

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

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

**MOTION OF THE DEBTORS FOR AN ORDER PROVIDING  
THAT CREDITORS' COMMITTEES ARE NOT AUTHORIZED OR  
REQUIRED TO PROVIDE ACCESS TO CONFIDENTIAL INFORMATION  
OF THE DEBTORS OR TO PRIVILEGED INFORMATION**

The captioned debtors and debtors in possession (the "Debtors"), hereby move this Court (the "Motion") for entry of an order pursuant to sections 105(a), 107(b), and 1102(b)(3)(A) of title 11 of the United States Code (as amended, the "Bankruptcy Code") and Rule 9018 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), providing that any creditors' committee appointed under section 1102(a) of the Bankruptcy Code in this case (the "Creditors Committee") is not authorized or required, pursuant to section 1102(b)(3)(A) of the Bankruptcy Code, to provide access to the Debtors' confidential and other non-public proprietary information, or to privileged information, to the creditors it represents. In support of the Motion, the Debtors respectfully state as follows:

---

<sup>1</sup> 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. The address for both Debtors is 355 South 520 West, Lindon, UT 84042.

### **Jurisdiction**

1. This Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2). Venue is proper before this Court pursuant to 28 U.S.C. § 1408.

2. The statutory predicates for the relief requested herein are sections 105(a), 107(b) and 1102 of the Bankruptcy Code.

### **Background**

3. On the date hereof (the “Petition Date”), the Debtors each filed a voluntary petition for relief under chapter 11 of title 11, United States Code (the “Bankruptcy Code”). The Debtors are continuing in possession of their property and are operating and managing their businesses, as debtors in possession, pursuant to sections 1107 and 1108 of the Bankruptcy Code.

4. The factual background relating to the Debtors’ commencement of these chapter 11 cases is set forth in detail in the *Declaration of Darl C. McBride, Chief Executive Officer of the Debtors, in Support of First Day Motions* (the “First Day Declaration”) filed contemporaneously with this Motion and incorporated herein by reference.

### **Relief Requested**

5. By this Motion, the Debtors seek entry of an order of the Court confirming that section 1102(b)(3)(A) of the Bankruptcy Code does not authorize or require any Creditors Committee appointed in this case to provide access to the Debtors’ Confidential Information (as defined below) to any creditor that such committee represents. Furthermore, the Debtors seek entry of an order clarifying that any Creditors Committee is not authorized or required to provide

access to Privileged Information (as defined below) to any creditor that such Creditors Committee represents. The relief requested herein will help ensure that confidential, privileged, proprietary and/or material non-public information will not be disseminated to the detriment of the Debtors' estates and will aid the Creditors Committee in performing its statutory function.

### **Basis for Relief**

6. On April 20, 2005, as part of the Bankruptcy Abuse Prevention & Consumer Protection Act of 2005, Congress enacted section 1102(b)(3) of the Bankruptcy Code. That section states, in relevant part, that a creditors' committee appointed under section 1102(a) of the Bankruptcy Code shall "provide access to information for creditors who (i) hold claims of the kind represented by that committee; and (ii) are not appointed to the committee." 11 U.S.C. § 1102(b)(3)(A). Section 1102(b)(3)(A) does not indicate how a creditors' committee should provide "access to information," to the creditors it represents. There is no legislative history to section 1102(b)(3) to provide guidance on the application of this provision.

7. The lack of specificity in section 1102(b)(3)(A) creates significant issues for debtors and creditors' committees. Typically, a debtor will share various confidential and other non-public proprietary information with a creditors' committee (the "Confidential Information).<sup>2</sup> Creditors' committees use this information to assess, among other things, a

---

<sup>2</sup> For purposes of this Motion, the term "Confidential Information" shall mean any nonpublic information of the Debtors, including, without limitation, information concerning the Debtors' assets, liabilities, business operation, projections, analyses, compilations, studies, and other documents prepared by the Debtors or its advisors or other agents, which is furnished, disclosed, or made known to the Creditors Committee, whether intentionally or unintentionally and in any manner, including written form, orally, or through any electronic, facsimile or computer-related communication. Confidential Information shall include (a) any notes, summaries, compilations, memoranda, or similar written materials disclosing or discussing Confidential Information; (b) any written Confidential Information that is discussed or presented orally; and (c) any other Confidential Information conveyed to the Creditors Committee orally that the Debtors or their advisors or other agents advise the Creditors Committee should be treated as confidential. Notwithstanding the foregoing, Confidential Information shall not include any information or portions of information that: (i) is or becomes generally available to the public or is or becomes available to the Creditors Committee on a non-confidential basis, in each case to the extent that such information

debtor's capital structure, opportunities for the restructuring of the debtor's business in chapter 11, the results of any revised operations of the debtor in the bankruptcy case, and the debtor's overall prospects for reorganization under a chapter 11 plan. In addition, creditors' committees typically execute confidentiality agreements or enter into other similar arrangements with debtors. Through these agreements and other arrangements a debtor can ensure that a committee's members will keep its information confidential and will not use Confidential Information except in connection with a chapter 11 case and on terms acceptable to the debtor.

8. The enactment of section 1102(b)(3)(A) raises the issue of whether a creditors' committee could be required to share a debtor's Confidential Information with any creditor that the committee represents. In the absence of appropriate protections for the Debtors' Confidential Information, the Debtors might be unwilling to share such information with any Creditors Committee, which would undoubtedly impede the Committee's ability to do its work and impair the working relationship between the Debtors and the Committee. Given the importance of the issue, the Debtors are seeking an order of the Court confirming that section 1102(b)(3)(A) does not authorize or require any Creditors Committee in this case to provide access to the Debtors' Confidential Information to any creditor that the Committee represents.

9. The enactment of section 1102(b)(3)(A) also raises the issue of whether a creditors' committee could be required to share with any creditor that the committee represents information subject to the attorney-client or some other state, federal, or other jurisdictional law

---

became so available other than by a violation of a contractual, legal, or fiduciary obligation to the Debtors; or (ii) was in the possession of the Creditors Committee prior to its disclosure by the Debtors and is not subject to any other duty or obligation to maintain confidentiality.

privilege, whether such privilege is solely controlled by the committee or is a joint privilege with the debtor or some other party (collectively, "Privileged Information"). Given the importance of the issue, the Debtors are seeking clarification that the Creditors Committee is not authorized or required to provide access to Privileged Information to any creditor that the committee represents. Of course, the Creditors Committee would be permitted, but not required, to provide access to Privileged Information to any party so long as (a) such Privileged Information was not Confidential Information, and (b) the relevant privilege was held and controlled solely by the Creditors Committee.

10. When a statute is clear and unambiguous, "the sole function of the courts is to enforce it according to its terms." U.S. v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)). However, in "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters... the intention of the drafters, rather than the strict language, controls." Id. at 242-43 (citing Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982) (internal quotation omitted)).

11. The Debtors respectfully submit that section 1102(b)(3)(A) is unclear and ambiguous. The statute simply requires a committee "to provide access to information," yet sets forth no guidelines as to the type, kind and extent of the information to be provided. In its extreme, section 1102(b)(3)(A) could be read as requiring a committee to provide access to all information provided to it by a debtor, or developed through exercise of its investigative function, regardless of whether the information is confidential, privileged, proprietary or material non-public information and regardless of whether disseminating such information implicates

securities laws disclosure requirements. See 17 C.F.R. §§243.100 to 243.103 (2005).

Accordingly, Courts in this District and elsewhere which have considered this issue have issued orders clarifying that creditors committees are not authorized or required to provide access to confidential or privileged information. See In re Custom Food Products Inc., Case No. 07-10495 (PJW) (Bankr. D. Del. April 13, 2007); In re Mortgage Lenders Network USA, Inc., Case No. 07-10146 (PJW) (Bankr.D. Del. Feb. 5, 2007) (providing that creditors' committee is not authorized or required to provide access to confidential or privileged information); In re FLYi, Inc., Case No. 05-20011 (MFW) (Bankr. D. Del. Nov. 17, 2005) (same); In re Refco, Inc., Case No. 05-60006 (RDD) (Bankr. S.D.N.Y Nov. 1, 2005) (provisionally granting the motion of the committee for an order clarifying the requirement to provide access to information pursuant to section 1102(b)(3)(A) until the court further clarifies the requirements under 1102 or the committee establishes an information-sharing protocol).

12. As discussed above, the legislative history does not provide any further guidance on this point and merely reiterates that language of section 1102(b)(3). See H.R. Rep. No. 109-31, 109<sup>th</sup> Cong., 1<sup>st</sup> Sess. 87 (2005) (“Section 405(b) requires the committee to give creditors having claims of the kind represented by the committee access to information. In addition, the committee must solicit and receive comments for these creditors and, pursuant to court order, make additional reports and disclosures available to them.”).

13. Given the ability to share information through the Internet or otherwise, the drafters of section 1102(b)(3) likely intended this provision to mean that a committee's constituency should have easier access to relevant public information about a debtor without the burden of retaining counsel to monitor the numerous proceedings within a bankruptcy case.

Congress could not have intended for a committee to be required to provide unfettered access to every type and kind of information that a committee receives from a debtor. If this had been the intention, section 1102(b)(3) would then frustrate numerous provisions of the Bankruptcy Code.

14. Furthermore, section 107(b)(1) of the Bankruptcy Code provides that “on request of a party in interest, the bankruptcy court shall...protect an entity with respect to trade secret or confidential research, development, or commercial information.”<sup>3</sup>

15. Section 107(b)(1) is mandatory. Video Software Dealers Ass’n v. Orion Pictures Corp., 21 F.3d 24, 27 (2d Cir. 1994) (providing that the protections of section 107(b)(1) are mandatory upon request). As a result, under section 107(b)(1) and Bankruptcy Rule 9018, this Court is empowered to protect the Debtors’ Confidential Information and Privileged Information from disclosure to general creditors.

16. The public dissemination of the Debtors’ Confidential Information likely would cause serious harm to the Debtors’ estates. Confidential Information of the Debtors, such as compensation levels or other employee information, is of a sensitive nature, and public disclosure of such information would cause morale and similar problems for the Debtors, as well as potentially violate federal and state privacy laws. Further, any documents of the Debtors that contain private consumer information must be protected in accordance with state and federal law. If the Debtors were to disclose such information to the Creditors Committee without adequate

---

<sup>3</sup> Section 107(b)(1) is further supported by Bankruptcy Rule 9018, which states, in relevant part, that “on motion or on its own initiative, with or without notice, the court may make any order which justice requires to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information...” Fed. R. Bankr. P. 9018.

measures to protect such information, they may become liable to previous borrowers and other individuals in their records system.

17. Of course, if there were a risk that Confidential Information given by the Debtors to the Creditors Committee would have to be turned over to any creditor, the Debtors would be highly discouraged from giving Confidential Information to a Creditors Committee in the first place. In fact, the Debtors might conclude that they could not give such information to the committee at all. The inability of the Creditors Committee to gain access to Confidential Information, in turn, could limit the ability of the committee to fulfill its statutory obligations under the Bankruptcy Code.

18. As such, the relief sought by the Debtors is not only for the benefit of the Debtors but for the benefit of a Creditors Committee as well. Any Creditors Committee also will need the benefit of the relief sought in this Motion to ensure that it does not breach the confidentiality agreements it will execute with the Debtors or the bylaws it will execute that will contain confidentiality provisions for the express benefit of the Debtors. A Creditors Committee cannot be put in a position of either violating the statute or breaching confidentiality agreements and thereby subjecting itself to suit by the Debtors and potentially other parties.

19. Finally, the risk to the Debtors and a Creditors Committee of the committee having to provide access to Privileged Information to the creditors it represents creates obvious and serious problems. If the Debtors and Creditors Committee believed that there could be a risk that Privileged Information would need to be turned over to such creditors, with the possible loss of the relevant privilege as that time, the entire purpose of such privilege would be eviscerated, and both the Debtors and the Creditors Committee would likely be unable

to obtain the independent and unfettered advice and consultation that such privileges are designed to foster. Indeed, unless it is made clear that the risk of dissemination of Privileged Information does not exist, the estate representation structure envisioned by the Bankruptcy Code would become immediately dysfunctional.

20. The disclosure of nonpublic or privileged information to such creditors will not foster a reorganization of the Debtors but will likely cause serious harm to the Debtors' estates. Therefore, pursuant to section 105(a), 107(b)(1), and 1102(b)(3)(A) of the Bankruptcy Code in order to maximize the value of the estates, the Debtors respectfully request that the relief herein be granted.

#### **Notice**

21. Notice of this Motion has been given to the Office of the U.S. Trustee, 844 King Street, Suite 2207, Lockbox 35, Wilmington, DE 19801. Following the first day hearing in this case, this Motion will be served on (a) creditors holding the 20 largest unsecured claims against the Debtors on a consolidated basis as identified in Debtors' petitions, or their legal counsel (if known); and (b) those persons who have requested notice pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

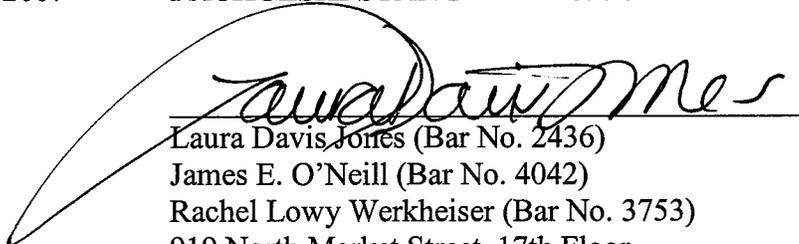
#### **No Prior Request**

22. No prior request for the relief sought in this Motion has been made to this Court or any other court.

WHEREFORE, the Debtors respectfully request that this Court enter an order, substantially in the form attached hereto granting the relief requested therein, and such other and further relief as this Court deems appropriate.

Dated: September 14, 2007

PACHULSKI STANG ZIEHL & JONES LLP



Laura Davis Jones (Bar No. 2436)

James E. O'Neill (Bar No. 4042)

Rachel Lowy Werkheiser (Bar No. 3753)

919 North Market Street, 17th Floor

P.O. Box 8705

Wilmington, DE 19899-8705 (Courier No. 19801)

Telephone: (302) 652-4100

Facsimile: (302) 652-4400

Email: ljones@pszjlaw.com

joneill@pszjlaw.com

rwerkheiser@pszjlaw.com

and

BERGER SINGERMAN, P.A.

Paul Steven Singerman

Arthur J. Spector

Grace E. Robson

200 South Biscayne Blvd., Suite 1000

Miami, FL 33131

Telephone: (305) 755-9500

Facsimile: (305) 714-4340

and

350 E. Las Olas Boulevard, Suite 1000

Fort Lauderdale, FL 33301

Telephone: (954) 525-9900

Facsimile: (954) 523-2872

Email: singerman@bergersingerman.com

aspector@bergersingerman.com

grobson@bergersingerman.com

[Proposed] Co-Counsel for the Debtors and  
Debtors-in-Possession