

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

*In re* : Chapter 11  
:   
THE SCO GROUP, INC., *et al.*, :   
:   
Debtors. : Case Number 07-11337 (KG)  
: (Jointly Administered)

Hearing Date: April 2, 2008 at 2:00 p.m.

**LIMITED OBJECTION TO THE DEBTORS' MOTION TO  
PRESENT EVIDENCE AND TESTIMONY RELATED TO  
THE DEBTORS' 2007 INCENTIVE PROGRAM UNDER SEAL  
(DOCKET ENTRY # 345)**

In support of her limited objection to the Debtors' motion to present evidence and testimony related to the Debtors' 2007 incentive program under seal (the "Motion"), Kelly Beaudin Stapleton, United States Trustee for Region 3 ("U.S. Trustee"), by and through her counsel, avers:

**INTRODUCTION**

1. Under (i) (an) applicable order(s) of the United States District Court for the District of Delaware issued pursuant to 28 U.S.C. § 157(a) and (ii) 28 U.S.C. § 157(b)(2)(A), this Court has jurisdiction to hear and determine the Motion.

2. Under 28 U.S.C. § 586, the U.S. Trustee has an overarching responsibility to enforce the laws as written by Congress and interpreted by the courts. See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.), 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that U.S. Trustee has "public interest standing" under 11 U.S.C. § 307 which goes beyond mere pecuniary interest); Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.), 898 F.2d 498, 500 (6<sup>th</sup> Cir. 1990) (describing the U.S. Trustee as a "watchdog").

3. Under 11 U.S.C. § 307, the U.S. Trustee has standing to be heard on the Motion and the issues raised in this objection.

#### **GROUND/BASIS FOR RELIEF**

4. 11 U.S.C. § 107(b) provides:

On request of a party in interest, the bankruptcy court shall, and on the court's own motion, the bankruptcy court may – (1) protect an entity with respect to a trade secret or confidential research, development, or commercial information; or (2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title.

5. Federal Rule of Bankruptcy Procedure 9018 provides:

On motion or on its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information, (2) to protect any entity against scandalous or defamatory matter contained in any paper filed in a case under the Code, or (3) to protect governmental matters that are made confidential by statute or regulation. If an order is entered under this rule without notice, any entity affected thereby may move to vacate or modify the order, and after a hearing on notice the court shall determine the motion.

6. 11 U.S.C. § 107 codifies the strong, compelling presumption of open access to judicial records and proceedings in civil matters. See 11 U.S.C. § 107(a) (“Except as provided in subsections (b) and (c) of this section and subject to section 112, a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge.”); United States v. Continental Airlines, Inc. (In re Continental Airlines), 150 B.R. 334, 340 (D. Del. 1993) (citing In re Revco D.S., Inc., No. 588-1308, 1990 WL 269887 (Bankr. N.D. Ohio Dec. 30, 1990)); In re Alterra Healthcare Corp., 353 B.R. 66, 75 (Bankr. D. Del. 2006) (Walrath, C.J.); cf. Pansy v. Borough of Stroudsburg, 23 F.3d 772, 785-86 (3d Cir.

1994) (discussing public interest in access to court records). Additionally, 11 U.S.C. § 107 presumes that public access applies to any paper filed in a bankruptcy case unless the material falls within one of its specific exceptions. See Gitto v. Worcester Telegram & Gazette Corp. (In re Gitto Global Corp.), 422 F.3d 1 (1<sup>st</sup> Cir. 2005).

7. The Debtors take the position that the following information is “confidential . . . commercial information” under 11 U.S.C. § 107:

(i) the Incentive Bonus received by individual employees, which the Debtors believe to be personal and confidential to each employee, (ii) data and factors considered by the Debtors’ Board of Directors related to the 2007 Incentive Program, the Performance Metrics and adjustments thereto at various board meetings, which the Debtors believe to be commercial and proprietary information, and (iii) information related to the Performance Metric targets, which the Debtors believe to be commercial and proprietary information. Mot. ¶ 5.

8. “Confidential . . . commercial information” is not defined in the Bankruptcy Code, so the term must “be interpreted as taking [its] ordinary, contemporary, common meaning.” See Perrin v. United States, 444 U.S. 37, 42 (1979). “Commercial information has been defined as information that would cause ‘an unfair advantage to competitors by providing them information as to the commercial operations of the debtor.’” Video Software Dealers Ass’n v. Orion Pictures Corp. (In re Orion Pictures Corp.), 21 F.3d 24, 27 (2d Cir. 1994) (citation omitted).

9. With regard to the amount of the Incentive Bonus received by individual employees, to the extent that there is a document describing the name, title, and amount of the bonus at issue, only the name should be redacted. Further, given that the Debtors are obligated under applicable securities laws to disclose compensation paid to insiders, all of the relevant information (name, title and amount) with respect to those persons should be disclosed.

10. With regard to the data and factors considered by the Debtors' Board of Directors and information related to the Performance Metric targets, the Debtors do not identify specific pieces of information which they are seeking to protect, nor do they explain how disclosure of the information will cause them competitive harm. With regard to the Performance Metrics, the Debtors have already generally described the Incentive Program in their "first day" motion. One of the three objectives under their so-called "40-40-20" plan (the Incentive Program) is purely subjective – the so-called "personal" objective. The revenue and "net income" metrics are not "confidential . . . commercial information" under 11 U.S.C. § 107(b) for at least two reasons. First, given that the Debtors are publicly-held companies under bankruptcy protection, their operating results are publicly available. The revenue and "net income" metrics for the fourth quarter of 2007 will tell the Debtors' competitors absolutely nothing about the Debtors' business today and will not give them a competitive advantage – the figures may be historical projections, or the figures may represent something else. Second, debtors in possession routinely seek approval of incentive-based compensation programs in this Court after disclosing the precise (or potential) amounts covered employees will be paid under the programs. The disclosure of the incentive metrics does not harm the ability of these debtors to remain competitive. Accordingly, the Debtors' argument lacks merit.

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**CONCLUSION**

WHEREFORE the U.S. Trustee requests that this Court issue an order denying the Motion or granting relief consistent with this objection.

Respectfully submitted,

**KELLY BEAUDIN STAPLETON  
UNITED STATES TRUSTEE**

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