

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

In re:)	
)	Chapter 11
The SCO Group, Inc., <u>et al.</u> ,)	
)	Case No. 07-11337 (KG)
Debtors.)	(Jointly Administered)
)	
)	Hearing Date: December 22, 2009 at 2:00 p.m. (ET)
)	Objection Deadline: November 30, 2009 at 4:00 p.m. (ET)

**MOTION OF SUSE LINUX GMBH PURSUANT TO BANKRUPTCY CODE SECTION
107(b) AND FED R. BANKR. P. 9018 FOR AN ORDER AUTHORIZING SUSE
TO FILE EXHIBITS TO DECLARATION OF GRANT L. KIM UNDER SEAL**

SUSE Linux GmbH (“SUSE”) files this motion (the “Motion”), pursuant to section 107(b) under chapter 11 of title 11, United States Code (the “Bankruptcy Code”) and Rule 9018 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) seeking authorization for SUSE to file Exhibits B and C (the “Confidential Exhibits”) to the *Declaration of Grant L. Kim In Support of SUSE’s Motion for Relief From the Automatic Stay to Complete International Arbitration* (the “Kim Declaration”) under seal. In support of this Motion, SUSE respectfully represents and states as follows:

JURISDICTION

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue of these cases and this motion in this District is proper 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 predicate for the relief requested herein is section 107(b) of the Bankruptcy Code, along with Bankruptcy Rule 9018 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.

BACKGROUND

2. The SCO Group, Inc. (“SCO”) and its affiliate, SCO Operations, Inc. (collectively with SCO, the “Debtors”), filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code on September 14, 2007. On September 18, 2007, this Court entered an order directing joint administration of the Debtors’ estates.

3. On September 28, 2007, SCO filed a motion (the “Stay Motion”) (Dkt. No. 69) seeking entry of an order enforcing the automatic stay against SUSE in relation to an arbitration proceeding pending in Zurich, Switzerland (the “Arbitration”). The Court granted the Stay Motion on November 14, 2007. (Dkt. No. 204.)

4. Contemporaneously herewith, SUSE has filed a motion to lift the automatic stay in order for the parties to complete the Arbitration (the “Lift Stay Motion”). SUSE references the Kim Declaration in support of its Lift Stay Motion.

RELIEF REQUESTED

5. By this motion, SUSE respectfully requests entry of an order authorizing it to file the Confidential Exhibits under seal, and directing that the Confidential Exhibits shall remain under seal and confidential, and shall not be made available to anyone other than: (i) the Court, (ii) the Office of the United States Trustee, (iii) the Chapter 11 trustee for The SCO Group, Inc., Edward Cahn (the “Trustee”); and (iv) counsel to any official committee of unsecured creditors, if subsequently appointed, consistent with the provisions of 11 U.S.C. § 107(b).

BASIS FOR RELIEF REQUESTED

6. Section 107(b) of the Bankruptcy Code provides bankruptcy 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).

7. Bankruptcy Rule 9018 sets forth the procedures by which a party may move for relief under Bankruptcy Code section 107(b), and provides that “[o]n 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. Local Rule 9018-1(b) additionally provides, in relevant part, that “[a]ny party who seeks to file documents under seal must file a motion to that effect.” Del. Bankr. LR 9018-1(b).

8. Unlike its counterpart in Rule 26(c) of the Federal Rules of Civil Procedure, section 107(b) of the Bankruptcy Code does not require an entity seeking such protection to demonstrate “good cause.” See, e.g., 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, 679 (Bankr. N.D. Ohio 1995). Rather, if the material sought to be protected satisfies one of the categories identified in

Bankruptcy Code section 107(b), “the court is required to protect a requesting party and has no discretion to deny the application.” In re Orion Pictures Corp., 21 F.3d at 27.

9. SUSE submits that good cause exists for the Court to grant the relief requested herein. The Kim Declaration refers to the Confidential Exhibits, which are pleadings filed in the *The SCO Group, Inc. v. Novell, Inc.*, United States District Court, District of Utah, Case No. 04-00139 (the “Utah Litigation”) and in the Arbitration.

10. Both of the Confidential Exhibits reference certain material that is protected by a confidentiality clause in the contracts that SUSE and SCO had signed in 2002 (the “UnitedLinux contracts”). The UnitedLinux contracts, which are centrally at issue in the Arbitration, both include provisions mandating that all parties must maintain the information in the Confidential Exhibits in confidence and not publicly disclose the information set forth in the Confidential Exhibits. This duty to preserve the confidentiality of the Confidential Exhibits is owed to SCO and various other third parties to the respective contracts.¹

11. Filing the Confidential Exhibits under seal is necessary because disclosure of material designated as “Confidential Information” could be perceived as a breach of the confidentiality agreement to which that information is subject. Accordingly, the Confidential Exhibits constitute “confidential commercial information” as that term is defined in section 107(b) of the Bankruptcy Code. In order to allow the Court to make an informed judgment regarding the relief sought by SUSE in the Lift Stay Motion, SUSE believes that providing the Court with the information set forth in the Confidential Exhibits is necessary. In light of the above, SUSE submits that approval of this Motion is necessary and appropriate.

¹ This Court has previously entered an order authorizing the filing of the UnitedLinux contracts themselves under seal (Dkt. No. 191). As the Confidential Exhibits disclose confidential details regarding the UnitedLinux contracts, SUSE submits that the Confidential Exhibits should be filed under seal as well.

NOTICE

12. Notice of this Motion has been provided to (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); (iii) counsel to the Trustee, and (iv) those parties requesting notice pursuant to Bankruptcy Rule 2002 in accordance with Del. Bankr. L.R. 2002-1(b). SUSE submits that no other or further notice need be provided.

13. No previous motion for the relief sought herein has been made to this or any other court.

WHEREFORE, SUSE respectfully requests that the Court grant this motion and grant such other and further relief as is just and proper.

Dated: Wilmington, Delaware
November 10, 2009

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