

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

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

Hearing Date: September 16, 2008 at 10:00 a.m. prevailing Eastern time  
Objection Deadline: September 9, 2008 at 4:00 p.m. prevailing Eastern time

**DEBTORS' MOTION TO PRESENT EVIDENCE AND  
TESTIMONY RELATED TO CERTAIN AWARDS UNDER  
THE 2004 OMNIBUS STOCK INCENTIVE PLAN UNDER SEAL**

The above-captioned debtors in possession (collectively, the “Debtors”) seek approval to present evidence and testimony related to the Debtors’ 2004 Plan<sup>2</sup> under seal pursuant to section 107(b) under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”), Rule 9018 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rule 9018-1(b) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”). In support of this Motion (the “Motion”), the Debtors respectfully represent and state as follows:

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<sup>1</sup> The last four digits of the taxpayer identification number for The SCO Group, Inc. is 2823. The last four digits of the taxpayer identification number for SCO Operations, Inc. is 7393. The address for both Debtors is 355 South 520 West, Lindon, Utah 84042.

<sup>2</sup> Capitalized terms not defined herein shall have the meaning ascribed to them in the *Debtors’ Motion for (1) Determination that Stock Options Awarded to Executives Were Awarded in the Ordinary Course of Debtors’ Business and (B) to be Awarded to Executives is in the Ordinary Course of Business and (2) for Continuing Authority to Award Ordinary Course Stock Options* (the “Stock Option Motion”).

## Jurisdiction and Background

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).
2. The statutory predicates for the relief requested herein are Section 107(b) of the Bankruptcy Code, Rule 9018 of the Bankruptcy Rules, and Local Rule 9018-1(b).
3. On September 14, 2007 (the "Petition Date"), the Debtors commenced these cases (the "Chapter 11 Cases") by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code.
4. Parties-in-interest and the Court are referred to the *Declaration of Darl C. McBride, Chief Executive Officer of the Debtors, in Support of First Day Motions* filed on the Petition Date and incorporated herein by reference for the factual background relating to the Debtors' business and their commencement of these Chapter 11 cases.
5. Concurrently with this Motion the Debtors filed the Stock Option Motion, which attaches a copy of the 2004 Plan as Exhibit A. The Debtors previewed the issue of whether the Options are within the ordinary course of the Debtors' business with the Office of the United States Trustee, and because that office has taken no position on the matter, it is possible that the United States Trustee may object to the Stock Option Motion and that a contested evidentiary hearing will likely go forward on September 16, 2008. In connection with a hearing on the Stock Option Motion, the Debtors anticipate the submission of evidence and the proffer of testimony related to the following: (i) Options received and to be received by individual employees, which the Debtors believe to be personal and confidential to each employee and (ii) data and factors considered by the Debtors' Board of Directors related to the

2004 Plan at various board meetings, which the Debtors believe to be commercial and proprietary information (collectively, the “Confidential Information”).

**Relief Requested and Basis Therefor**

6. By this Motion, the Debtors seek the entry of an order, pursuant to Section 107(b) of the Bankruptcy Code, Bankruptcy Rule 9018 and Local Bankruptcy Rule 9018-(b), authorizing the Debtors to present the evidence and testimony related to the Confidential Information under seal.

7. Section 107 of the Bankruptcy Code provides bankruptcy courts with the power to issue orders that will protect entities and individuals from potential harm:

(b) 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 . . . .

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(c) (1) The bankruptcy court, for cause, may protect an individual, with respect to the following types of information to the extent that the court finds that disclosure of such information would create undue risk of identity theft or other unlawful injury to the individual or the individual’s property:

(A) Any means of identification (as defined in section 1028(d) of title 18) contained in a paper filed, or to be filed, in a case under this title,

(B) Other information contained in a paper described in subparagraph (A).

11 U.S.C. § 107(b), (c).<sup>3</sup> Section 1028(d) of Title 18 defines “identification document” as:

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<sup>3</sup> In fact, the Congressional intent of section 107(b) was to require the bankruptcy court on request of a party in interest to seal trade secrets, confidential research, development or commercial information. See Senate Report No.

[A] document made or issued by or under the authority of the United States Government, a State, political subdivision of a State, a foreign government, political subdivision of a foreign government, an international governmental or an international quasi-governmental organization which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals ...

Of course, any type of identification document necessarily contains a person's name.

8. Bankruptcy Rule 9018 identifies the procedure by which a party may move for relief under section 107:

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 . . . .

Fed. R. Bankr. P. 9018.

9. Commercial information has been defined to include any information that would cause "an unfair advantage to competitors by providing them information as to the commercial operations of the debtor." *In re Orion Pictures Corp.*, 21 F.3d 24, 27 (2d Cir. 1994) (citing *In re Itel Corp.*, 17 B.R. 942, 944 (B.A.P. 9th Cir. 1982)). The Debtors submit that the Confidential Information constitutes confidential information that is not in the public realm. If such information were to be made public, the Confidential Information will be exposed to the detriment of the Debtors and their business. The Debtors have concerns that: (i) disclosure of the names and Options awarded under the 2004 Plan could distract attention from job-related tasks, diminish morale and would also allow competitors and others to harass the employees or possibly entice them away from the Debtors' employ; and (ii) the Debtors' Board meetings are

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989 § 107.01, 107-2. (section 107(b) "requires the court, on the request of a party in interest, to protect trade secrets, confidential research, development, or commercial information").

confidential and are a forum for open discussion; therefore, if such information was made publicly available it could chill Board discussions as well as reveal information to the public and the Debtors' competitors relating to the Debtors' decision making processes related to their business not ordinarily available to parties other than the Debtors. Furthermore, the Debtors would like to protect their Confidential Information both to protect their employees' privacy and to prevent disclosure of proprietary information. If the Confidential Information were to become public, then the Debtors' business and employees could be irreparably harmed. Accordingly, the Debtors submit that the Confidential Information contains "commercial information" or "trade secrets" and should be subject to the protections of Section 107(b) of the Bankruptcy Code.

10. The Debtors propose to seal the Courtroom on an as-needed basis at the hearing on the Stock Option Motion consistent with the provisions of 11 U.S.C. § 107.

#### **Notice**

11. Notice of this Motion has been given to the following parties or, in lieu thereof, to their counsel, if known: (i) the Office of the United States Trustee; (ii) the creditors holding the 20 largest unsecured claims against the Debtors' estates (on a consolidated basis); and (iii) any party which has filed a request for notices with this Court prior to the date of this Motion. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

#### **No Prior Request**

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

WHEREFORE, the Debtors respectfully request that the Court enter an order, substantially in the form as the proposed order filed herewith, (i) authorizing the Debtors to present evidence and testimony related to the Stock Option Motion under seal, and (ii) granting further relief as is just and proper.

Dated: August 27, 2008

PACHULSKI STANG ZIEHL & JONES LLP



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