

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

In re:

The SCO GROUP, INC., et al.,

Debtors.

Chapter 11

Case No. 07-11337 (KG)  
(Jointly Administered)

**Hearing Date: April 18, 2008 at 1:30 p.m.**  
**Docket No. 367**

**OBJECTION OF INTERNATIONAL BUSINESS MACHINES CORPORATION TO  
DEBTORS' MOTION FOR AUTHORITY TO PAY AN EXPENSE REIMBURSEMENT  
TO YORK CAPITAL MANAGEMENT**

International Business Machines Corporation ("IBM"), a creditor and equity security holder in this Chapter 11 case, objects to the "Motion for Authority to Pay an Expense Reimbursement to York Capital Management", filed with this Court by the debtors and debtors in possession, The SCO Group, Inc. and SCO Operations, Inc. (collectively, "SCO" or "Debtors"), on February 29, 2008 (the "Motion").

**Background**

1. On October 23, 2007, SCO filed an "Emergency Motion Of The Debtor For An Order (A) Approving Asset Purchase Agreement [the "APA"], (B) Establishing Sale And Bidding Procedures And (C) Approving The Form And Manner Of The Notice Of Sale" (the "Sale Motion"), proposing to sell most of its assets to York Capital Management ("York"). (See Sale Motion) (Docket No. 149.) The Sale Motion did not include a signed APA or any other definitive or binding sale documents, but only a non-binding term sheet that outlined the proposed terms and conditions of the asset sale (the "Term Sheet"). Neither the Sale Motion nor

the Term Sheet listed just what intellectual property SCO would sell, which executory contracts it would to assign or which litigation rights related it would transfer. The sale price amounted to only a maximum guaranteed price of \$10 million, subject to reduction for an unstated amount of assumed liabilities. For its non-binding commitment, York requested bidder protections, including a cash break-up fee of \$780,000 and expense reimbursements in an amount up to \$300,000 (not conditioned upon any expense documentation) (the “Bidder Protections”).

2. IBM, Novell, and the United States Trustee objected to the Sale Motion, including the absence of an APA.

3. SCO finally filed the APA contemplated by the Sale Motion, but not until minutes before the November 16, 2007 hearing on the Sale Motion. The APA, however, was not signed by either York or SCO, nor did it include any of the schedules or exhibits identifying the assets to be sold and terms of the sale.

4. The Court rejected the Sale Motion, finding that proceeding with an asset sale without adequate disclosure of what assets SCO intended to sell and without any binding sale documents would “substantively prejudice” the parties in interest and even the Debtors. (See Transcript of Nov. 16, 2007 Hearing at 38:1-39:15 (filed Nov. 26, 2007)) (Docket No. 231.) Although the Court gave SCO time to complete and execute the definitive sale documents and prepare a revised Sale Motion, SCO withdrew the Sale Motion just days later on November 20, 2007. (See Notice of Withdrawal of Sale Motion) (Docket No. 225.) As SCO concedes, “the negotiations between SCO and York did not reach a mutually satisfactory conclusion, the transaction failed, and the Court never entered an Order approving the transaction or any of the documents that contemplated the transaction”. (Motion ¶ 3.) The Court also never entered an Order approving bidding procedures or bidder protections.

5. SCO now seeks approval of an expense reimbursement for York of \$150,000 (or \$50,000, as an alternative) (the “Expense Reimbursement”) on the theory that paying York’s expenses for a deal to which it never committed is somehow a “moral matter”. (Motion ¶ 4.)

### **Argument**

6. To obtain expense reimbursement approval, the requesting party must show that expenses are “actual, necessary costs and expenses of preserving the estate”, requirements which “must be observed with scrupulous care”. In re O’Brien Envir. Energy, Inc., 181 F.3d 527, 535-37 (3d Cir. 1999); In re Merry-Go-Round Enters., Inc., 180 F.3d 149, 157 (4th Cir. 1999); see also In re Integrated Res., Inc., 147 B.R. 650, 657 (S.D.N.Y. 1992); In re SpecialtyChem Prods. Corp., 372 B.R. 434, 439-40 (E.D. Wis. 2007). Courts should “highly scrutinize” a request for approval of expense reimbursement. In re Hupp Indus., Inc., 140 B.R. 191, 195 (Bankr. N.D. Ohio 1992); see also In re Integrated Res., Inc., 135 B.R. 746, 750-51 (Bankr. S.D.N.Y. 1992). Courts consider whether the expense reimbursement is a fair and reasonable percentage of the proposed transaction and whether the estate received an actual benefit from the proposed transaction. Id.; see also Broadcast Corp. v. Broadfoot, 54 B.R. 606, 611 (N.D. Ga. 1985) (“use of the words ‘actual’ and ‘necessary’ indicate that the estate must accrue a real benefit from the transaction for which the claim is being filed”).

7. Approval of an expense reimbursement is not warranted where the purchaser did not enter into a legally binding agreement with the debtor, there was no information on the value of the proposed sale, and there was no evidence as to the time, effort, expense or risk that the purchaser contributed to the proposed sale. See In re Tiara Motorcoach

Corp., 212 B.R. 133, 137-38 (Bankr. N.D. Ind. 1997); In re O'Brien Envir. Energy, Inc., 181 F.3d 527 at 535-37.

8. Here, the proposed deal died at the negotiating table. York did not sign an agreement, attract any bidders or contribute to any sale. There is not even any evidence that the promise of expense reimbursement was necessary to attract York to enter into its non-binding commitment. York did nothing for the estate: no benefits given, no risks assumed. In fact, the failed transaction actually harmed SCO, which needlessly spent time and money presenting and defending the Sale Motion before its time, and IBM, Novell and the United States Trustee, who were required, also needlessly, to spend their own time and resources to respond by the objection deadline (as well as to this Motion).

9. SCO argues that failure to award the Expense Reimbursement will harm the estate, because “[i]f SCO does not honor this commitment, future negotiations may be made more difficult.” (Motion ¶ 7.) Nonsense. First, SCO never entered into a binding commitment to York. Second, Stephen Norris Capital Partners LLC came to the table (albeit with another non-binding commitment) even though this Court had not approved the York Expense Reimbursement.

10. If the Expense Reimbursement is treated instead as a use of property of the estate or a transaction out of the ordinary course of business under section 363(b), the Motion still does not meet the minimum requirements for approval. The use of assets out of a debtor’s ordinary course of business requires, among other things, proof of “a sound business purpose”. In re Exaeris Inc., 380 B.R. 741, 744 (Bankr. D. Del. 2008); see also In re Lionel Corp., 722 F.2d 1063, 1070 (2d Cir. 1983); In re Montgomery Ward Holding Corp., 242 B.R. 147, 153 (Bankr. D. Del. 1999). SCO has not adduced a sound business purpose for the underlying York

transaction, let alone for an expense reimbursement for which York provided no benefit to SCO's estate. The Motion displays only an eleemosynary purpose with the estate's scarce funds in favor of a not impecunious beneficiary. The Motion should be denied.

Dated: April 11, 2008

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