that there are no written commitments to back up either the Letter of Credit-Balance or the Letter of Credit-Sun and that he has no scheduled meetings over the next two weeks with any potential investors (Norris Dep. Tr. 96:12-25, 97:9-23, 179:15-21.) He claimed to have a variety of interested bidders, but did not clearly explain his solicitation process and, apparently on the advice of counsel, refused to identify any of the potential bidders. (Norris Dep. Tr. 159:1-160:18, 165:8-166:18.)

16. *Explanations for the Letter of Credit-Sun and Retained SCO Rights Provisions in the PSA*. Mr. McBride testified that he had no explanation for the expiration of the Letter of Credit-Sun or for the Retained SCO Assets provision in Section 12.4(iv) of the PSA noted above and discussed in more detail below. (McBride Dep. Tr. 151:18-153:17, 164:23-167:21.) The Motion also does not provide any explanations.

C. Additional Discovery and Evidence

17. In anticipation of the hearing, IBM asked the Debtors to produce documents important to the Motion and the pending motions to convert, including documents concerning: (1) communications between the Debtors and unXis or Stephen Norris; (2) offers or bids to acquire, or expressions of interest in acquiring, any or all of the Debtors' assets; and (3) the Debtors' financial and other performance. Debtors essentially declined to cooperate. So far as IBM can tell, they made no more than a token effort to search for the requested documents and produced only a few documents, while withholding a much larger set of relevant documents. Debtors' refusal to conduct a reasonable search for and produce the requested documents materially impedes IBM's, Novell's, the U.S. Trustee's and this Court's ability properly to test the assertions underlying the Motion and their opposition to the motions to convert. IBM respectfully requests that the Court require the Debtors to produce the requested documents and decline to approve the Motion unless the Debtors do so in advance of the hearing.

* * *

18. As more fully described below, the Motion does not provide adequate evidence that the proposed sale meets the requirements for court approval of a sale under Section 363 of the Bankruptcy Code. In addition, the PSA contains provisions that violate Section 363's "good faith" requirement and includes terms that unfairly benefit the Purchaser at the expense of creditors and the estate. The sale process also has been tainted both by non-disclosure of

important payments and by other circumstances that call into question the intention and ability of the parties to consummate the transaction. Therefore, the Court should not grant the Motion.

II. DISCUSSION

A. The Requirements for Approval of a Sale Under Section 363.

19. This Court has clearly summarized what is required for a sale of assets out of the ordinary course of business:

> (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 has acted in good faith. In re Delaware & Hudson Railway Co., 124 B.R. 169, 176 (D. Del. 1991). The element of "good faith" is of particular importance, as the Third Circuit made clear in In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143, 149-50 (3d Cir. 1986) (" . . . when a bankruptcy court authorizes a sale of assets pursuant to section 363(b)(1), it is required to make a finding with respect to the ('good faith' of the purchaser.").

In re Exaeris, Inc., 380 B.R. 741, 744 (Bankr. D. Del. 2008). The meaning of these four requirements and their reasons are plain.

20. The court must scrutinize a sale of a substantial portion of a debtor's assets under Section 363 of the Bankruptcy Code closely because of the danger that such a sale might deprive parties of substantial rights inherent in the Chapter 11 plan confirmation process. 3 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy, ¶ 363.02[2] (15th rev. ed. 2005). Therefore, where a debtor in possession seeks approval of a sale or disposition of property of the estate outside of the ordinary course of business, "there must be some articulated business justification" before the court may authorize such disposition under Section 363(b) of the Bankruptcy Code. In re Lionel Corp, 722 F.2d 1063, 1070 (2d Cir. 1983); In re Del. & Hudson Ry. Co, 124 B.R. 169, 176 (D. Del 1991); In Re Montgomery Ward Holding Corp., 242 B.R. 147, 153 (Bankr. D. Del. 1999).

21. As to the fair sale price requirement, as the Debtors recognize, "[t]he auction procedure has developed over the years as an effective means for producing an arm's length fair value transaction." (Mot. ¶ 11 (citing Ramsay v. Vogel, 970 F.2d 471, 473 (8th Cir. 1992))). "It is the burden of the proponents of the Sale to establish that the price is fair which would require information on the value of the assets being sold, including the business, claims being released, inventory and the like." In re Exaeris, Inc., 380 B.R. at 745.

22. The Debtors also acknowledge the importance of the "good faith" requirement, noting "judicial approval under section 363 of the Bankruptcy Code requires a showing that the proposed action is fair and equitable, in good faith and supported by a good business reason." (Mot. ¶ 9 (citing In re Phoenix Steel Corp., 82 B.R. 334, 335-36 (Bankr. D. Del. 1987))).

23. Although the Bankruptcy Code does not define "good faith" for purposes of determining whether a purchaser acted in good faith in a Section 363 sale, most courts have adopted a traditional equitable definition, stating that a purchaser who acts in good faith is "one who purchases the assets for value, in good faith and without notice of adverse claims". In re Made in Detroit, Inc., 414 F.3d 576 (6th Cir. 2005) (quoting In re Rock Indus. Mach Corp., 572 F.2d 1195 (7th Cir. 1978)). The good faith of a purchaser is shown by the integrity of his conduct during the course of the sale proceedings; where there is a lack of such integrity, a good faith finding may not be made. A purchaser will not be found to have acted in good faith where there is "fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders." In re Gucci, 126 F.3d 380, 390 (2d Cir. 1997); In re Rock Indus., 572 F.2d at 1198.

24. And of course, disclosure is a fundamental requirement of good faith. A sale is not in good faith where "the relationship between the seller and the buyer has been concealed". In re Wilde Horse Enters., Inc., 136 B.R. 830, 842 (Bankr. C.D. Cal. 1991) (citing In re Tri-Can, Inc., 98 B.R. 609, 618-619 (Bankr. Mass. 1989). The court in Wilde Horse stressed the importance of full disclosure, noting:

> Of course, the court and the creditors can only make an "articulated business" judgment regarding the prudence of the sale where there has been a full disclosure of the details of the proposed sale by its proponent. "The key to the reorganization Chapter . . . is *disclosure* . . . ." The essential purpose served by disclosure is to ensure that parties in interest are not left entirely at the mercy of the debtor and others having special influence over debtor.

Id. at 841 (citations omitted; emphasis in original). Although Wilde Horse involved disclosure of an insider's dealings with the debtor in possession, the court's prescription for disclosure in connection with a sale ensures good health for the sale process even for non-insider transactions: "Clearly then, a debtor who proposes a sale of all of its assets to an insider must fully disclose to the court and creditors the relationship between the buyer and the seller, as well as the circumstances under which the negotiations have taken place, any marketing efforts, and the factual basis upon which the debtor determined that the price was reasonable." Id. at 842; see also In re Medical Software Solutions, 286 B.R. 431, 440 (Bankr. D. Utah 2002) ("In order to approve a sale of substantially all the [d]ebtor's assets outside the ordinary course of business, . . . [t]he debtor must show . . . there has been adequate and reasonable notice to interested parties, including full disclosure of the sale terms and the [d]ebtor's relationship with the buyer."); In re Betty Owens Schools, Inc., No. 96 Civ. 3576(PKL), 1997 WL 188127 at 4 (S.D.N.Y. 1997) ("[A] debtor-in-possession who proposes a sale of all of its assets to an insider must fully disclose the relationship between the buyer and the seller."). Belated disclosure after the truth

has been uncovered should not suffice to cure earlier non-disclosure. A debtor's response of disclosing only after being caught cannot constitute good faith.

25. Additionally, courts also assess the fiduciary duty of a debtor in possession, as a fiduciary of the creditors and the estate, and prohibit the debtor in possession from self dealing with assets of the estate or taking self-interested actions, unless the debtor in possession proves that the self-interested transaction is inherently fair. See In re Schipper, 109 B.R. 832, decision aff'd, 112 B.R. 917 (N.D. Ill. 1990), aff'd, 933 F.2d 513 (7th Cir. 1991).

26. The Motion does not show at all how the PSA meets at least three of these four sale requirements. The Motion does not show a sound business purpose for the sale. Rather, the timing of the sale, especially the dramatic eleventh hour, fifty-ninth minute signing before the hearing on the conversion motions, suggests just the opposite. The Motion does not show how the price was determined, whether it is fair or whether the proposal for a private sale will generate a sufficient market test and a fair price. There is no evidence of the good faith of the Debtors or of the Purchasers, and certain PSA provisions, the testimony of the principal parties involved in its negotiation and the lack of disclosure of payments from the Debtors' affiliate to Mr. Norris, who arranged the sale and signed the PSA on behalf of the Purchaser, imply a lack of good faith. Finally, there is no evidence that the Purchaser has the financing available to close the sale.

27. IBM objects to the Motion because of, among other reasons, the inclusion of the Retained SCO Rights "poison pill" provision, the Letter of Credit-Sun provisions and the termination rights discussed below and because of the undisclosed and unexplained payments and the absence of committed financing. But even if the Debtors address those matters, this Court cannot approve the sale unless the Debtors make a complete record in support of the

Motion, including not only on the matters to which IBM objects, but also on all of the requirements for approval of a sale under Section 363 of the Bankruptcy Code. IBM therefore reserves the right to object to additional aspects of the Motion and the PSA.

B. The Sale Is Not In Good Faith

1. The PSA's Poison Pill Provision Is Not in Good Faith

28. The Debtors have repeatedly touted (over IBM's objections) the supposed significance and allegedly astronomical value of the Litigated Copyrights and the Litigated Contract Rights, including recently in the *Debtors' Response to Motions to Dismiss or Convert Filed by United States Trustee (D.E. #750), International Business Machines Corporation (D.E. #751), and Novell, Inc. (D.E. #753)* ("Response to Conversion Motions") [Docket No. 778], stating that

> SCO represents a daunting threat to IBM and Novell, even setting aside the billions of dollars that SCO stands to recover directly if it prevails in court .... If SCO establishes [its claimed copyrights and contractual rights in UNIX] in court, SCO also would have profitable claims in countless Linux distributions to customers ....

(Response to Conversion Motions, at 3.) Yet in the face of motions to convert the Chapter 11 cases, the Debtors include a provision in the PSA, Section 12.4(iv), that would forfeit those assets if their cases are converted to Chapter 7 or if a trustee is appointed. Certainly, any such provision in a prebankruptcy agreement would run afoul of Section 365(e) of the Bankruptcy Code, invalidating *ipso facto* clauses in executory contracts, or Section 541(c) of the Bankruptcy Code, invalidating any transfer restriction based on an *ipso facto* clause.

29. There is no more reason to permit such a provision here, even if conversion motions were not pending. If approved, the provision would create a penalty for the estates if the pending conversion motions were granted, improperly interfering with the exercise of the Court's discretion to make an appropriate disposition of these Chapter 11 cases and

imposing a limitation on the Court's authority to determine what is in the best interests of creditors and the estate.

30. The Motion offers no reason for such a provision. Nor can one readily imagine how such a provision would benefit the estates or any reason why a purchaser in general or this Purchaser in particular would reasonably demand transfer of an asset for no additional consideration only if the cases were converted or a trustee were appointed. In fact, Mr. McBride, the Debtors' CEO, could not name a legitimate business reason for the poison pill. (McBride Dep. Tr. 167:10-21.) Under circumstances where the Court may otherwise have determined that the best interests of creditors and the estate would be served by conversion of these Chapter 11 cases or the appointment of an examiner or a Chapter 11 trustee, this provision invites the Court to tie its own hands in considering the conversion motions, without any basis or explanation. The inclusion of the poison pill when the conversion motions are pending is indicative of a self-interested motive, lack of good faith in the sale or other breach of fiduciary duty to the estates.

31. Therefore, the Motion should not be approved if this poison pill against fair consideration of the conversion motions remains a part of the PSA.

2. The Undisclosed Payments Are Not in Good Faith

32. While the Debtors have largely refused to produce the documents IBM has requested, discovery has unearthed undocumented payments by the Debtors' affiliates in connection with the PSA that have not been previously disclosed to this Court. The payments appear to have totaled $200,000, although some of the testimony suggests that they exceeded $300,000, including expense reimbursement. That amount exceeds the $250,000 deposit the Purchaser has made under the PSA. Full disclosure is the hallmark of good faith in a Chapter 11 case. Without full disclosure of all the payments, their sources and their purposes and a determination by this Court that the payments were proper and did not divert value away from

these estates, this Court cannot approve the Motion. Payments from the Debtors' affiliates to the putative purchaser that cover nearly all the money the Purchaser has deposited in escrow suggest anything but a good faith commitment to consummating the deal.

C. The Sale Price Is Not Fair.

1. The Letter of Credit-Sun Terms Are Not Fair

33. As currently constructed, the PSA provides that the Purchase Price will include a draw of all or a portion of the Letter of Credit-Sun if any payment obligation of SCO Group to Novell under the Novell Summary Judgment is affirmed by a final, nonappealable judgment. (PSA § 3.3.) By contrast, the Purchase Price will not include any amount under the Letter of Credit-Sun if the Novell Summary Judgment is reversed or remanded in whole or in part. (Mot. ¶ 5; PSA § 3.3.) Thus, the Purchaser would pay a higher price if it is determined that the Litigated Copyrights, which the Debtors have valued so highly, and contractual rights that the Debtors claim to own are not owned by the Debtors, and consequently, not included in the Purchased Assets. The Purchaser would pay a lower price if those allegedly valuable assets are included. It does not require citation of authority to show that a purchase and sale agreement that provides for a lower price upon the transfer of higher value assets does not provide a fair sale price to the estate.

34. What's more, whether or not the Tenth Circuit's ruling on the Novell Summary Judgment enhances or diminishes the Debtors' assets, a purchase price that fluctuates based only on the Debtors' liabilities rather than on its assets cannot be a fair price, either from the perspective of the creditors who would be left unpaid if the Letter of Credit-Sun were terminated or devoted solely to payment of a single creditor or, if assets were adequate to pay all creditors, from the perspective of the Debtors' shareholders.

35. The Letter of Credit-Sun provisions put the estate at risk in another way. If the Court of Appeals reverses or remands the Novell Summary Judgment, the Purchaser may control the litigation on remand in its sole discretion while the Letter of Credit-Sun is in effect. Alternatively, the Purchaser may require the Debtors to pursue further appellate review. The Letter of Credit-Sun expires under all circumstances on December 31, 2009. Therefore, it would not be a difficult for the Purchaser to extend the matter for a few months until the Letter of Credit-Sun expires, depriving the estate of the additional value it would otherwise represent. Such a provision does not represent a fair price.

2. The Closing and Termination Provisions Are Not Fair

36. The Debtors have made clear they expect a ruling from the Tenth Circuit on or before August 31, 2009. (See Response to Conversion Motions, at 3.) The Purchaser has the right under the PSA to delay closing until after August 31, 2009, regardless of whether the conditions to closing are actually satisfied by then. Thus, the Purchasers can wait until at least mid-September to see if the Tenth Circuit's ruling is favorable to the Debtors before having to close on the deal. If the ruling is favorable to the Debtors, the Purchaser may close for only $2,400,000. If it is unfavorable, the Purchaser can choose to close for that amount or choose not to close, forfeiting only its $250,000 deposit and suffering no other liability. Such a provision is not a fair purchase price. It is an option for about 5% of the total purchase price. The "Purchase Price" touted by the Debtors masks the contingency and optionality upon which it is based.

37. A sale agreement that provides the purchaser only an option and does not require the purchaser to close is of even greater concern where the purchaser does not have committed financing for the transaction and no agreements in place to obtain financing. Mr. Norris testified that there is no financing in place for this transaction. Lining up an additional $2,150,000 of financing must certainly be easier than lining up an additional $5,000,000. By

structuring the PSA as an option, the Purchaser has the ability and, without committed financing in place yet, the incentive to walk away from the deal if the Tenth Circuit's ruling is not favorable to the Debtors.

38. Furthermore, where only an option is involved, there does not seem to be any basis on which to dispense with an auction and proceed with a private sale, as the Debtors propose to do here. The very structure of the transaction belies any supposed urgency. As the Debtors acknowledge in their Motion, an auction is the effective means to determining a fair price. The option arrangement here, coupled with a private sale, does not ensure that the estates are receiving a fair sale price.

39. Therefore, the Motion should not be approved if PSA is not amended to provide that the Letter of Credit-Sun is available to the estates under all circumstances and that the Purchasers are required to close, whatever the outcome of the Tenth Circuit appeal.

D. Additional Issues.

40. IBM has not completed discovery in connection with the Motion and the PSA and therefore reserves its rights to object to the sale on all grounds and based on any additional matters revealed during discovery, including the lack good faith of both the Purchaser and the Debtors, the lack of disclosure of the Debtors' relationship with the Purchaser, the Debtors' business justification for the sale and for particular terms of the sale, such as the exclusion of the Me Inc. assets and its effect on the Purchase Price, and the competing offers that the Debtors received and rejected in the weeks leading up to the signing of the PSA.

III. CONCLUSION

For the foregoing reasons, IBM respectfully requests that this Court deny the Motion and the PSA in its present form.

Dated: July 20, 2009

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