IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 11
	:	
TSG Group, Inc. (f/k/a The SCO Group, Inc.), *et al*.,[1]	:	Case No. 07-11337 (KG)
	:	
	:	(Jointly Administered)
Debtors.	:	

Objection Deadline: August 8, 2011 at 4:00 p.m. ET
Hearing Date: August 15, 2011 at 11:00 a.m. ET

CHAPTER 11 TRUSTEE'S MOTION PURSUANT TO BANKRUPTCY CODE SECTIONS 105 AND 363 AND BANKRUPTCY RULE 9019 FOR ENTRY OF ORDER AUTHORIZING THE TRUSTEE TO ENTER INTO A SETTLEMENT AGREEMENT WITH THE LENDERS

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**") for entry of an order, in substantially the form attached hereto as Exhibit A (the "**Proposed Order**"), authorizing and approving that certain Settlement Agreement ("**Settlement Agreement**"), attached as Exhibit 1 to the Proposed Order, dated July [25], 2011, by and among the bankruptcy estates of TSG Group, Inc. and TSG Operations, Inc. (f/k/a The SCO Group, Inc. and SCO Operations, Inc., respectively) and each of the persons (each a "**Lender**" and collectively, the "**Lenders**") that made some portion of the loan to the Debtors' estates pursuant to the terms of the *Secured Super-Priority Credit Agreement, dated as of March 5, 2010, among the Bankruptcy Estates of The SCO Group, Inc., a Delaware*

[1] The Debtors and the last four digits of each of the Debtors' federal tax identification numbers are as follows: (a) TSG Group, Inc. [f/k/a The SCO Group, Inc.], a Delaware corporation, Fed. Tax Id. #2823; and (b) TSG Operations, Inc. [f/k/a SCO Operations, Inc.], a Delaware corporation, Fed. Tax Id. #7393.

Corporation and SCO Operations, Inc., a Delaware Corporation, by and through Edward N. Cahn, solely in his capacity as Chapter 11 Trustee, as Borrower, and Certain Lenders Thereto (the "**Credit Agreement**").[2] In support of the Motion, the Trustee respectfully represent as follows:

JURISDICTION

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. § 1334. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). The statutory predicates for the relief sought herein are sections 105(a) and 363 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the "**Bankruptcy Code**") and Rule 9019 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**").

BACKGROUND

2. On September 14, 2007 (the "**Petition Date**"), the Debtors commenced their bankruptcy cases by filing voluntary petitions for relief under the Bankruptcy Code. The Debtors' chapter 11 cases are being jointly administered.

3. On August 25, 2009 this Court approved the appointment of Edward N. Cahn, Esquire 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.

4. The Trustee and the Lenders entered into the Credit Agreement as of March 5, 2010, pursuant to which the Debtors' estates became indebted to the Lenders in the principal

[2] The Proposed Order and the Settlement Agreement are fully incorporated herein.

amount of $2,000,000 plus interest, plus the right of the Lenders to receive certain fees thereunder. The Credit Agreement was approved by the Bankruptcy Court on March 5, 2010 [D.I. 1084].

5. As of April 11, 2011, the Trustee sold and conveyed to unXis, Inc. (the "**Buyer**") the UNIX® system software product and related services business, in accordance with the terms and conditions of the Asset Purchase Agreement dated January 19, 2011 and ancillary documents (the "**Asset Purchase Agreement**") and pursuant to an order of the Bankruptcy Court entered on March 7, 2011 [Dkt. No. 1253], approving the sale to the Buyer. The cash portion of the purchase price was in the amount of $600,000 ("**Sale Proceeds**"). In addition, among other things, the Buyer delivered Warrants to the Trustee as defined more fully in the Asset Purchase Agreement.

6. On or about April 28, 2011 and again on May 4, 2011, the Lenders sent the Trustee a notice of Event of Default under the terms of the Credit Agreement. The Trustee disputed that an Event of Default occurred. On May 5, 2011, the Trustee filed the *Motion of the Chapter 11 Trustee for (I) Hearing Pursuant to Article VII of the Credit Agreement and (II) Entry of An Order (A) Determining There Is No Default by the Trustee Under the Loan Documents, (B) Directing That the Automatic Stay Remains in Full Force and Effect, and (C) Deeming Wrongful Notices Null and Void* [D.I. 1269] (the "**Default Dispute Motion**"). Thereafter, the parties entered into confidential discussions and ultimately settlement negotiations.

RELIEF REQUESTED

7. By this Motion, the Trustee seeks the entry of the Proposed Order and the approval of the Settlement Agreement pursuant to Bankruptcy Rule 9019(a) and Bankruptcy Code sections 105(a) and 363. Subject to this Court's approval, the Trustee and the Lenders

(collectively, the "**Parties**") have agreed to the terms and conditions set forth in the Settlement Agreement. A summary of some of the key terms of the Settlement Agreement are as follows:[3]

- On the third business day after the entry of an order approving this Agreement (the "Payment Date"), (i) the Estate will make a payment to the Lenders in the amount of $350,000 in immediately available funds ("Cash Payment"); (ii) the Trustee will execute and deliver to the Collateral Agent the Amended and Restated Promissory Note; (iii) the Estate will assign, transfer and deliver to the Lenders the Warrant pursuant to the terms of the Assignment of Warrant and (iv) the Borrowers will execute the Amended Collateral Agent Agreement.

- The Loan Fee is increased from 6.6% to 12%.

- The Lenders shall be deemed to have withdrawn the notices to the Trustee of the Events of Default under the Credit Agreement.

- The Cash Payment to the Lenders will be applied to reduce the principal amount of the Original Loan. The Lenders acknowledge and agree that the remaining balance of $2,048,176.00 (the "Restated Debt") will accrue Basic Interest from the Payment Date. Hereafter, all references in this Agreement to the Restated Debt shall mean the sum of the Restated Debt plus the Basic Interest accruing on the Restated Debt from the Payment Date until the date the Restated Debt is paid in full. To the extent partial payments are made on the Restated Debt such payments shall be applied to reduce the principal amount of the Restated Debt and interest shall accrue on the reduced principal amount.

- The Lenders acknowledge and agree that the Restated Debt and the Loan Fee will be payable solely from the Litigation Proceeds. The Lenders shall be paid from any Litigation Proceeds received by the Trustee and/or the Estates. The Trustee shall not wait for the full amount of the Litigation Proceeds to be received by the Trustee and/or the Estates before making partial or full payment to the Lenders. There will be no further distribution to the Lenders from the Sale Proceeds or from the Estates to reduce the Original Loan, the Restated Debt or the Loan Fee, except as set forth herein.

- To secure the Restated Debt, including the Loan Fee, the Trustee and the Estates hereby grant to Lenders a lien on and continuing interest in all of the Estates' assets as of the date hereof, and all of the Estates' rights and interests in the Litigation Proceeds, subject to the terms and conditions and limitations in this Agreement; provided, however, it is understood and agreed that the Lenders

[3] To the extent that this summary of terms and the Settlement Agreement are inconsistent, the terms and conditions set forth in the Settlement Agreement shall control.

hereby consent to the Trustee's use of the Estates' assets (exclusive of the Litigation Proceeds) in the Trustee's sole discretion and without further approval from the Lenders, provided no Event of Default has been declared by the Lenders through the Collateral Agent.

- The Lenders will not object to the request for, or payment of, any fees or expenses of the Estate Professionals, nor will Lenders object to the Sale Proceeds or other Estate assets being applied to reduce the Estate Professional Fees. Lenders and the Trustee agree that if and when any Litigation Proceeds are received by the Trustee and/or the Estates, to the extent there are allowed and unpaid professional fees and expenses of the Estates ("Estate Professional Fees"), the Restated Debt and the Loan Fee shall be paid *pari passu* with such Estate Professional Fees.

- Each of the Lenders on the one hand, and the Estates and the Trustee on the other hand, for good and valuable consideration, the adequacy of which is hereby confirmed, release each other and the Estate Professionals unconditionally, absolutely, irrevocably and forever from any and all claims and causes of action of any nature whatsoever, whether known or unknown, with respect to the Credit Agreement and the Chapter 11 proceedings except that the Parties retain their rights to enforce this Agreement and the Amended and Restated Promissory Note.

- At closing on the Settlement Agreement, the Parties also will execute and deliver the Amended and Restated Promissory Note, the Amendment to Collateral Agent Agreement and the Assignment of Warrant.

BASIS FOR RELIEF REQUESTED

8. Bankruptcy Rule 9019(a) provides that, on motion by a debtor, bankruptcy courts may approve a compromise or settlement. *See* Fed. R. Bankr. P. 9019(a). Indeed, "[t]o minimize litigation and expedite the administration of a bankruptcy estate, '[c]ompromises are favored in bankruptcy.'" *Meyers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996) (citation omitted).

9. "[T]he decision whether to approve a compromise under Rule 9019 is committed to the sound discretion of the Court, which must determine if the compromise is fair, reasonable, and in the interest of the estate." *In re Louise's, Inc.*, 211 B.R. 798, 801 (D. Del. 1997) (declining to approve settlement found to be sub rosa plan). Courts should not, however, substitute their judgment for that of the trustee, but instead canvas the issues to see whether the settlement falls

below the lowest point in the range of reasonableness. See *In re Neshaininy Office Bldg. Assocs.*, 62 B.R. 798, 803 (E.D. Pa. 1986); *In re W.T. Grant and Co.*, 699 F.2d 599, 608 (2d Cir. 1983), *cert. denied*, 464 U.S. 22 (1983); *see also In re World Health Alts., Inc.*, 344 B.R. 291, 296 (Bankr. D. Del. 2006) ("The court does not have to be convinced that the settlement is the best possible compromise. Rather, the court must conclude that the settlement is within the reasonable range of litigation possibilities.") (internal citations and quotations omitted).

10. The Third Circuit Court of Appeals has enumerated four factors that should be considered in determining whether a settlement should be approved. The four enumerated factors are as follows: "(1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors." *In re Martin*, 91 F.3d at 393; *accord Will v. Nw. Univ. (In re Nutraguest Inc.)* 434 F.3d 639, 644 (3d Cir. 2006) (finding that the *Martin* factors are useful when analyzing a settlement of a claim against the debtor as well as a claim belonging to the debtor); s*ee also Protective Comm. For Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968); *In re Marvel Entm't Group, Inc.*, 222 B.R. 243 (D. Del. 1998) (proposed settlement held to be in best interests of the estate); *In re Mavrode*, 205 B.R. 716,721 (Bankr. D.N.J. 1997).

11. The *Martin* factors weigh heavily in favor of approving the Settlement Agreement. First, the Settlement Agreement avoids potential litigation to resolve the dispute with the Lenders. Such litigation would deplete the limited resources of the Debtors' estates and would not provide any additional benefit thereto. The Settlement Agreement resolves, in a time- and cost-effective manner, any disputes related to the Credit Agreement, and this expeditious resolution is to the benefit of all parties involved.

12. Because the Settlement Agreement prevents unnecessary and expensive litigation, and requires no expenditure by the Debtors' estates, the Trustee believes that the Settlement Agreement is fair, reasonable, and in the best interests of the Debtors' estates. The parties negotiated the terms of the Settlement Agreement in good faith and at arm's length, and the Trustee believe the Settlement Agreement falls well within the range of reasonableness under *Martin* and its progeny. Accordingly, the Settlement Agreement should be approved pursuant to Bankruptcy Rule 9019(a).

13. Additionally, to the extent that Bankruptcy Code section 363 is implicated in connection with the settlement embodied in the Settlement Agreement, the Trustee seeks authority thereunder to approve and effectuate the Settlement Agreement. The Trustee submits that the terms of the Settlement Agreement have a sound business purpose and represent the exercise of his sound business judgment and, accordingly, any actions required to effectuate the terms of the Settlement Agreement should be authorized and approved pursuant to section 363(b). *See In re Lionel Corp.*, 722 F. 2d 1063, 1071 (2d Cir. 1983) ("The rule we adopt requires that a judge determining a 363(b) application expressly find from the evidence presented before him a good business reason to grant such an application."); *In re Del. & Hudson Ry. Co.*, 124 B.R. 169, 179 (Bankr. D. Del. 1991).

14. Finally, authorizing the Trustee to enter into and effectuate the terms of the Settlement Agreement is well within the equitable powers of this court. *See* 11 U.S.C. § 105(a) Bankruptcy Code section 105(a) further provides that "[t]he court may issue any order . . . that is necessary or appropriate to carry out the provision of [the Bankruptcy Code]." Approval of a compromise or settlement pursuant to Bankruptcy Rule 9019 is committed to the bankruptcy

court's discretion. *Key3Media Group, Inc. v. Pulver.com, Inc. (In re Key3Media Group, Inc.)*, 336 B.R. 87, 92 (Bankr. D. Del. 2005).

15. The relief sought herein reflects a fair compromise that would avoid costly and protracted litigation, as well as uncertain litigation results. Indeed, the compromise embodied in the Settlement Agreement easily surpasses the "lowest point in the range of reasonableness" and otherwise meets all the factors set forth by the Court of Appeals for the Third Circuit to approve a settlement or compromise.

16. Based upon the foregoing, the Trustee submits that the terms contained in the Settlement Agreement are in the best interests of all concerned.

NO PRIOR REQUEST

17. No prior request for the relief sought in this Motion has been made to this Court in these cases.

NOTICE

18. 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, and (c) counsel to the Lenders. In light of the nature of the relief requested herein, the Trustee submits that no other or further notice is necessary or required.

WHEREFORE, the Trustee respectfully request that this Court enter an order, substantially in the form of the Proposed Order, approving the Settlement Agreement, authorizing the Debtors' estates to enter into the Settlement Agreement, the Amended and Restated Promissory Note, the Amendment to Collateral Agent Agreement and the Assignment of Warrant , and granting such other and further relief as is just, proper and necessary.

Dated: July 25, 2011
Wilmington, Delaware

BLANK ROME LLP

/s/ Stanley B. Tarr
Bonnie Glantz Fatell (No. 3809)
Stanley B. Tarr (No. 5535)
1201 Market Street, Suite 800
Wilmington, DE 19801
Telephone: (302) 425-6400
Facsimile: (302) 425-6464

Counsel to the Chapter 11 Trustee