

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

-----	:	Chapter 11
In re	:	
	:	
The SCO GROUP, INC., <i>et al.</i> , <sup>1</sup>	:	Case No. 07-11337 (KG)
	:	(Jointly Administered)
Debtors.	:	
-----	:	Hearing Date: December 30, 2009 at 10:00 a.m.
	:	Objection Deadline: Hearing Date

**MOTION OF CHAPTER 11 TRUSTEE TO (I) FILE UNDER SEAL  
EXHIBIT A TO THE DECLARATION OF RYAN E. TIBBITTS IN  
SUPPORT OF OBJECTION OF CHAPTER 11 TRUSTEE TO SUSE'S  
MOTION FOR RELIEF FROM THE AUTOMATIC STAY TO COMPLETE  
INTERNATIONAL ARBITRATION AND (II) SHORTEN TIME FOR  
NOTICE AND RESPONSE THERETO**

Edward N. Cahn, Esq. (the "Chapter 11 Trustee" or "Trustee"), in his capacity as chapter 11 trustee for The SCO Group, Inc. and SCO Operations, Inc. (collectively, the "Debtors"), hereby moves (this "Motion") this Court for entry of an order (i) pursuant to section 107(b) of title 11 of the United States Code (the "Bankruptcy Code") and Rule 9018 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") authorizing the Trustee to file under seal *SCO's Opening Memorial in Opposition to SUSE's Statement of Claim* dated August 22, 2007 (the "Confidential Arbitration Document"), attached as **Exhibit "A"** to the *Declaration of Ryan E. Tibbitts in Support of Objection of Chapter 11 Trustee to SUSE's Motion for Relief from the Automatic Stay to Complete International Arbitration* (the "Tibbitts Declaration"), and (ii) pursuant to Bankruptcy Rules 2002 and 9006, and Rules 9006-1(c) and (e) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of

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<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.

Delaware (“Local Rules”), shortening time for notice of and response to this Motion. In support of this Motion, the Trustee respectfully states as follows:

### **JURISDICTION**

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue of these proceedings and this Motion is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The statutory predicates for the relief sought herein are 11 U.S.C. §105(a), 107(b)(1), Fed. R. Bankr. P. 2002, 9006, 9018 and Del. Bankr. L.R. 9006-1(c) and (e).

### **BACKGROUND**

2. On September 14, 2007 (the “Petition Date”), the Debtors commenced their bankruptcy cases by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code.

3. On September 18, 2007, this Court entered the *Order Authorizing Joint Administration of Related Chapter 11 Cases: 07-11337 and 07-11338* [Docket No. 25]. The Debtors continued in the management and operation of their businesses and property as debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108 until August 25, 2009 (the “Appointment Date”), when this Court appointed a chapter 11 trustee.

4. On the Appointment Date, the Office of the United States Trustee filed its *Notice of Appointment of Edward N. Cahn, Esquire as Chapter 11 Trustee* [Docket No. 898] and, on the same day, this Court entered the *Order Approving Appointment of Chapter 11 Trustee* [Docket No. 900].

5. On November 10, 2009, SUSE Linux GmbH (“SUSE”) filed its *Motion for Relief from Stay to Complete International Arbitration* [Docket No. 951] and on December 15, 2009,

the Trustee filed its objection thereto [Docket No. 992] (the “Objection”). The historical background of the Debtors’ litigation with Novell and SUSE was set forth in the Objection and is incorporated herein by reference.

6. On December 23, 2009, *SUSE’s Reply in Support of Its Motion for Relief from the Automatic Stay to Complete International Arbitration* [Docket No. 998] (the “SUSE Reply”) raised the assertion that, among other things, the “...Trustee does not even attempt to explain the evidence and arguments that supposedly support SCO’s position.” *SUSE Reply* at page 9.

7. In support of its Objection and to aid the Court in determining the issues raised in the Motion for stay relief filed by SUSE, the Trustee seeks to file under seal the Confidential Arbitration Document. Contemporaneously herewith, the Trustee is filing on the public docket the Tibbitts Declaration which attaches as Exhibit A thereto a blank inserted page indicating that the production of such exhibit is subject to entry of this Court’s order authorizing the Confidential Arbitration Document to be filed under seal.

### **RELIEF REQUESTED**

8. By this Motion, the Trustee respectfully requests that this Court enter an order (i) authorizing the Trustee to file the Confidential Arbitration Documents under seal, so as to maintain its confidentiality, and (ii) shortening the time period for notice of and response to this Motion so that it may be heard in connection with the Hearing.

### **BASIS FOR RELIEF**

#### **I. Protective Order for Confidential Arbitration Documents Is Warranted**

9. Bankruptcy Code section 107(b) provides courts with the power to issue orders that will protect entities from potential harm that may result from the disclosure of certain confidential information. This section provides in relevant part:

On request of a party in interest, the bankruptcy court shall, and on the bankruptcy 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.

11 U.S.C. § 107(b).

10. Fed. R. Bankr. P. 9018 defines the procedures by which a party may move for relief under Bankruptcy Code section 107(b), and provides that:

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 [or] (2) to protect any entity against scandalous or defamatory matter contained in any paper filed in a case under the Code . . . .

Fed. R. Bankr. P. 9018.

11. Bankruptcy Code section 107(b)(1) allows the Court to protect “commercial information.” See 11 U.S.C. § 107(b)(1). As explained in Senate Report No. 989, Bankruptcy Code section 107(b) “permits the court, on its own motion, and requires the court, on the request of a party in interest, to protect trade secrets, confidential research, development, or commercial information.” Id., citing S. Rep. No. 989, 95<sup>th</sup> Cong., 2d Sess. 30, ¶ 107.01, at 107-2, reprinted in 1978 U.S.C.C.A.N. 5787, 5816. “If the information fits any of the specified categories, the court is *required* to protect a requesting interested party and has no discretion to deny the application.” Id. (emphasis in original).

12. Though good cause exists in the instant case, unlike its counterpart in Federal Rule of Civil Procedure 26(c), Bankruptcy Code section 107 does not require an entity seeking protection to demonstrate “good cause.” See e.g., In re Video Software Dealers Ass’n v. Orion

Pictures Corp. (In re Orion Pictures Corp.), 21 F.3d 24, 28 (2d Cir. 1994); Phar-Mor, Inc. v. Defendants Named Under Seal (In re Phar-Mor, Inc.), 191 B.R. 675, 67 (Bankr. N.D. Ohio 1995). Instead, if material sought to be protected satisfies one of the categories identified in section 107(b), “the court is required to protect a requesting interested party and has no discretion to deny application.” See Orion Pictures, 21 F.3d at 27.

13. The Internal Rules of the International Court of Arbitration at paragraph 3 therein specifically provides that “[t]he documents submitted to the Court, or drawn up by it in the course of its proceedings, are communicated only to the members of the Court and to the Secretariat and to persons authorized by the Chairman to attend Court sessions.” *Internal Rules of the International Court of Arbitration* at Appendix II, ¶3.

14. The Confidential Arbitration Document was submitted by the Debtors to the Swiss Tribunal (as defined in the Objection) and, as such, constitutes confidential information in the context of a highly-litigated commercial arbitration matter. Disclosure of the Confidential Arbitration Document may be in violation of the aforementioned rules.

## **II. Shortening Notice and Time to Respond Appropriate Under Circumstances**

15. Del. Bankr. L.R. 9006-1(c)(i) fixes the time for service and filing of motions and objection thereto. Specifically, Del. Bankr. L.R. 9006-1(c)(i) provides, in pertinent part, as follows:

Unless the Fed. R. Bankr. P. or these Local Rules state otherwise, all motion papers shall be filed and served in accordance with Local Rule 2002-1(b) at least fourteen (14) days...prior to the hearing date.

Del. Bankr. L.R. 9006-1(c).

16. Bankruptcy Rule 9006(c)(1) and Local Rule 9006-1(e) authorize this Court to reduce the notice period required for this Motion. Bankruptcy Rule 9006(c)(1) provides, in pertinent part, as follows:

[W]hen an act is required or allowed to be done at or within a specified time by these rules..., the court for cause shown may in its discretion with or without motion or notice order the period reduced.

Fed. R. Bankr. P. 9006(c)(1). Similarly, Local Rule 9006-1(e) provides that:

No motion will be scheduled on less notice than required by these Local Rules or the Fed. R. Bankr. P. except by order of the Court, on written motion (served on all interested parties) specifying the exigencies justifying shortened notice. The Court will rule on such motion promptly without need for a hearing.

Del. Bankr. L.R. 9006-1(e).

17. Shortening the notice period required by Local Rule 9006-1(c) so that a hearing on this Motion may take place on the Hearing Date is appropriate in light of the circumstances of these cases. Specifically, this Court will consider SUSE's motion seeking to lift the stay, the Trustee's Objection and SUSE's reply on the Hearing Date. Since SUSE has made the assertion that the Trustee has not attempted to explain the evidence and arguments that support his contention that SUSE's probability of success on the merits is unlikely, the Trustee seeks to submit the Confidential Arbitration Document to this Court to support his position.

### **NOTICE**

18. Notice of this Motion has been provided to: (a) the Office of the United States Trustee; (b) counsel to SUSE; and (c) all parties that have requested notice pursuant to Bankruptcy Rule 2002. The Trustee submits that no other or further notice need be provided.

19. No previous request for the relief sought in this Motion has been made to this Court.

**WHEREFORE**, for the reasons state above, the Trustee respectfully requests that this Court enter an order (i) authorizing the Trustee to file the Confidential Arbitration Document under seal, (ii) shortening notice and time to respond to this Motion, and (iii) granting such other and further relief as this Court deems just, proper and necessary.

Dated: Wilmington, Delaware  
December 29, 2009

Respectfully submitted,

BLANK ROME LLP

/s/ Bonnie Glantz Fatell

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