

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

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In re : Chapter 11  
: :  
The SCO GROUP, INC., *et al.*,<sup>1</sup> : Case No. 07-11337 (KG)  
: (Jointly Administered)  
Debtors. : :  
: **Hearing Date: 4/20/2010 at 4:00 p.m. (ET)**  
: **Objection Deadline: 4/13/2010 at 4:00 p.m. (ET)**  
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**MOTION OF THE CHAPTER 11 TRUSTEE FOR ORDER UNDER  
11 U.S.C. §§ 105(a) AND 363 AND FED. R. BANKR. 2002 AND 6004  
(A) APPROVING THE SALE OF THE IP ASSET FREE AND CLEAR OF ALL LIENS,  
CLAIMS, INTERESTS, AND ENCUMBRANCES PURSUANT  
TO 11 U.S.C. § 363 AND (B) GRANTING RELATED RELIEF**

Edward N. Cahn, Esq. (the “Chapter 11 Trustee” or “Trustee”), in his capacity as Chapter 11 Trustee for the above-captioned debtors (collectively, the “Debtors”) hereby moves this Court (this “Motion”), pursuant to sections 105(a) and 363(b), (f), (m) of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the “Bankruptcy Code”), and Rules 2002 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) for entry of an order substantially in the form attached hereto as Exhibit A (the “Sale Order”) (a) approving the sale of the IP Asset (as defined in paragraph 8 below) to Liberty Lane, LLC (“Liberty Lane”) or another higher and better bidder pursuant to Bankruptcy Code section 363; (b) authorizing the Trustee to execute and deliver the Patent Assignment by The SCO Group, Inc. (“SCO”) to Liberty Lane, attached hereto as Exhibit B, to consummate the sale of the IP Asset; and (c) granting other relief. In support of this Motion, the Trustee respectfully represents as follows:

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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.

## **JURISDICTION AND VENUE**

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).

2. The statutory predicates for the relief sought herein are Bankruptcy Code sections 105(a) and 363(b), (f), (m) and Bankruptcy Rules 2002(a)(2) and 6004(a), (b),(c),(e),(f) and (h).

## **RELIEF REQUESTED**

3. By this Motion, the Trustee respectfully requests, pursuant to Bankruptcy Code sections 105(a) and 363<sup>2</sup> and Bankruptcy Rules 2002 and 6004, entry of the Sale Order: (a) approving the sale of the IP Asset to Liberty Lane or another higher and better bidder pursuant to Bankruptcy Code section 363; (b) authorizing the Trustee to execute and deliver the Patent Assignment to Liberty Lane to consummate the sale of the IP Asset; and (c) granting other relief.

## **BACKGROUND**

4. On September 14, 2007, the Debtors commenced their bankruptcy cases by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Debtors' chapter 11 cases are being jointly administered.

5. On August 25, 2009 this Court approved the appointment of Edward N. Cahn, Esq. as Chapter 11 trustee in these cases (Docket No. 900). No official committee of unsecured creditors has been appointed to date. The Trustee has been performing his duties and operating the Debtors as authorized by Bankruptcy Code sections 1106 and 1108.

6. The Debtors are publicly held Delaware corporations with their corporate headquarters located in Lindon, Utah.

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<sup>2</sup> The Trustee asserts that no consumer privacy ombudsman is required pursuant to Bankruptcy Code section 332 since this Motion does not contemplate a sale of any personally identifiable information.

7. The Debtors' core business focus is to serve the needs of small-to-medium sized businesses and branch offices and franchisees of Fortune 1000 companies, by providing reliable, cost-effective UNIX software technology for distributed, embedded, and network-based systems.

8. In addition to the Debtors' core business focus, the Debtors own "The SCO Group, Inc. – Perk Up," which includes United States Patent Number 6,931,544, Method and Apparatus for Executing Multiple JAVA(™) Applications on a Single JAVA(™) Virtual Machine, together with any patents and patents issuing from applications claiming priority to such patents (the "IP Asset"), attached hereto as Exhibit C.

9. Due to the current restructuring of the Debtors' business, the Trustee, in the exercise of his business judgment and in consultation with his retained professionals, determined it is not in the best interests of the Debtors' estates to retain ownership of the IP Asset. The Debtors' have never utilized the IP Asset in their business and will not utilize the IP Asset in their business in the future. In order for the Debtors' estates to gain the maximum benefit from the IP Asset, the Trustee determined to sell the IP Asset.

10. Upon determining the IP Asset should be sold, the Trustee consulted with his counsel and financial advisor, Ocean Park Advisors LLC ("OPA"), and authorized and directed OPA to investigate possible purchasers of the IP Asset. As set forth more fully in the Affidavit of Mark Fisler in support of the Motion ("Fisler Affidavit," attached hereto as Exhibit D), OPA marketed the IP Asset to over 40 potential purchasers ("Targets") during a five month period.

11. On February 22, 2010, a Letter of Intent was submitted to OPA by Allied Security Trust I, on behalf of Liberty Lane, to acquire the IP Asset for the purchase price of \$100,000.00. A true and correct copy of the executed Letter of Intent is attached hereto as Exhibit E.

12. As the prospective buyer, Liberty Lane will make a good faith deposit of \$10,000.00, which will be held by the Trustee in escrow.

13. After consulting among the Trustee, his professionals, and SCO business people, and after considering the market for the IP Asset, it was determined that OPA should pursue a private sale of the IP Asset as the market did not warrant the expense and delay of an auction process. Nevertheless, the Trustee will advertise the sale to be certain that any other parties that may be interested in purchasing the IP Asset will have notice and an opportunity to make an offer. Accordingly, upon the filing of this Motion, an advertisement will be placed in the local newspaper in Salt Lake City, Utah. The advertisement will indicate that the Trustee has entered into a Letter of Intent on behalf of Debtors for the purchase of the IP Asset and will invite any interested parties to contact OPA.

14. Subject to this Court's entry of the Sale Order, the Trustee will sell and assign the IP Asset to Liberty Lane, on the terms and conditions in the Patent Assignment. Briefly, the Patent Assignment provides that the IP Asset will be assigned to Liberty Lane for a purchase price of \$100,000.00 cash, to be paid upon execution of the Patent Assignment.<sup>3</sup>

15. After the sale of the IP Asset, Liberty Lane will record the assignment with the United State Patent and Trademark Office pursuant to 35 U.S.C. § 261.

### **APPLICABLE AUTHORITY**

#### **A. The Sale is Reasonable and Appropriate Under Sections 105(a) and 363(b).**

16. Bankruptcy Code section 363(b)(1) provides that “[t]he trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the

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<sup>3</sup> The description of the Patent Assignment set forth herein is fully qualified by the Patent Assignment, and parties in interest are advised to review the Patent Assignment in its entirety. Unless otherwise defined herein, all capitalized terms used in this description of the Patent Assignment shall have the meanings ascribed to them in the Patent Assignment. To any extent this Motion conflicts with the Patent Assignment, the Patent Assignment shall control.

estate.” 11 U.S.C. § 363(b)(1). Whether a sale of assets pursuant to Bankruptcy Code section 363(b) should be approved in a particular case is a matter within the Court’s discretion, giving due consideration to the sound business judgment of the proponent of the sale. *See In re Martin*, 91 F.3d 389, 395 (3d Cir. 1996); *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143 (3d Cir. 1986); *In re Delaware & Hudson Ry. Co.*, 124 B.R. 169 (D. Del. 1991).

17. Additionally, section 105(a) provides that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” 11 U.S.C. § 105(a). Provided that a bankruptcy court does not employ its powers under section 105(a) to achieve a result not contemplated by the Bankruptcy Code, the exercise of its powers under section 105(a) is proper. *See In re Fesco Plastics Corp.*, 996 F.2d 152, 154 (7th Cir. 1993); *Pincus v. Graduate Loan Ctr. (In re Pincus)*, 280 B.R. 303, 312 (Bankr. S.D.N.Y. 2002). Pursuant to section 105(a), the court may fashion an order or decree that helps preserve or protect the value of a debtor’s assets. *See, e.g., Chinichian v. Campolongo (In re Chinichian)*, 784 F.2d 1440, 1443 (9th Cir. 1986) (“Section 105 sets out the power of the bankruptcy court to fashion orders as necessary pursuant to the purposes of the Bankruptcy Code”); *In re Cooper Props. Liquidating Trust, Inc.*, 61 B.R. 531, 537 (Bankr. W.D. Tenn. 1986).

18. To approve the use, sale, or lease of property outside the ordinary course of business, this Court only needs to determine the trustee’s decision is supported by “some articulated business justification.” *See, e.g., Comm. Of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070 (2d Cir. 1983); *see also, In re Martin*, 91 F.3d 389, 395 (3d Cir. 1996) (citing *In re Schipper*, 933 F.2d 513, 515 (7th Cir. 1991)); *Dai-Ichi Kangyo Bank*,

*Ltd. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 242 B.R. 147, 153 (D. Del. 1999).

19. Once the trustee articulates a valid business justification, there “is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company.” *In re Integrated Resources, Inc.*, 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)). Once a valid business judgment is made, the business judgment rule shields the trustee from judicial second-guessing. *See In re Farmland Indus., Inc.*, 294 B.R. 903, 913 (Bankr. W.D. Mo. 2003).

20. The Trustee, with assistance from his retained professionals, has demonstrated sound business justification for the relief requested in this Motion. The Trustee submits that it is in the best interest of the Debtors’ estates to sell the IP Asset to Liberty Lane to receive the maximum value of the IP Asset. The sale is especially beneficial to the Debtors’ estates because Debtors have never utilized the IP Asset in their business and will not utilize the IP Asset in their business in the future. As described in the Fislser Affidavit and herein, the Trustee has undertaken numerous steps to ensure that the Debtors’ estates are receiving market value for the IP Asset.

**B. A Private Sale is Permitted Under Section 363.**

21. The Trustee submits that a private sale of the IP Asset satisfies the requirements of Bankruptcy Code section 363. In fact, there is no requirement that a bankruptcy sale be by public auction. *See In re Trans World Airlines, Inc.* 2001 Bankr. LEXIS 980, \*13 (Bankr. D. Del. April 2, 2001) (“...a § 363(b) sale transaction does not require an auction procedure. The auction procedure has developed over the years as an effective means for producing an arm’s

length fair value transaction”); accord Bankruptcy Rule 6004(f)(1) (providing for a public or private sale); *Penn Mut. Life Ins. Co. v. Woodscape Ltd. Partnership (In re Woodscape Ltd. Partnership)*, 134 B.R. 165, 174 (Bankr. D. Md. 1991) (“[t]here is no prohibition against a private sale...”). The Trustee believes the IP Asset has been marketed adequately in an effort to generate the highest and best recovery for the benefit of the Debtors’ estates.

22. The purchase price is fair and reasonable, has been proposed and negotiated in good faith, is the highest, best and only offer received to date for the IP Asset, and has the highest degree of certainty of a guaranteed payment to the Debtors’ estates. The Trustee submits that Liberty Lane is purchasing the IP Asset in good faith and is entitled to the protections of Bankruptcy Code section 363(m). See *In re Abbotts Dairies*, 788 F.2d at 149-150.

23. Moreover, by selling the IP Asset in the proposed private sale, the Trustee will maximize the estates’ profits by avoiding the costly expenses of an auction. In light of the unique nature of the IP Asset, and the fact that after marketing the IP Asset only one potential purchaser was identified, the Trustee respectfully submits that requiring a separate auction for the sale of the IP Asset would be unreasonably costly for the Debtors’ estates. Indeed, the costs and delays associated with holding an auction for the IP Asset would substantially and unreasonably reduce the economic benefits of selling the IP Asset.

24. Nevertheless, out of an abundance of caution and to ensure that the Debtors’ estates receive maximum value for the IP Asset, the IP Asset will continue to be marketed for sale until this Court’s approval of this Motion. Specifically, this Motion and the Patent Assignment will be provided to all parties previously identified as potentially having an interest in the IP Asset and the proposed sale will be advertised in the local papers in Salt Lake City, Utah. Any party interested in purchasing the IP Asset will be required to submit a written bid. If

any party does submit a bid for the IP Asset, OPA and the Trustee will conduct an auction of the IP Asset on April 19, 2010, one business day prior to the hearing on the sale of the IP Asset.

**C. The Sale is Appropriate Under Section 363(f).**

25. Pursuant to Bankruptcy Code section 363(f), a trustee may sell estate property free and clear of liens in such property if: (i) such a sale is permitted under applicable non-bankruptcy law, (ii) the party asserting a lien, claim or interest consents to such sale, (iii) the interest is a lien and the purchase price for the property is greater than the aggregate amount of all liens on the property, (iv) the interest is the subject of a *bona fide* dispute, or (v) the party asserting the lien, claim or interest could be compelled, in a legal or equitable proceeding, to accept a money satisfaction for such interest. *See* 11 U.S.C. § 363(f); *In re Elliot*, 94 B.R. 343, 345 (Bankr. E.D. Pa. 1988) (section 363(f) is written in the disjunctive; the court may approve sale “free and clear” provided at least one of the subsections is met).

26. The Trustee is not aware of any liens against, claims secured by, or third party interests in the IP Asset. The Trustee further proposes that any party with a lien on the IP Assets shall have a corresponding lien in the proceeds of such sale, with the same validity, force, and effect as such lien had prior to such sale. As such, the requirements of Bankruptcy Code section 363(f) would be satisfied.

**D. Successful Purchaser Should be Entitled to the Protections of Section 363(m).**

27. Pursuant to Bankruptcy Code section 363(m), a good faith purchaser is one who purchases assets for value, in good faith, and without notice of adverse claims. *See Abbotts Dairies* 788 F.2d at 147.

28. The Letter of Intent and the Patent Assignment were negotiated at arm’s length. OPA engaged in discussions with several other Targets, which ultimately were fruitless. The



Trustee submits that the sale represents the best, highest and only offer for the IP Asset. Accordingly, the Sale Order will include a provision that Liberty Lane, and/or any proposed buyer with a higher and better offer, determined in the exercise of the Trustee's business judgment and after consultation with his professionals, is a "good faith" purchaser within the meaning of Bankruptcy Code section 363(m).

**E. The Court Should Grant a Waiver of the Stay Period Under Bankruptcy Rule 6004(h).**

29. Bankruptcy Rule 6004(h) provides that an order authorizing the sale of property of the estate "is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 6004(h). The Trustee respectfully seeks a waiver of the 14-day stay period in order to be able to consummate the sale of the IP Asset immediately following approval of this Motion.

**NOTICE**

30. Notice of this Motion has been provided to: (a) the Office of the United States Trustee; (b) any party filing a request for notice pursuant to Bankruptcy Rule 2002, (c) all persons known to the Trustee who have expressed an interest in the IP Asset. In addition, advertisements of this Motion will be placed in the local papers in Salt Lake City, Utah. In light of the nature of the relief requested herein, the Trustee submits that no other or further notice is necessary or required.

**NO PRIOR REQUEST**

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

**WHEREFORE**, the Trustee respectfully requests entry of an order substantially in the form attached hereto granting the relief requested herein and such other and further relief as is just and proper.

Dated: March 29, 2010  
Wilmington, Delaware

Respectfully submitted,

**BLANK ROME LLP**

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