

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

In re:

TSG GROUP, INC., *et al.*,

Debtors.

Chapter 7

Case No. 07-11337 (BLS)

Hearing Date: 9/22/21 at 1:00 p.m. (ET)
Objections Due: 9/9/21 at 4:00 p.m. (ET)

**MOTION OF THE CHAPTER 7 TRUSTEE PURSUANT TO
FED. R. BANKR. P. 9019 FOR ENTRY OF AN ORDER APPROVING THE
SETTLEMENT AND RELEASE AGREEMENT BY AND BETWEEN THE TRUSTEE
AND INTERNATIONAL BUSINESS MACHINES CORPORATION**

Edward N. Cahn, in his capacity as the Chapter 7 trustee (the “Trustee”) of the bankruptcy estate (the “Estate”) of TSG Group, Inc. and TSG Operations, Inc. (together, “TSG” or the “Debtors”), submits this motion (the “Motion”) for entry of an order, pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), authorizing and approving the *Settlement and Release Agreement* (the “Settlement Agreement”)¹ among the Trustee, on behalf of Debtors’ estates, and International Business Machines Corporation (“IBM”). A copy of the Settlement Agreement is annexed as **Exhibit 1** to the Proposed Order attached hereto as **Exhibit A**. In support of the Motion, Trustee respectfully states as follows:

PRELIMINARY STATEMENT

1. By the Settlement Agreement, the Trustee has reached a settlement with IBM that resolves all of the remaining claims at issue in the Utah Litigation (defined below). The Settlement Agreement is the culmination of extensive arm’s length negotiation between the Trustee and IBM. Under the Settlement Agreement, the Parties have agreed to resolve all disputes between them for a payment to the Trustee, on behalf of the Estates, of \$14,250,000. For the reasons set forth more

¹ Capitalized terms used but not defined in the Motion have the meanings ascribed to such terms in the Settlement Agreement.

fully below, the Trustee submits the Settlement Agreement and the settlement with IBM are in the best interests of the Estates and creditors, are well within the range of reasonableness, and should be approved.

JURISDICTION

2. The Court has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the District of Delaware*, dated February 29, 2012. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).² Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief requested herein are section 105(a) of title 11 of the United States Code (the “Bankruptcy Code”) and Bankruptcy Rule 9019.

BACKGROUND

3. On March 6, 2003, Caldera Systems, Inc. d/b/a The SCO Group (n/k/a TSG Group, Inc.) commenced an action against International Business Machines now pending before the United States District Court for the District of Utah (the “Utah District Court”) as *The SCO Group, Inc. v. International Business Machines Corporation*, Civil No. 2:03-CV-00294-DN (the “Utah Litigation”), alleging among other things that (1) IBM breached contracts relating to joint development (known as Project Monterey) of Unix-based operating system by improperly disclosing Debtors’ proprietary Unix source code and methods to contribute to Linux, an open-source variant of Unix, and developing IBM’s own version of Unix known as “AIX,” that (2) IBM’s breaches of the Project Monterey agreements and post-termination actions infringed the Debtors’

² The Trustee confirms his consent pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware to the entry of a final order by this Court in connection with this Motion to the extent it is later determined this Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

copyrights on Unix and UnixWare, and that (3) IBM engaged in unfair competition by attempting to destroy the economic value of Unix and the Debtors' ownership rights therein.

4. In response to and as part of the Utah Litigation, IBM denied the Debtors' claims and asserted various counterclaims against Debtors (the "Counterclaims"), including among other things breach of contract and unfair competition claims.

5. On September 14, 2007, each of the Debtors filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Cases") before the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court").

6. On April 4, 2008, IBM filed proof of its unsecured, unliquidated claim against the Debtors identified as claim number 91 (the "Proof of Claim").

7. On August 25, 2009, the Office of the United States Trustee filed its Notice of Appointment of Edward N. Cahn, Esquire as Chapter 11 Trustee [D.I. 898] and, on the same day, the Bankruptcy Court entered an Order Approving Appointment of Chapter 11 Trustee [D.I. 900].

8. On January 19, 2011, Debtors submitted to the Bankruptcy Court an Asset Purchase Agreement [D.I. 1216-1] to sell substantially all of Debtors' software business assets to unXis, Inc while retaining, among other things, causes of action and other legal or equitable rights and remedies relating to (1) all rights and interests in all litigation claims pending or that may be asserted in the future against IBM and (2) any allegations against Red Hat, Inc. ("Red Hat") or others that Linux violates SCO's Unix or Unixware intellectual property, contract or other rights.

9. On March 7, 2011, the Bankruptcy Court entered an order approving the Asset Purchase Agreement, finding the terms therein to be "fair and reasonable" and "valid, binding, and enforceable" [D.I. 1253].

10. On February 16, 2012, the Bankruptcy Court entered the *Order Granting Stipulation and Order Modifying the Automatic Stay* [D.I. 1396], which among other things allowed the Utah Litigation to recommence in the Utah District Court.

11. On August 24, 2012, the Bankruptcy Court entered an order converting the Debtors' Chapter 11 cases to cases under chapter 7 [D.I. 1439].

12. On August 28, 2012, the Bankruptcy Court appointed the Trustee for the purpose of overseeing and administering the Debtors' Chapter 7 bankruptcy estates [D.I. 1443].

13. On February 5 and February 8, 2016, the Utah District Court, *per* Judge David Nuffer, entered summary judgment ("Summary Judgment") in favor of IBM on Debtors' remaining claims of unfair competition and tortious interference [Utah District Court, D.I. 1159 & 1160].

14. On January 2, 2018, a panel of the Tenth Circuit Court of Appeal ("Tenth Circuit") affirmed in part and reversed in part the Utah District Court's Summary Judgment.

15. Red Hat was not involved in any of the conduct alleged in the Utah Litigation and thus has no prior or continuing obligations to Debtors under this Settlement Agreement or any other agreement to which Debtors are a party.

SUMMARY OF PROPOSED SETTLEMENT

16. In addition to usual and customary settlement terms, the material terms³ of the Settlement Agreement include the following:

- a. Court Approval. The Settlement Agreement is subject to the approval of this Court pursuant to Federal Rule of Bankruptcy Procedure 9019 (the "Approval Order").
- b. Effective Date. The Settlement Agreement will become effective (the "Effective Date") upon the expiration of the time to appeal or move for

³ In the event of any inconsistency between the description of the Settlement Agreement contained in this Motion and the terms of the Settlement Agreement, the terms of the Settlement Agreement shall govern and control.

reconsideration of the Approval Order if no appeal is taken or motion filed, or upon the conclusion of all appeals and denial of all motions with prejudice.

- c. Settlement Payment. Within five (5) business days of the Effective Date, IBM shall pay the total amount of \$14,250,000 by wire transfer to the Trustee.
- d. Trustee's Release. In consideration of IBM's obligations and releases under this Settlement Agreement, the Trustee, for the Debtors' bankruptcy estates, its agents, attorneys, employees, officers, directors, shareholders, assigns, and affiliates, hereby irrevocably and unconditionally releases and discharges IBM, its past and present officers, directors, shareholders, agents, insurers and reinsurers, attorneys, predecessors, affiliates and employees, and each of their respective successors, assigns, heirs and representatives (collectively, the "IBM Released Persons"), from any and all claims, rights, demands, injuries, debts, liabilities, omissions, accounts, contracts, agreements, causes of action, suits and damages whatsoever, in law or equity, and whether based on contract, tort, or otherwise, known or unknown, suspected or unsuspected, of every kind and nature, which the Debtors' bankruptcy estates, or its, affiliates, successors, assigns, heirs, and representatives at any time had, now have, or hereafter can or may have against IBM for, upon or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the date of this release, concerning, related to, arising out of, or arising from the Utah Litigation, the Proof of Claim or IBM's relationship with the Debtors or their estates (or their predecessors), Project Monterey, or IBM's relationship with the Debtors or their estates. In an avoidance of doubt, the foregoing includes causes of action and other legal or equitable rights and remedies relating to (1) all rights and interests in all litigation claims pending or that may be asserted in the future against IBM and Red Hat, and (2) any allegations that Linux violates SCO's Unix or Unixware intellectual property, contract or other rights, which, pursuant to the Asset Purchase Order and the Bankruptcy Court's order authorizing the same, the Trustee has the sole authority to bring against IBM, Red Hat, or others. Notwithstanding the foregoing, this release does not release IBM from its representations and obligations under this Settlement Agreement.
- e. IBM's Release. In consideration of the Trustee's obligations and releases under this Settlement Agreement, IBM, for itself, each of its respective agents, attorneys, employees, officers, directors, shareholders, assigns, and affiliates, hereby irrevocably and unconditionally releases and discharges the Trustee, the Debtors' bankruptcy estates, and their respective past and present officers, directors, shareholders, agents, insurers and reinsurers, attorneys, predecessors, affiliates and employees, and their respective successors, assigns, heirs and representatives, from any and all claims, rights, demands, injuries, debts, liabilities, omissions, accounts, contracts, agreements, causes of action, suits and damages whatsoever, in law or equity, and whether based on contract, tort, or otherwise, known or unknown, suspected or unsuspected, of every kind and nature, which IBM, or its affiliates, successors, assigns,

heirs, and representatives at any time had, now have, or hereafter can or may have against the Trustee or the Debtors' estates for, upon or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the date of this release, concerning, arising out of, or arising from the Utah Litigation, the Proof of Claim, or IBM's relationship with the Debtors or their estates (or their predecessors). Notwithstanding the foregoing, this release does not release the Trustee from his representations and obligations under this Settlement Agreement.

RELIEF REQUESTED AND BASES THEREFOR

17. By this Motion, Trustee respectfully requests entry of an order, substantially in the form annexed hereto as **Exhibit A**, authorizing and approving the Settlement Agreement, a copy of which is annexed as **Exhibit 1** to the Proposed Order.

18. Settlements in bankruptcy are favored as a means of minimizing litigation, expediting the administration of the bankruptcy estates, and providing for the efficient resolution of bankruptcy cases. *See In re Martin*, 91 F.3d 389, 393 (3rd Cir. 1996); *accord Will v. Next Proteins, Inc. (In re Nutraquest, Inc.)*, 434 F.3d 639, 644 (3d Cir. 2006). To achieve these results, Bankruptcy Rule 9019(a) empowers a bankruptcy court to approve a settlement or compromise by the trustee after notice and a hearing. *See Fed. R. Bankr. P. 9019(a)*; *see also* 11 U.S.C. § 105(a) (empowering the court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code).

19. In applying this rule, a bankruptcy court should approve a settlement if it is "fair and equitable" and "in the best interest of the estates". *In re Capmark Fin. Grp. Inc.*, 438 B.R. 471, 514 (Bankr. D. Del. 2010); *Key3Media Grp., Inc. v. Pulver.com, Inc. (In re Key3Media Grp., Inc.)*, 336 B.R. 87, 93 (Bankr. D. Del. 2005), *aff'd*, No. 05-828-SRL, 2006 WL 2842462 (D. Del. 2005). To properly make this determination, the court "must be apprised of all relevant information that will enable it to determine what course of action will be in the best interest of the estate." *Key3Media*, 336 B.R. at 92 (quoting *Martin*, 91 F.3d at 393).

20. The United States Court of Appeals for the Third Circuit has provided four criteria a bankruptcy court should consider in approving a settlement: (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 creditors. *See Martin*, 91 F.3d at 393. When applying these four criteria to the facts of a particular case, a court “is not supposed to have a mini-trial on the merits, but should canvass the issues to see whether the settlement falls below the lowest point in the range of reasonableness.” *Key3Media*, 336 B.R. at 93; *In re Nortel Networks, Inc.*, 522 B.R. 491, 510 (Bankr. D. Del. 2014) (approving settlement under the *Martin* factors); *In re Capmark Fin. Grp. Inc.*, 438 B.R. 471, 514 (Bankr. D. Del. 2010) (same). The court does not have to be convinced the settlement is the best possible compromise. Rather, the court must conclude the settlement is “within the reasonable range of litigation possibilities.” *In re World Health Alt., Inc.*, 344 B.R. 291, 296 (Bankr. D. Del. 2006) (internal citation omitted).

21. The Trustee submits the terms of the Settlement Agreement fall well within this range of reasonableness and, accordingly, the Settlement Agreement should be approved. Indeed, the *Martin* factors weigh strongly in favor of approval of the Settlement Agreement.

22. First, the probability of the ultimate success of the Trustee’s claims against IBM is uncertain. For example, succeeding on the unfair competition claims will require proving to a jury that events occurring many years ago constituted unfair competition and caused SCO harm. Even if SCO were to succeed in that effort, the amount of damages it would recover is uncertain and could be significantly less than provided by the Settlement Agreement. Such could be the case should a jury find that (1) the amount of damage SCO sustained as a result of IBM’s conduct is less than SCO has alleged, (2) SCO’s damages are limited by a \$5 million damage limitation provision in the Project Monterey agreement, or (3) some or all of IBM’s Counterclaims, alleging millions of dollars

in damages related to IBM's Linux activities and alleged interference by SCO, are meritorious. Although the Trustee believes the Estates would ultimately prevail on claims against IBM, a not insignificant risk remains that IBM could succeed with its defenses and/ or Counterclaims

23. Second, litigating the Trustee's and IBM's claims will be a complex, lengthy, and expensive process. In the absence of the proposed Settlement Agreement, the Trustee and IBM would need to continue engaging in costly and time-consuming litigation to resolve the claims. Furthermore, both sets of claims raise difficult questions regarding liability and damages which will require costly expert analysis and testimony. In the meantime, resolution of the Bankruptcy Case and any distributions to creditors will be delayed and will remain uncertain.

24. Third, the paramount interest of the Debtors' creditors will be best served by the Settlement Agreement. The proposed Settlement Agreement avoids the substantial risks, costs, and delays of litigation while bringing substantial value into the Estates. Among other things, the Settlement Agreement provides an immediate and substantial monetary recovery and creates important liquidity for the benefit of all creditors and claimants.

25. Finally, although IBM appears to have sufficient assets to pay any judgment the Trustee could reasonably obtain through litigation, there are appellate risks which may significantly delay the timing of when any judgment could be obtained. The case is currently not set for trial in Utah, and has been pending on remand from the Tenth Circuit with various motions yet to be decided.

26. Thus, all of the relevant factors support approval of the Settlement Agreement. The Trustee, therefore, respectfully submits that the Settlement Agreement is fair, reasonable, and in the best interest of the Estates and their creditors and should be authorized and approved.

RESERVATION OF RIGHTS

27. Except as expressly set forth in this Motion or in the Settlement Agreement, the Trustee, on behalf of himself and the Estates, and IBM each expressly reserve all rights, claims, counterclaims, defenses, and arguments.

NOTICE

28. Notice of this Motion has been provided to the following parties or their respective counsel, if any: (i) the Office of the United States Trustee for the District of Delaware, (ii) the DIP financing lenders, (iii) IBM, and (iv) all parties that have requested to receive notice in this case pursuant to Bankruptcy Rule 2002. The Trustee submits, in light of the nature of the relief requested, no further notice is necessary or required.

29. No prior request for the relief requested in this Motion has been made to this Court or to any other court.

30. The Trustee submits this Motion does not present novel issues of law requiring the citation to any authority, other than the statutes and rules cited above, and, accordingly, submit no separate memorandum of law is necessary.

CONCLUSION

WHEREFORE, for all the foregoing reasons, the Trustee respectfully requests that the Court enter the Proposed Order annexed as **Exhibit A** to this Motion (1) authorizing and approving the Settlement Agreement annexed as **Exhibit 1** to the Proposed Order, and (2) granting such other and further relief as the Court deems just, necessary and proper.

Dated: August 26, 2021
Wilmington, Delaware

BLANK ROME LLP

/s/ Stanley B. Tarr

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