IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

	:	
	:	Chapter 11
In re	:	
	:	Case No. 07-11337 (KG)
THE SCO GROUP, INC., *et al.*,[1]	:	(Jointly Administered)
	:	
Debtors.	:	**Hearing Date: November 20, 2009 at 2:00 p.m. (EST)**
	:	**Objection Deadline: November 13, 2009 at 4:00 p.m.**
	:	**(EST)**
		Re: D.I. 942, 960

RESPONSE AND OPPOSITION OF MOVANT WAYNE R. GRAY TO "OBJECTION OF CHAPTER 11 TRUSTEE TO MOTION OF WAYNE R. GRAY FOR ENTRY OF ORDER LIFTING AUTOMATIC STAY TO PERMIT THE DEBTOR, THE SCO GROUP, INC., TO PARTICIPATE IN FLORIDA FEDERAL COURT ACTION AND PENDING ELEVENTH CIRCUIT COURT OF APPEALS PROCEEDING"

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[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.

RESPONSE AND OPPOSITION OF MOVANT WAYNE R. GRAY TO "OBJECTION OF CHAPTER 11 TRUSTEE TO MOTION OF WAYNE R. GRAY FOR ENTRY OF ORDER LIFTING AUTOMATIC STAY TO PERMIT THE DEBTOR, THE SCO GROUP, INC., TO PARTICIPATE IN FLORIDA FEDERAL COURT ACTION AND PENDING ELEVENTH CIRCUIT COURT OF APPEALS PROCEEDING"

The Movant, WAYNE R. GRAY ("the Movant Mr. Gray" or "Mr. Gray"), by and through his undersigned counsel, hereby submits this his "Response And Opposition Of Movant Wayne R. Gray To 'Objection Of Chapter 11 Trustee To Motion Of Wayne R. Gray For Entry Of Order Lifting Automatic Stay To Permit The Debtor, The SCO Group, Inc., To Participate In Florida Federal Court Action And Pending Eleventh Circuit Court Of Appeals Proceeding'" filed by EDWARD N. CAHN, in his capacity as Chapter 11 Trustee for the Debtor, The SCO Group, Inc. ("the Trustee"), and in support of his Response and Opposition, the Movant Mr. Gray states:

I.

INTRODUCTION

The Movant Mr. Gray filed his original "Motion Of Wayne R. Gray For Entry Of Order Lifting Automatic Stay To Permit The Debtor, The SCO Group, Inc., To Participate In Florida Federal Court Action And Pending Eleventh Circuit Court Of Appeals Proceeding" for three (3) separate but interrelated reasons:

1. On September 17, 2009, Circuit Judge Stanley F. Birch, Jr., Judge of the United States Court of Appeals for the Eleventh Circuit, entered an Order in *Wayne R. Gray v. Novell, Inc., The SCO Group, Inc., and X/Open Limited Company*, staying the entire appeal pursuant to Section 362(a) of the Federal Bankruptcy Code, thereby bringing that entire appeal to a halt. Mr. Gray believed, and continues to believe, that that appeal will not go forward unless and until the Debtor, The SCO Group, Inc., participates in it.

2. A careful analysis of the chain-of-title of the ownership of the registered U.S. "UNIX" Trademarks[2] confirms that the Debtor SCO is the lawful owner of the "UNIX" Trademarks, an asset of the bankruptcy estate and the value of which far exceeds the value of any other asset of the bankruptcy estate.

3. The failure of the Debtor SCO to protect its rights in and to the "UNIX" Trademarks may well result in the destruction of those trademarks and the loss of significant past and future licensing fees, and the destruction of the "UNIX" Trademarks and the loss of those licensing fees will deprive the Debtor SCO and its creditors of substantial amounts of money.

Accordingly, the Movant Mr. Gray filed his "Motion Of Wayne R. Gray For Entry Of Order Lifting Automatic Stay To Permit The Debtor, The SCO Group, Inc., To Participate In Florida Federal Court Action And Pending Eleventh Circuit Court Of Appeals Proceeding."

II.

STATEMENT OF THE CASE AND KEY FACTS

The Movant Mr. Gray filed an action in the United States District Court for the Middle District of Florida, Tampa Division, styled and numbered *Wayne R. Gray v. Novell, Inc., The SCO Group, Inc., and X/Open Limited Company*, Case No. 8:06-cv-01950-JSM-TGW, alleging, among other tings, that an analysis of the chain-of-title of the ownership of the "UNIX" Trademarks confirmed that the Debtor, The SCO Group, Inc. ("the Debtor SCO" or "SCO"), and not X/Open Company Limited ("X/Open"), owned

[2] For the purpose of this bankruptcy proceeding, the term "U.S. 'UNIX' Trademarks" shall refer, collectively, to United States Serial Nos. 73537419 and 73544900, Registration Nos. 1390593 and 1392203, respectively, for the "UNIX" trademarks registered by AT&T in 1986.

the "UNIX" Trademarks:

A. The original owner and lawful registrant of the "UNIX" Trademarks was AT&T.

B. Through a series of transactions, Novell ended up the lawful registrant of the "UNIX" Trademarks in 1995.

C. On or about September 19, 1995, Novell entered into an "Asset Purchase Agreement" ("the 1995 APA") pursuant to which The Santa Cruz Operation, Inc. ("Santa Cruz"), purchased the UNIX business from Novell. The 1995 APA itself made plain that the "UNIX" Trademarks were to be transferred to Santa Cruz, along with (i) the UNIX business and (ii) the goodwill of that business symbolized by the "UNIX" Trademarks.

D. On or about December 6, 1995, Novell (as Seller) and Santa Cruz (as Buyer) executed and delivered a "Bill of Sale" that transferred from Novell to Santa Cruz the assets identified in the 1995 APA. The "UNIX" Trademarks were identified in the 1995 APA as assets to be transferred to Santa Cruz.

E. On or about December 6, 1995, and October 16, 1996, Novell and Santa Cruz entered into two (2) amendments, neither of which affected the transfer of the "UNIX" Trademarks to Santa Cruz.

F. Santa Cruz (and its successors, including the Debtor SCO) has continued to use the "UNIX" Trademarks in connection with the UNIX business through today.

Accordingly, the Debtor SCO currently owns the "UNIX" Trademarks.

The Defendant X/Open argued to the Florida District Court and to the Eleventh Circuit that, on or about September 4, 1996, it, Novell, and Santa Cruz entered into a so-called "Confirmation Agreement" that ultimately resulted in it (X/Open) owning the "UNIX" Trademarks. The so-called "Confirmation Agreement" stated:

> WHEREAS, NOVELL and SCO entered into a September 19, 1995 Purchase Agreement, as amended (APA"). pursuant to which NOVELL agreed to convey its entire right, title and interest in and to the UNIX trademark to SCO....

* * *

> WHEREAS, X/OPEN and SCO desire to provide for the acceleration of vesting of title … to the UNIX trademark,
>
> * * *
>
> … notwithstanding any understanding to the contrary, NOVELL shall for this purpose be considered the owner of legal title to the UNIX trademark…
>
> * * *
>
> SCO agrees that notwithstanding the fact that NOVELL will be executing [UNIX trademark] assignment document(s) [to X/Open] after the Closing Date established by the APA, such assignment by NOVELL shall not be considered a breach of NOVELL's obligations [to Santa Cruz] under the APA. (emphasis added.)

The so-called "Confirmation Agreement" was, and still is, a legal nullity for a variety of reasons:

A. If it is viewed as an assignment of the "UNIX" Trademarks to Novell, it fails unless it was a transfer accompanied by a transfer of the UNIX business and the goodwill of that business as symbolized by the "UNIX" Trademarks. But, there is no evidence that Santa Cruz (or any of its successors) ever transferred back to Novell (i) either of the "UNIX" Trademarks, (ii) the UNIX business, or (iii) the goodwill of the UNIX business as symbolized by the "UNIX" Trademarks. Moreover, the 1995 APA specifically required that Novell not compete with the UNIX business of Santa Cruz after Santa Cruz purchased that business from Novell. And, the 1995 APA itself made clear that the only Marks being transferred by Novell to Santa Cruz were the "UNIX" Trademarks and the "UnixWare" Mark.

B. In a "Deed Of Assignment" dated November 13, 1998, Novell purportedly assigned to X/Open the "UNIX" Trademarks. That "Deed Of Assignment" expressly declared that the "UNIX" Trademarks were being assigned to X/Open, along with the "goodwill attached to the said [UNIX] trade marks." That "Deed Of Assignment" was fraudulent, as was X/Open's subsequent

> registration of the "UNIX" Trademarks predicated upon that "Deed Of Assignment." Why? Because the so-called "Confirmation Agreement" was, and still is, a legal nullity. It is meaningless and of no legal effect under the controlling federal trademark laws.

III.

ARGUMENT

After discussing Mr. Gray's motion with Bonnie Glantz Fatell (counsel for the Chapter 11 Trustee for the Debtor SCO), counsel for Mr. Gray wrote to Ms. Fatell on Thursday, November 12, 2009, and stated:

> In particular, if the Trustee believes that the so-called "Confirmation Agreement" of September 4, 1996, is dispositive of X/Open's ownership of the "UNIX" Trademarks, then, given that both Novell and SCO stipulated in the Utah District Court Action that Novell's entire UNIX business, all of Novell's "UNIX" Trademark licenses, and Novell's "UNIX" Trademarks transferred unencumbered from Novell to Santa Cruz (a predecessor of SCO) by way of the September 19, 1995, "Asset Purchase Agreement" and the related December 6, 1995, "Bill of Sale," we ask that he explain in detail in his response:
>
> 1. how and when the UNIX business, including the UNIX licensing business, transferred from Santa Cruz (or one of its successors) back to Novell;
>
> 2. how and when the good will associated with the UNIX business, including the goodwill associated with the UNIX licensing business, transferred from Santa Cruz (or one of its successors) back to Novell;
>
> 3. how and when the "UNIX" Trademarks, which symbolize the goodwill associated with the UNIX business, including the goodwill associated with the UNIX licensing business, transferred from Santa Cruz (or one of its successors) back to Novell;
>
> 4. how Novell managed to be in the UNIX business in 1998 (when it purportedly transferred the "UNIX" Trademarks, together with the UNIX business and the goodwill associated with those Trademarks, to X/Open) when it had agreed earlier in the 1995

"Asset Purchase Agreement" and the "Technology Licensing Agreement" to restrictive covenants requiring it (Novell) to exit the UNIX business and to remain out of it; and

5. how X/Open has lawfully owned the "UNIX" Trademarks since 1994, as it continues to state on its official web site, when the purported "Deed Of Assignment" was not executed by Novell until November, 1998.

A complete and accurate copy of Mr. Steele's letter of November 12, 2009, to Ms. Fatell is attached as Exhibit A to this "Response and Opposition." A careful review of the "Objection Of Chapter 11 Trustee" discloses a complete and utter failure of the Trustee and his counsel to address any of the pertinent questions posed by Mr. Gray, and those questions are the ones that should guide this Court's analysis and evaluation of Mr. Gray's initial motion. Addressing the key corresponding paragraphs of the "Objection Of Chapter 11 Trustee," this Court should note:

7. Paragraph 7 completely, and perhaps unintentionally, mischaracterizes the specific request of Mr. Gray's initial motion. According to counsel for the Trustee, Mr. Gray "seeks the entry of an order lifting the automatic stay to compel the Trustee to participate in an appeal pending before the United States Court of Appeals for the Eleventh Circuit." (Emphasis in original.) Not so. Mr. Gray has called to the attention of the Trustee and to this Court the fact that, in his view, the "UNIX" Trademarks (i) have great value and (ii) clearly belong to the Debtor SCO. Yet, for some as-yet-unexplained reason, the Trustee and his counsel appear content not to pursue an asset that may be worth a

significant multiple of $5 million. Hence, given Circuit Judge Birch's Order, Mr. Gray was compelled to call to the attention of the Trustee and his counsel, as well as to the attention of this Court, that (i) SCO owned (and owns) the "UNIX" Trademarks, (ii) those Trademarks were (and are) extremely valuable, and (iii) the creditors of SCO deserved (and still deserve) an investigation into that ownership.

8. Paragraph 8's characterization of Mr. Gray's motion as "highly irregular," escapes the fact that the Trustee's (and his counsel's) studied ignorance of, and refusal to pursue, a highly-valuable asset of the Debtor SCO itself is "highly irregular." Mr. Gray's motion is irregular if, and only if, the Trustee and his counsel are content to walk away from an asset (the "UNIX" Trademarks) that likely is worth millions and millions of dollars. The real "irregularity" here is the eagerness displayed by the Trustee and his counsel in their effort to convince this Court to reject Mr. Gray's motion. Precisely whose interests are being protected here? Certainly not the interests of the creditors of the Debtor SCO.

9. a. The Trustee and his counsel first point to the dismissal motion filed by the Defendant SCO in the Florida District Court Action. There, in a motion to dismiss, according to the Trustee and his counsel, SCO argued for dismissal of the lawsuit, "clearly evidencing SCO's position that it has no interest in the Gray litigation." That statement, of course, is a *non sequitur* of substantial measure. An expressed lack of interest in Mr.

Gray's lawsuit does not equate to a lack of interest in the quite valuable "UNIX" Trademarks. And, even if SCO had no interest in the "UNIX" Trademarks, that lack of interest offers no excuse for the Trustee and his counsel to adopt such a lack of interest. Given the undisputed facts and the applicable federal trademark law, SCO's willful refusal -- to investigate, and to evaluate, whether the Debtor SCO, in fact and in law, is the lawful owner of the "UNIX" Trademarks -- should come as a genuine shock to the creditors of the Debtor SCO.

b. The Trustee and his counsel appear to find genuine persuasiveness in the Florida District Court's view that, while the *SCO-Novell* litigation ("the Utah District Court Action"), involves copyrights, the Florida District Court Action involves trademarks. That pleasure is a short-lived "red herring"; the Tenth Circuit's decision in *The SCO Group, Inc. v. Novell, Inc.*, makes clear that Mr. Gray's view of the operation of the 1995 APA is the correct one: Schedule 1.1(a) must be read as asset-inclusive, and Schedule 1.1(b) must be read as "asset-exclusive." That view is contrary to the position advanced by X/Open, *i.e.*, that the 1995 APA and related "Bill of Sale" did not transfer the "UNIX" Trademarks to Santa Cruz because the marks were excluded from the transfer. To the contrary, the 1995 APA and related "Bill of Sale" transferred the "UNIX" Trademarks from Novell to Santa Cruz, and the 1995 APA made clear that those Trademarks were transferred without encumbrance of any kind.

Most significantly, the Florida District Court virtually ignored the 1995 APA and related "Bill of Sale." Yet that transaction made the so-called "Confirmation Agreement" a legal nullity. The 1995 APA and related "Bill of Sale" transferred the UNIX business (including the license agreements), along with the goodwill of that business and the "UNIX" Trademarks that symbolized that goodwill, from Novell to Santa Cruz. Nowhere is there a document that transfers that business (including those license agreements), that goodwill, and those "UNIX" Trademarks back to Novell. So what business and goodwill did Novell transfer to X/Open when it (Novell) purportedly assigned the "UNIX" Trademarks to X/Open in the November 13, 1998, "Deed of Assignment"? The short and correct answer to that question, of course, is: none. After Novell transferred those Trademarks to Santa Cruz by way of the 1995 APA and related "Bill of Sale," they (the "UNIX" Trademarks) remained with Santa Cruz and its successors, ultimately the Debtor SCO. So the Florida District Court simply was wrong when it elected to analyze the case from a point of view that ignored the operation and effect of the 1995 APA and related "Bill of Sale." Without question, the "UNIX" Trademarks belong to the Debtor SCO.

c. In subparagraph 9 c., the Trustee and his counsel betray the fact that they have not had the undisputed key facts reviewed and evaluated by competent trademark counsel or a valuation expert. Proudly, they quote

from the dismissal motion filed by SCO in the Florida District Court Action that "there is no doubt that X/Open is, in fact, the registrant of certain UNIX marks as Gray alleges in paragraph 73 and 74 [of the Complaint]." But, the fact that X/Open is the "registrant" does not establish that it is the "owner" of the "UNIX" Trademarks. Indeed, the key points are that (i) Novell's November 13, 1998, "Deed Of Assignment" was fraudulent (because Novell did not own the "UNIX" Trademarks, the UNIX business, or the goodwill associated with the UNIX business and symbolized by the "UNIX" Trademarks and (ii) X/Open's registration of the assignment of the "UNIX" Trademarks therefore was fraudulent.

10. Mr. Gray's motion demonstrates "good cause" for the requested relief, in that it establishes a *prima facie* case that the "UNIX" Trademarks were owned by Santa Cruz on and after December 6, 1995, and that, after the 1995 APA and related "Bill of Sale," never were owned again by Novell. Accordingly, Novell could not have owned either Trademark when it purportedly assigned them to X/Open in the "Deed of Assignment" of November 13, 1998; rather, SCO owned both Trademarks, and it continues to do so.

11. Applying the four (4)-factor test to the limited relief sought by the Movant Mr. Gray, this Court should conclude that Mr. Gray's motion has carried the day:

a. No prejudice would be suffered by the Debtor SCO from entry

of an order granting the requested limited relief;

b. The Debtor SCO would encounter no undue hardship of any kind if this Court required it to investigate the likelihood that, in fact, it owns the "UNIX" Trademarks; and

c. Given the analysis set forth in Section III of the "Motion Of Wayne R. Gray For Entry Of Order Lifting Automatic Stay To Permit The Debtor, The SCO Group, Inc., To Participate In Florida Federal Court Action And Pending Eleventh Circuit Court Of Appeals Proceeding," there is a very strong likelihood that the Trustee and his counsel will conclude that the Debtor SCO, and not X/Open, owns the "UNIX" Trademarks.

CONCLUSION

The Movant Mr. Gray has met his burden of demonstrating good cause for the Chapter 11 Trustee of The SCO Group, Inc., to investigate (and, if necessary, conduct discovery on) the merits of the view of Mr. Gray that, in fact and in law, the Debtor SCO, and not X/Open, is the proper and exclusive owner of the "UNIX" Trademarks, and report the results of that investigation and evaluation to this Court and to counsel for Mr. Gray, along with a written recommendation as to the action (if any) to be taken by SCO in connection with the Eleventh Circuit Appeal.

Importantly, the Movant Mr. Gray is not seeking immediate litigation activity by the Debtor SCO at this time. Rather, all that he seeks in this motion is the limited relief of an order (i) lifting the automatic stay with respect to the participation of the Debtor SCO in the Florida Federal Court Action, (ii) directing the Chapter 11 Trustee to investigate (and, if necessary, conduct discovery on) the merits of the view of Mr. Gray that, in fact and in law, SCO, and not X/Open, is the proper and exclusive owner of the "UNIX" Trademarks, and report the results of that investigation and evaluation to this Court and to counsel for Mr. Gray, along with a written recommendation as to the action (if any) to be taken by SCO in connection with the Eleventh Circuit Appeal.

The Movant Mr. Gray has demonstrated that, in all likelihood, the Debtor SCO owns the "UNIX" Trademarks, an asset the value of which probably would dwarf that of the current aggregate assets of SCO. Neither the Trustee nor his counsel has investigated the value of those Trademarks and the licenses that they support. Accordingly, this Court should enter an order (i) lifting the automatic stay with respect to the participation of the

Debtor SCO in the Florida Federal Court Action, (ii) directing the Chapter 11 Trustee to investigate (and, if necessary, conduct discovery on) the merits of the view of Mr. Gray that, in fact and in law, SCO, and not X/Open, is the proper and exclusive owner of the registered U.S. "UNIX" Trademarks, and report the results of that investigation and evaluation to this Court and to counsel for Mr. Gray, along with a written recommendation as to the action (if any) to be taken by SCO in connection with the Eleventh Circuit Appeal.

November 17, 2009.

Respectfully submitted,

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