IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
	.	
THE SCO GROUP, INC.,	.	Case No. 07-11337(KG)
et al.,	.	(Jointly Administered)
	.	
	.	Dec. 30, 2009 (10:04 a.m.)
Debtors.	.	(Wilmington)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE KEVIN GROSS
UNITED STATES BANKRUPTCY COURT JUDGE

Appearances:

For the Chapter 11 Trustee:	Bonnie Glantz Fatell, Esq. Blank, Rome LLP
For Alan P. Petrofsky (Pro Se):	Alan P. Petrofsky
For the SUSE/Novell:	Alan Lewis, Esq. Morrison & Foerster
For an Interested Party:	Ted Normand, Esq. Boies, Schiller & Flexner, LLP

Audio Operator: Jennifer Pasierb

Transcriber: Elaine M. Ryan
(302) 683-0221

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

THE CLERK: Please rise.

THE COURT: Good morning, everyone. Thank you and please be seated.

MR. LEWIS: Good morning, Your Honor.

THE COURT: It's a pleasure to see you all again.

MR. LEWIS: Thank you.

THE COURT: Mr. Lewis, it's been awhile, and it's good to see you, sir.

MR. LEWIS: It's always a pleasure to be here, Your Honor.

THE COURT: Thank you. Good morning, Ms. Fatell.

MS. FATELL: Good morning, Your Honor. Bonnie Fatell from Blank Rome on behalf of the Trustee, Mr. Edward Cahn, who's here with me today.

THE COURT: Good to have you back, Mr. Cahn.

MS. FATELL: Also on the line, Your Honor, I believe is Mr. Ted Normand from the Boies, Schiller firm. We filed a motion *pro hac vice* late yesterday for his admission and I ask that he be admitted for purposes of this hearing and able to participate. He had arranged by telephone in the event he has any additional comments to the argument with respect to the SUSE motion.

THE COURT: Thank you. Mr. Normand, you are admitted for this hearing, and we will sign that order as soon as it comes to my attention.

MR. NORMAND (TELEPHONIC): Thank you, Your Honor.

MS. FATELL: Your Honor, if I might just walk through the agenda for this morning -

THE COURT: And one thing I can save you time with is the CNO orders are all acceptable and will be signed.

MS. FATELL: Okay, that's perfect.

THE COURT: So, that helps.

MS. FATELL: Okay, then, I think that takes care of item number 1, item number 2, which is the motion for authorization to have sale procedures for de minimis assets approved and certain abandonment procedures.

THE COURT: Yes.

MS. FATELL: Item number 3 was *nunc pro tunc* approval to enter into a new lease for the office headquarters, which it sounds like you have approved.

THE COURT: Yes.

MS. FATELL: Number 4 was the retention of Hatch, James and Dodge as special litigation counsel.

THE COURT: Yes.

MS. FATELL: Which then takes us to the contested matters, and I thank you for approving those, Your Honor. The first contested matter is item number 5 and that is the motion of Petrofsky for an order compelling the Trustee's compliance with reporting requirement and setting reporting deadlines. Your Honor, we did file monthly operating reports

just prior to filing our response, I believe, and actually I will cede the podium to Mr. Petrofsky. I don't know if here's here or if he's on the phone.

THE COURT: It looks like Mr. Petrofsky is on the telephone. Good morning, Mr. Petrofsky.

MR. PETROFSKY (TELEPHONIC): Yes, I'm here, thank you. Good morning, Your Honor.

THE COURT: I have had an opportunity to read the papers but certainly you may proceed to make some argument.

MR. PETROFSKY (TELEPHONIC): Excellent, thank you, Your Honor. Okay, I mostly wish to stand on those briefs, but I will go over a few points. First of all, part of the information in the monthly operating reports is the statement of disbursements, and it's clear that there was an October 31 deadline for Rule 2015(a)(5) for the filing of the statement of disbursements for July through September. That deadline may be extended by the Court, but the Trustee never sought to extend it and he missed that deadline by 53 days. Now, the filing of several MORs just before the objection deadline has made the motion moot as to statements of disbursements, but I believe that un-excused tardiness of 53 days should be a factor when the Court decides whether it should do anything to address the non-moot reporting issues. Now, moving onto those non-moot issues, the MORs, in the revised proposed order, the January 31 deadline for the October MOR is the

same date that the Trustee's objection stated that he would be meeting, and the order also says that that date is the deadline for the November and December reports, which are presumably being held up by the same fiscal year end accounting issue, and then going forward, the order would set deadlines at 20 days after the end of each month and those deadlines would be extendable for cause. As I described in the briefs, the lack of any MOR deadlines set by the Court has been a problem throughout these cases causing unnecessary confusion for all the parties and the Trustee's objection did not identify any harm though it comes from setting some deadlines. And then lastly on the semi-annual subsidiaries reports for Rule 2015.3. This rule was adopted on December 1, 2008, and the Supreme Court ordered that it shall govern insofar as just and practicable all cases filed before that date, and I describe in my brief why it would be just and practicable in these cases. Now, the mere accident of birth that these cases happen to be commenced before the December 2008 date of the rule change does not justify continuing to operate the businesses indefinitely with no reports. We're more than a year past the change. We're into our third semi-annual period of business operations that are being conducted after the rule change, and the Supreme Court explicitly chose not to put in a grandfather clause and have all cases keep running under the old rules indefinitely. Instead, cases are

to be switched to running under the new rules as soon as just and practicable. Now the Trustee had a full 17 days' notice period of this hearing, and he is free to present any evidence he wishes today, however, in his objection he indicates he would not be bringing any evidence today, and he requested if the Court were at all disposed to ruling against him on this, that he be given another notice period to prepare his evidence. Now the new rule itself includes plenty of leeway for the Court to modify the reporting requirements upon cause shown, and I have no objection to the Trustee being given another opportunity to make such a showing. What I want today is just an order that the mere accident of birth of when these cases started does not justify the absence of reports. I don't want the burden of showing cause to modifying the reporting requirement to be placed upon the Trustee as it would be in any case that happened to be filed after December 1, 2008. And that's it. Thank you for hearing me.

THE COURT: Certainly. I just have one question for you because it's never been quite clear to me, Mr. Petrofsky.

MR. PETROFSKY (TELEPHONIC): Yes.

THE COURT: You are a shareholder of the debtors.

MR. PETROFSKY (TELEPHONIC): That is correct.

THE COURT: And may I ask how many shares you own?

MR. PETROFSKY (TELEPHONIC): I own 100 shares.

THE COURT: Okay. And did you buy those shares pre- or post-petition? In other words, before or after the bankruptcy filing?

MR. PETROFSKY (TELEPHONIC): I've owned them since before the case and they're listed in the list of shareholders that was attached to the petition.

THE COURT: Okay. Thank you.

MR. PETROFSKY (TELEPHONIC): You're welcome.

THE COURT: Ms. Fatell?

MR. PETROFSKY (TELEPHONIC): And I guess - I'm sorry.

THE COURT: No, go on.

MR. PETROFSKY (TELEPHONIC): In case there's any suggestion as to, you know, what size that interest is, the Trustee has personally certified to the Court that the estate's claims against IBM and Novell are meritorious and should be proceeded aggressively.

THE COURT: Yes.

MR. PETROFSKY (TELEPHONIC): And those claims seek a minimum of $5 billion from IBM. That's 5 billion with a "b" as in boy. And should the Trustee succeed on those claims, the proceeds would be enough to pay off all the creditors with interest and we've, you know, more than $200 per share for the equity holders, which would be more than $20,000 for me. So, that's the potential side of the interest.

THE COURT: Alright. Thank you.

MR. PETROFSKY (TELEPHONIC): You're welcome.

THE COURT: Now, Ms. Fatell.

MS. FATELL: Thank you, Your Honor. Let me first address the new ruling -

THE COURT: Yes.

MS. FATELL: - and the suggestion that it's the burden of the Trustee to -

THE COURT: To show cause.

MS. FATELL: - seek to modify that.

THE COURT: No. As I understand the rule, cause must be shown by the movant here.

MS. FATELL: That's how we understand the rule, Your Honor.

THE COURT: Yes.

MS. FATELL: The rule clearly states that it is not a grandfather rule, that it does not apply to cases that were already pending. These cases were pending for probably well over a year, close to two years at the time the rule was enacted. There was no request by the U.S. Trustee. There was no other party prior to this date urging the Court to order the debtors, when they were in possession back in January '09 after the rule was adopted, to comply with this provision. So, I'm not certain why there suddenly should be a burden placed on the Chapter 11 Trustee who clearly has

come in well into two years into this case to now address that rule. I don't think it's applicable, and I don't think the burden should be on the Trustee to show cause why it should not comply. I don't think it's required to comply. So, that's my response to that. As far as the timely filing of the monthly operating reports, as we explained in our response and also in footnotes to the monthly operating reports and, you know, everybody's burdened and so I don't suggest that that is an unending excuse, but certainly for the early part of the Trustee's involvement in this case, we have done the best that we could to comply with the filing of those reports. We have now filed July, which was prior to the Trustee being appointed. August, which was prior to the Trustee being appointed. Have not had an opportunity to go back and really scrub those and the historical data we did rely on the people at the company who have previously filed these reports to prepare them in accordance with how they were previously filed. Our financial advisors did review them, so we were comfortable filing them, but we did caveat to say that as we wind down the year, which is the end of October, and we review the current financial situation as well as the financial situation since the Trustee became appointed that we would reserve the right to go back and make some modifications to those. So, we are in compliance with respect to July, August, and September. As to October, that

is the company's fiscal year-end. That does take additional time to close those books. We are in the process of that and we have represented to this Court that we expect that October and November and hopefully December will be filed timely in January, certainly October and November. As far as the request that the Court set an absolute court-ordered deadline, which is not required by the rules or by any provisions or guidelines in the U.S. Trustee's Office, we're concerned, Your Honor, that that places an undo burden on the estate that if we are in need of an extension of time for whatever reason that the Trustee now has to come into this court, has to file a motion, has to show cause as to why it should be granted any type of extension, and we think that that's really not an appropriate burden on this estate. We understand the requirements. We are doing our best to comply with the guidelines. We will continue to do that, and we do not expect that we're going to file - excuse me, that we are going to run into significant issues that would preclude us from filing these as close to within the 20-day time period as the rules require. So, we would request that the motion and the revised order of Mr. Petrofsky be denied and if the Court deems that it should be denied without prejudice and he thinks that he needs to come back in and revisit this issue, that's certainly up to him.

THE COURT: Alright.

MS. FATELL: Thank you, Your Honor.

THE COURT: Thank you, Ms. Fatell. Well, let me just rule, because I do think that I understand the circumstances, and first of all, as far as the late filing of the monthly operating reports is concerned and whether they are excused or unexcused, I think that the circumstances of the case provide the appropriate excuse for the late filings. We have a new trustee in the case. He has been working, from everything that I have seen and reviewed, very, very diligently. There are major issues and difficulties which the Trustee is addressing, and so I do believe that the late filings are excused here, and I for similar reasons am not going to require a firm deadline for the filing of those monthly operating reports. I note, for example, that the Office of the United States Trustee is not present, has not joined in the motion or has not raised a concern and that is of course of significance to the Court, and in this particular case, as I said, I am satisfied with the Trustee's diligence and efforts and those of counsel, and I don't think it appropriate to impose the deadline other than obviously if it drags on beyond what the Court views to be a reasonable time then I will notify the parties, perhaps with an order to show cause or something of that kind why the continued delay is occurring, but it is to me significant that the Trustee also had to prepare monthly operating reports for pre-

appointment months which obviously required, I think, much extra effort on the Trustee's part. So I do take note of that and will deny the motion on the monthly operating reports insofar as the reports for subsidiaries are concerned, I do note that it was specifically not a grandfathered rule. It applies in a prospective manner unless cause is shown, and I don't think that cause has been shown here why the Court should extend the amended rule to this debtor, the Trustee in this situation, and I will deny the motion for the filing of those monthly operating reports subject to - without prejudice if Mr. Petrofsky would like to file a motion and present evidence to the Court as to why the for cause requirement can be met and is met, then certainly I will reconsider the ruling today, but at the present time, I have not heard a basis to find that cause should require the Court or the Trustee to deviate from the clear import of the revised rule. So, to that extent, I deny the motion on the monthly operating reports and deny without prejudice the motion as to compliance with the amended rule requiring prospectively filings of the subsidiary information.

MS. FATELL: Thank you, Your Honor.

MR. PETROFSKY (TELEPHONIC): Okay, thank you, Your Honor.

THE COURT: Thank you, Mr. Petrofsky.

MS. FATELL: Would the Court like us to prepare and

submit an order?

THE COURT: That would be helpful, thank you, thank you, that's kind of you.

MS. FATELL: Thank you, Your Honor. Your Honor, the next item on the agenda is the motion of SUSE for stay relief to proceed with the arbitration in Switzerland. We did file an emergency motion for leave to file a particular document under seal.

THE COURT: Yes.

MS. FATELL: And if the Court wants to take that up first or hear argument from SUSE's counsel first and then deal with that.

THE COURT: I don't know - We can just ask, I think, if there's any objection to that motion for the filing under seal. Mr. Lewis, as I said earlier, it's good to see you again and welcome back.

MR. LEWIS: Thank you, Your Honor, and as I said earlier earnestly, it's always a pleasure to be in this Court.

THE COURT: Thank you.

MR. LEWIS: Like a true lawyer, my answer to the question, Do I have any opposition? is yes and no.

THE COURT: Okay.

MR. LEWIS: I certainly don't object to the filing of the document under seal if it's to be filed at all.

THE COURT: Okay.

MR. LEWIS: The if it's to be filed at all is the yes part of the question, and that is, this filing is pretty late, the eve of the hearing, and I note, Your Honor, that we filed our motion on the - I think it was the 10th of November. The Trustee asked for and got an extension to file his response until - I think we filed on the 9th of November, until the 10th of December - or 15th of December. That was 35 days. We had a shortened time to file our reply because of the holiday season and counting back, but that's okay. Why this had to be filed on a clear open issue on the eve of the hearing is just beyond me. I can't see any excuse for it. That's the first question, and this is not the first time in this case where we have faced eve-of-hearing filings without any real excuse. The second point, Your Honor, is while we don't in principle object to the filing of the underlying document under seal, the declaration contains an opinion in it by Mr. Tibbitts which is an opinion as to a legal issue, which I think is inadmissible and inappropriate, and for that reason we would object to the declaration anyhow because Mr. Tibbitts' opinion as to the merits of the SUSE proceedings, if it's to be considered at all, is not an appropriate matter for this Court to consider. Legal issues are not appropriate matters for expert opinion and they're certainly not appropriate matters for any opinion. It's this Court's

responsibility if this Court wants to get into the details to look at the facts, not to consider opinions. So, for both of those reasons, I think it's inappropriate for this document to be filed. If it had been filed and there had been nothing to seal it, I would have asked that it be struck anyhow, and I think that's the appropriate result here. We're prepared wholly to concede that the SUSE proceeding is contested. We don't disagree with that. Otherwise, we wouldn't be here. But that's about all that the declaration really accomplishes because what it really did was it simply basically filed an answer to what amounted to our moving papers in that proceeding. That's where we are.

THE COURT: Yes.

MR. LEWIS: So, I would suggest - I would ask the Court not to admit it in the first place, because I don't think the declaration is appropriate for both for timing reasons and because it contains a legal opinion and even if it did, I don't think it really adds anything to what's already before this Court. Thank you, Your Honor.

THE COURT: Thank you, Mr. Lewis. Why don't we just at least resolve this issue at the outset.

MS. FATELL: Thank you, Your Honor. Your Honor, as to the timing of the filing, this is a confidential document. It's part of the arbitration in the Swiss Tribunal. It is not a surprise document to SUSE. They clearly are aware of

the document. They have their own copy of it. They've had it and certainly in preparing their submissions and their redacted version of their counter-document that they also filed in this SUSE arbitration, they're aware of this and I'd be surprised if they hadn't reviewed it. So, I don't think there is surprise here. The fact that we filed it as late as we did, we filed it because it was in response to the reply brief that was filed on December 23rd, which was just before the Christmas weekend, and so we filed this as promptly as we could after that where they said that the Trustee doesn't even attempt to explain the evidence and arguments that supposedly support our position. We did not address this initially because the burden is on SUSE to show that they're going to prevail. We were satisfied with the response that we filed. In light of their reply, we felt that the Court should have the opposition papers that were - and a statement of position that was filed in the Swiss Tribunal similar to the statement, although redacted, that was filed by SUSE. So, for that reason we did file it. As far as the declaration, Your Honor, the purpose of the declaration was merely to identify the document as true and correct, and to the extent that there's an issue with respect to paragraph (5) of the declaration, I'm happy to have that stricken so that the declaration from Mr. Tibbitts only states that this is a true and correct copy of the actual document that was

filed in the Swiss Tribunal. And so, we would request, Your Honor, that it be permitted to be filed under seal.

THE COURT: Alright, thank you, Ms. Fatell. Does that help a little bit, Mr. Lewis?

MR. LEWIS: It helps a little bit, Your Honor, and I appreciate the concession on paragraph (5) of the declaration, but I really think we have to set some standards for how this case is going to proceed and the eve of filing is not an appropriate act here. The issue of the merits of the SUSE arbitration was teed up by our opening motion. We discussed the merits and we provided some evidence on it. We provided some discussion of it. It was clearly an issue for the reply, the opposition. The fact that in our reply we commented on the fact that in their opposition they didn't do what they should have done doesn't give them grounds to reconsider what their opposition looked like and file what amounts to a sur-opposition on the eve of the hearing. I just don't think it's appropriate to permit that here, and I understand it may kind of be in a some sense no harm, no foul, but on the other hand, you know, Your Honor, I don't want this to keep happening. At least when the debtor came and however inaccurately on the eve of the original hearing on the motion to convert, the debtor could say, Well, we just signed the thing up. That's not even true here. In 35 days, the Trustee couldn't figure out that the Trustee needed to

file something that addressed the merits of the litigation, something that, as the Trustee has said this morning, they knew about too. It's been in the pleadings, in the arbitration right along. So, again, I would urge the Court to simply not allow the filings so that we have a standard that we follow here except for really good cause, and I understand those things can happen, and they do happen and they have happened, and they may happen again, but we don't have that here. Thank you, Your Honor.

THE COURT: Well, let me just ask a quick question, Mr. Lewis -

MR. LEWIS: Yes, Your Honor.

THE COURT: - and that is, are you prejudiced by the filing. In other words, it's not a surprise document, and the reason I ask is because - and I realize that there have to be standards. Bankruptcy is a little bit of an unusual animal and as a Judge, I like to try to get things right and it helps me to get it right to be able to consider all of the evidence and unless a party tells me that they in some way have been surprised, totally surprised, you know, a witness that was never disclosed or a document that was never produced. Is that your situation here?

MR. LEWIS: Your Honor, we're not totally surprised because we know what the record is, but the fact that you know what the record is doesn't mean that someone's going to

try to use it at the last moment for some reason that hasn't been anticipated and I suppose in one sense we're not prejudiced because we know what their answer, I'll call it an answer, has said for sometime -

THE COURT: Right.

MR. LEWIS: - for a long time. On the other hand, you know, encouraging this kind of last minute thinking about, Well, gee, how should we bulk up our response because we didn't really do a great job, encourages people not to put everything in front of the Court until they see what there is they need to respond to further. I am in favor of the courts having everything in front of it. I understand the courts wanting to have that and wanting to get it right by having that. The question here is, that could have been the case without this last moment filing and if we let this go then we're going to see this again sometime, and we're going to be arguing about it again, and there really is no excuse this time whereas on other occasions there may be. I mean, from our perspective, yes, you know, you can ask the question, Was this something we couldn't expect and so on and so forth, sort of look at the realities. Look at the realities on the other side of the coin. In this instance, there is no excuse for why this was done. It's as simple as that. But, Your Honor, I don't think in the end it's necessarily going to affect the outcome of the proceedings anyhow, although I

don't know what arguments they're going to make based upon that given that Mr. Norman's on the phone, for example. So, I can't necessarily say it won't prejudice us, but I understand the Court's point of view.

THE COURT: Thank you, Mr. Lewis.

MR. LEWIS: Thank you, Your Honor.

THE COURT: Well, I certainly do appreciate the concession on paragraph (5) of the declaration and in fact I was going to rule that it would not be considered by the Court. As to the document being filed, again, I think that it's helpful to the Court. It is not prejudicial. I do appreciate Mr. Lewis' comments that we need to have structure and we need to have limits, but in this particular case, I think that given the nature of the document that is being offered, the fact that the opposition was well-aware of the document, I'm going to allow the filing. I don't know if I can stop the filing. I suppose I could have had it stricken, but in this particular case, I'm not going to strike the document, the declaration, and I will permit it to be filed under seal given its nature.

MS. FATELL: Thank you, Your Honor.

THE COURT: Thank you. Mr. Lewis, the merits of your motion.

MR. LEWIS: Thank you, again, Your Honor.

THE COURT: Of course.

MR. LEWIS: This is a motion by which SUSE asked the Court to grant its stay relief to complete an arbitration that has now been pending for four years and has been stayed essentially at the request of the debtor for 2 1/2 years in this case. This arbitration, contrary to anything you've read, is important to the outcome of these cases. The debtor asserts in the Utah litigation, which is about to get started again in March, that it owns certain copyrights that are critical to its future, to its ability to reorganize. What is asserted essentially in the SUSE litigation is that even if the Utah litigation, if SCO prevails in the Utah litigation by showing that it acquired the copyrights from Novell, in the SUSE litigation we're going to show that SCO turned around and transferred those copyrights. It doesn't own them anymore. That's what's at stake in that litigation, Your Honor, and those copyrights are at the core of the debtors' whole reorganization. They've been at the core of the reorganization since this Court - the Court has recognized that since the Court granted stay relief two years ago, almost, for the litigation to resume in Utah, and this is the other side of that same coin, and if you don't own the copyrights, you can't sue on them. The billions of dollars that we hear the litigation is worth from the Trustee, I wouldn't say necessarily evaporate to the last penny. They might. Depending on exactly how broad a ruling is obtained

in the SUSE arbitration in SUSE's favor if that happens, but a lot of that value is going to evaporate. You can't reorganize these companies. You can't do anything with them until you know the whole picture, and let me quote, Your Honor, from paragraph (16) of SCO's reply, SCO's motion to enforce the stay - to find that the stay applies to the arbitration from two years ago.

THE COURT: Yes.

MR. LEWIS: This is paragraph (16). In our opposition we argue there was no jurisdiction, personal, and so on and so forth, and then we added at the end, "That in any case, in commencing the arbitration, SUSE wasn't really suing SCO. It was just defending itself." And SCO responded, "No, this is really authentic." And here's what SCO says, "SUSE lastly contends that the Swiss arbitration is not stayed because the arbitration is not being brought against the debtor within the meaning of 11 U.S.C. § 362(a). In fact, however, SUSE commenced the arbitration and seeks an arbitral award of over $100 million", and here's the key, "plus a declaratory judgment that SCO does not own perhaps its most valuable asset, the Unix intellectual property." How much more clear could it be out of SCO's own mouth that the Swiss arbitration is a key to the value of these key assets. We don't know exactly what the ruling will be in Switzerland. We don't know what the scope of the ruling will

be in Switzerland, but even back two years ago, 2 1/2 years ago, SCO itself realized and said to this Court that that ruling could seriously undermine the value of its assets, the key assets. That hasn't changed. The only thing that's changed, Your Honor, is that the Tenth Circuit has reversed the decision in the District Court which held that Novell owned the copyrights, never transferred them, and put that question up for grabs again, and so now this issue becomes important.

THE COURT: But, let me ask this, if SCO loses in the Utah litigation in March, it's scheduled for March 8th, doesn't that moot the arbitration?

MR. LEWIS: It probably largely moots the arbitration if not altogether, but what happens if it wins? Then you still have to have this decided. Is the Trustee prepared to say that the Trustee will agree to a stay of execution and stay of further proceedings based upon the result in Utah if it's in the Trustee's favor until the arbitration is decided? Which could be - if it doesn't get going soon, could be several years from now. Why not have these proceed on a parallel track? The money in an estate, however limited it is, has to be spent for the central purposes of the case, and the central purposes of this case include deciding who owns what when it comes to this intellectual property. It's at the heart of the Trustee's

attempt to prosecute the litigation or sell the litigation assets or sell the copyrights and so on. The only consequence of allowing the Utah litigation to go forward and reach a result that is contrary to Novell without protection for Novell is that the Trustee gets a period of having a leg up in the relationships between the parties while he can try to capitalize on that until it gets further resolved in the SUSE arbitration, which may be, if it doesn't get started soon, a couple of years away, and that is totally unfair. It's a use of the stay as a sword instead of a defense. There is no need to - the Trustee has said that the litigation is worth billions of dollars and has to be pursued aggressively now. Well that means everything that relates to that issue has to be pursued aggressively now not just what suits him or what suits his strategy, and on the question of limited resources, we don't really have any evidence on that subject, Your Honor. This is sort of apropos of Mr. Petrofsky's motion regardless of how you see the motion. There's really very little in the record at this moment about what's available. There's nothing in the record about how much it would cost. There is nothing in the record about what else is going on with the estate, but even if the estate has limited assets, this arbitration is every bit as important unless you want the parties to have unequal power as the Utah litigation, and the only way to have these things

come out and decided more or less at the same time is to get the Swiss arbitration underway. Everybody acknowledges that if stay relief is granted today, the Swiss arbitration isn't going to happen tomorrow. And I want to remind the Court that the arbitration is nearly done. There's one small brief that SCO needs to file on its counterclaims. All the other briefing is in. The Tribunal's familiar with everything. All that remains is for the merits hearing, which will take a few days and cost some money, at half price, I note, as we did in our papers except for local counsel, but what else is the money here for? That's the whole point of this estate. Everybody recognizes that. What are we saving the money for, even if it's limited. You know, the only party that's going to be harmed in the end in terms of the spending of the money if we win everything, is we'll never see a penny of our own claim. But that's okay with us if that's what it takes to get this resolved. There's no harm to the estate here and there's no prejudice certainly because the estate has to know the answer to this question. The creditors have to know the answer to this question, and I think it's very important to get the stay terminated now so that we can notify the Tribunal that it can get things back on track three and schedule a hearing which probably won't take place until after the Utah trial under any circumstances but will take place, perhaps, more or less contemporaneously with it. The

parties will have to figure out a way to handle that as they would have anyhow, because neither set of lawyers can be in two places at one time. I think it will leave it up to the parties to handle that problem, but it's got to be done, and I just can't see a good reason not to do it unless the Trustee's seeking an unfair advantage through the intervention and continuation of a stay that has now been in place for 2 1/2 years, and I add, if the arbitration is not resumed, who knows what will happen. It may not happen at all. The Tribunal may just dismiss the proceeding for the moment. All that money that's been spent so far will be wasted. This estate will have to find the money to start again, as will my client, which will be prejudiced by having to do the same thing. There just isn't a good reason not to do this now, Your Honor.

THE COURT: Describe for me, Mr. Lewis, so that I understand completely, what remains to be done in that arbitration.

MR. LEWIS: Two things -

THE COURT: Yes.

MR. LEWIS: One, SCO has the opportunity to file a further brief, one further brief, essentially on its counterclaims, and the merits hearing. That's what remains to be done. Preparation of witnesses -

THE COURT: Any discovery?

MR. LEWIS: No, it's done.

THE COURT: All done.

MR. LEWIS: Everything - all the record is in, Your Honor, except for this final brief, and the arbitration will involve some witnesses and some lawyers in the merits hearing. That's all that remains to be done. It's some cost, no doubt, to both sides, but it's not like we're starting from scratch and a discovery has to be done and all the briefing has to be done and so on and so forth.

THE COURT: And how many days do you estimate the merits hearing would take?

MR. LEWIS: I've talked to my co-counsel, who's been involved in that, and I have not, and I've heard eight days, maybe. Certainly nothing like the three-week trial in Utah, not a jury trial. It's a hearing before a three-member professional panel according to specified rules where again, everything is in. It's basically all in except for this last brief which SCO probably was in the process of getting ready anyhow, but even it if weren't, it's not that much additional to do. That's my pitch, Your Honor. There's just no good reason to put this off any longer because it will just either give the Trustee an advantage if he wins in Utah, if we don't do it soon or drag things out indefinitely and nether of those things is appropriate. Thank you, Your Honor.

THE COURT: Thank you. Thank you very much, Mr.

Lewis. Ms. Fatell. Take your time, Mr. Lewis.

MR. LEWIS: Thank you.

MS. FATELL: Thank you, Your Honor. There are some fundamental flaws in SUSE's argument, and I wanted to go through those if I may for the Court. There's no question that the ownership of the copyrights is the fundamental issue that has to be decided first.

THE COURT: Yes.

MS. FATELL: The question, Your Honor, is, where should that be decided; okay? That issue is squarely before the Utah District Court. There is a jury trial set for March 8th for three weeks. The parties are fully engaged right now in trial preparation. We have to remember, Your Honor, that the SUSE arbitration is an action initiated by SUSE, not SCO, so the comment that SCO would have to start it all over again, I don't quite understand, but it is to stop SCO from suing SUSE for copyright infringement. Now SCO has not yet sued SUSE at this point in time, and we submit that it's illogical to even schedule this arbitration on the SUSE claim to stop litigation that hasn't yet occurred before the District Court first determines if in fact SCO owns this copyright. Why we would have these two issues going on almost simultaneously makes - it's just illogical. If SCO is wrong, as was just discussed and conceded, the SUSE arbitration issues are moot. So, it's important to remember,

Your Honor, that the action that's going on in the District Court is not just about this infringement, but it's also about a claim for slander of title. It's for a breach of contract. There are a number of claims that are asserted there, and I need to ask the Court to bear with me as I go back through this timeline, because I think that that's very important here. In 1995, Novell sold the Unix business to Santa Cruz Operations. In 2001, Santa Cruz sold that business to Caldera, which was the predecessor of SCO. In May of 2002, SCO entered into a series of agreements with SUSE and others to form United Winnicks, which is the issues that are raised in the Swiss arbitration. In March of 2003, SCO sued IBM, not Novell, IBM to enforce its copyrights to the Unix technology. It sued for breach of contract and copyright claims arising out of Project Monterey which was a joint venture between IBM and SCO. Novell, seeing that litigation, directed to go to waive its litigation in its claims against IBM alleging for the first time since 1995 when the asset purchase agreement was originally signed, for the first time that those copyrights were never transferred to SCO, and Novell publicly asserted that it was the owner of Unix, and consequently in January of 2004, SCO then sued Novell for slander of title, and as we all know, that case has been proceeding in the District Court in Utah. The complaint was later amended. It added copyright

infringement, unfair competition, breach of contract, breach of duty of good faith and fair dealing and I'm sure some other allegations that I've omitted.

THE COURT: It's been like a rolling snowball.

MS. FATELL: It has, Your Honor.

THE COURT: It's gotten larger over time.

MS. FATELL: Over two years later, SUSE in April of 2006 initiated the arbitration with the International Tribunal in Switzerland. In April of 2006 also, Novell sought to stay the District Court action to permit that Swiss arbitration to proceed, and the District Court ruled that the SCO's action against Novell would proceed, and it would only stay those infringement claims that related to the Swiss arbitration, as I understand it, Your Honor. I'm not an IP expert and I was not involved in the details of this, so I may have stated it a little broadly, but that's my understanding of it. So, the litigation in Utah went forward, and as we all know, Novell prevailed on the summary judgment motions and SUSE was nowhere to be found to interfere and prevent that from going forward. In August of 2007, the District Court ruled in favor of Novell. It reversed for trial the amount of the royalties due to Novell from SCO and consequently in September of '07, SCO filed for Chapter 11. The arbitration was stayed, but the debtor did come in and asked the Bankruptcy Court to enforce the stay as

to the SUSE arbitration, which the Court did, and in November of 2007, Novel obtained stay relief from this Court to go forward in the District Court in Utah to liquidate its claim for royalties. Again, SUSE was nowhere to be found to object to that proceeding that Novell was moving forward with going forward. The Court in Utah held a five-day bench trial and awarded Novell approximately $2 1/2 million. SCO took the appeal. The Tenth Circuit reversed and remanded back for trial and at the same time, Mr. Cahn was appointed as the Chapter 11 Trustee.

THE COURT: Yes.

MS. FATELL: Now we have a jury trial set for March, less than 2 1/2 months from now. Your Honor, I go through this timeline because it's important for the Court to appreciate that the Unix copyrights that are at issue were transferred based on SCO's position in 1995 when that asset purchase agreement was first signed. It wasn't until 2003 that Novell first asserted that it in fact never transferred those copyrights, but it held them. But from 1995, Santa Cruz and then after 2001, SCO conducted the Unix business without any challenges. The present dispute with Novell didn't start until 2004. The SUSE arbitration didn't start until two years later, and again, SUSE has not objected to any of the activities going on when Novell was in the winner seat, when Novell was prevailing on the summary judgment

motions, when Novell went forward with its five-day bench trial on the amount of its royalty payments that were due from SCO, there was no reason why those issues suddenly needed to be resolved all at the same time. So Novell has had its day in court, Your Honor, and it is now time for SCO to have its day in court, and we submit that the merits of that copyright dispute are properly before the District Court. That has to be decided first. There's no reason to put the cart before the horse and decide the SUSE claims before we know if there's even a copyright that SUSE alleged was transferred to it or to United Linux several years later. We think it is inherently unfair to permit SUSE to interfere with the sequence of the trial of these issues. As a court of equity, we submit that one of the things the Court should consider is the fairness in its deliberations under its 362 and stay relief, and we think it is inherently unfair to now when SCO finally has its day in court to say, No, we're going to stop that, or we're going to interfere with that and have another proceeding go forward at the same time. The second flaw I want to point out is that contrary to some statements in the pleadings by SUSE, the arbitration is not the most important asset of the estate, the SUSE issues are not, quote, "the keys to the reorganization kingdom", the Trustee does not agree that the arbitration needs to be decided before the Trustee can determine if reorganization or

liquidation is appropriate in this case. The Trustee believes that the estate has viable claims against Novell for slander of title. It has strong claims against IBM for breach of contract, among other claims and among other claims against Novell, and these are separate from the SUSE issues. If the estate prevails, the recoveries there will likely pay all creditors in full and will inure to the benefit of the equity holders. So, yes, the infringement claims that SUSE is concerned the debtor may pursue against it at some time in the future, may have value to this estate. There may be other claims that this estate will pursue for copyright infringement against other parties, but the issue today is, does SCO own those copyrights and does it have valid claims against Novell and IBM. We also disagree that the Utah litigation is dependent on the outcome of the arbitration. We think it is very separate. As was noted by the District Court when it addressed the arbitration issues there are different issues here, there are different facts, there are different contracts, and there's no reason why they need to be decided in tandem. With respect to the merits of the SUSE arbitration, Your Honor, without getting into the details of the dispute, just briefly, SUSE's claim is grounded on the unsupported allegation that in 2002 by signing the contracts for the now defunct United Linux Project, that SCO gave away its most valuable asset, the intellectual property rights to

its proprietary Unix computer operating system. Gave it away to SUSE and every other worldwide user of the competing Linux operating system. Your Honor, it's SCO's position that under any fair and reasonable interpretation, SUSE's claims lack merit, that there is no way that SCO would have entered into those agreements and given away its entire business. Given the history of SCO and its predecessors, it's worldwide base of customers who rely on the Unix operating system to run their businesses, we think it is ridiculous to believe that by entering into the United Winnicks' agreements that SCO intended to put itself out of business, which is effectively what SUSE's position is. We've submitted to Your Honor under seal the position papers that were submitted to the arbitration panel. They very strongly refute the story that SUSE has crafted. SCO directs the Tribunal to look at the entire set of documents that were involved in the United Linux transaction. It points to very specific provisions that carves out and reserves and accepts certain assets that do not go into the United Linux venture. There are witness statements. There are documents. There are emails that in SCO's view completely eviscerates the claims of SUSE in that arbitration, and SCO is very confident that it will prevail in that arbitration. The testimony of the parties that were involved in the negotiations are also referenced in the pleadings and again, it is SCO's position that it did not

assign or transfer its Unix technology to the United Linux venture. Now, obviously, where not here to decide the outcome of that arbitration. We address that only to let the Court know that SCO believes very firmly that that is not a done deal to go forward with that SUSE arbitration and that SUSE is right in its position. So, I think the Court then needs to go through the Rexene factors -

THE COURT: Right.

MS. FATELL: - and see if in fact there is a basis for stay relief here. The first is the prejudice to the debtor. Your Honor, just looking at the submissions that were filed under seal, SCO, as well as SUSE, are likely to have several witnesses. SCO will have to pay 50 percent of the costs of the three arbitrators, who we understand bill at $800 an hour. There will be lawyers from the United States, and it is true that the Boies, Schiller attorneys have agreed to bill at 50 percent of their normal fees in this case, but nevertheless, they still have to be involved. There will be costs. I suppose in-house counsel will have to attend. We will need to hire new Swiss counsel because Your Honor our Swiss counsel, I'm advised, has resigned from the case quite some time ago. So we would have to get new counsel, bring that person up to speed, and get them involved in the proceeding. We will have to bring in experts and I can go on and on. Your Honor, all of this is required for the Swiss

arbitration to go forward, and it's going to go forward in Switzerland. It is not a minimal expense for the estate to cover the costs not only of the preparation for the trial but all of the expenses of all of these people to be there for what counsel has suggested could be an eight-day trial which in my view is a two-week trial. Eight business days, it's a two-week trial, and there's a huge expense to have all of those people transported, housed, fed, et cetera, in Switzerland. SCO estimates that this cost could be in the hundreds of thousands of dollars if not approaching a million dollars, and I base that, Your Honor, on records that we've looked at in the debtors' records that Bois, Schiller to date has already spent approximately $400,000 on this litigation. This is not a short hearing. This is not a brief afternoon argument to the Court. This is a trial, and it will involve all of the costs that any other trial would involve and respectfully, I think that SUSE minimizes the cost and the burden on this estate by suggesting that everything is done except one brief and preparing and going forward with the trial. Preparing and going forward with the trial in and of itself is a huge expense. If the stay is lifted there is no certainty when the Tribunal will reconvene. If the panel scheduled this arbitration for even April or May after the March trial in Utah, Your Honor, preparation surely will overlap. There's no way that SCO could walk into this

arbitration in April or May without spending time preparing at the same time that it is preparing and going forward with a three-week jury trial in Utah, and obviously, it is the same counsel. The MORs recently filed do demonstrate and the Trustee has represented to this Court previously that this Court is on a very thin shoestring financially. We are going through a restructuring. We are trying to create some value here, but we do not have excess cash lying around to fund two trials going forward at the same time, particularly, when the arbitration may be moot if Novell ultimately prevails in Utah. In terms of balancing the hardships, Your Honor, there's no question, as just discussed, proceeding with the arbitration will be a hardship for these estates. SUSE states it will only cause a modest incremental burden. Again, we dispute that. We don't think there's any hardship to SUSE in comparison. The arbitration has been in abeyance for over two years. The copyright issue will be litigated promptly in the Utah District Court. So that issue is going to be resolved. If anything, allowing that trial to go forward to completion will advance the arbitration because either it will be moot or at least the ownership of the copyright aspect will have been resolved as to whether it originally - it now lies with SCO and whether SCO even had the ability to transfer it as SUSE avers. In terms of the likelihood of the success on the merits, again, it is SCO's

position that the SUSE claim is merit-less. I've already gone through that, Your Honor, I don't want to burden the Court with reiterating all of that. The burden is on SUSE to demonstrate to this Court that it is likely to prevail on the merits, and we don't think that it has or can meet that burden. In conclusion, Your Honor, we think that this motion is just premature. It is an attempt to bury SCO in litigation costs. We think that the motion should be denied without prejudice for SUSE to renew the motion at the appropriate time, and, Your Honor, the litigation in Utah needs to go forward to its conclusion, and I know SUSE's going to say, Well, if there are appeals and it takes forever, we're harmed and we're prejudiced. SCO is not suing SUSE at this point, so I don't see that there's a prejudice. Until that ultimate issue is decided, nothing can really happen in the arbitration. Those issues cannot be decided. So, if we look at what's going on in the District Court right now, SCO could prevail, Novell could prevail, either party could prevail on some issues and not others. The parties could go up on appeal or it may be resolved in some other fashion, but again, until those issues are resolved, the arbitration should not go forward. I just want to point out, the Trustee has considered this and shared with me his view that if there is an appeal, and again, I anticipate SUSE will be anxious that this appeal will take forever, the legal

issues have already been decided on summary judgment and they've gone up to the Tenth Circuit. The Tenth Circuit has in essence really laid out a roadmap for how the trial should proceed, and so, if there is an appeal, it probably would be very limited to evidentiary rulings and perhaps if there's a challenge to the charge to the jury, but the trial judge really does have a good roadmap how to proceed with this case, and we don't think that there's any basis for there to be a separate action going forward in the SUSE litigation. There was one - I wanted to just comment, address a couple of comments that were made. One is that there was a statement that the Trustee has indicated that the litigation is worth billions of dollars and that the litigation is therefore worth bringing. The Trustee never said that it was worth billions of dollars. He did say that, and I'm not quoting, but he did say that he thought that there were strong claims and that they should be aggressively pursued. We think that - Let me just look at my notes, if I may, Your Honor.

THE COURT: Address for me, Mr. Lewis' concern that the stay will be used as a sword rather than a shield against SUSE.

MS. FATELL: I'm struggling with that comment, Your Honor.

THE COURT: Because you haven't sued yet.

MS. FATELL: We haven't sued yet. We're entitled to

our day in court on the claims that we have brought against Novell, and we're finally getting that day in court. I don't see how we're suggesting that a Swiss arbitration not be able to go forward in an action against the debtor and somehow we're using the stay as a sword. I'm a little tongue-tied to try and respond directly because I don't understand how we're using the stay as a sword in this case, Your Honor. There is litigation going forward. We are the plaintiff in that litigation. We're entitled to have that litigation go forward, and if anything, we think that the statements and the actions by SUSE to try and interfere with that, and I do say "interfere" because I think trying to press forward with this Tribunal, this arbitration in Switzerland, is an interference because it will cause the estate to incur tremendous expense. It will interfere with the logical progression of deciding these issues, which is the ownership of the copyrights. It will cause the professionals of the estate to be torn between two tribunals probably at the same time. So, I don't see that we're using the stay and the ability to proceed with our claims as a sword. If in fact we prevail and ultimately we prevail, whether we go after SUSE for copyright infringement is an open issue. We've not waived that claim. We're not walking away from it, but we certainly are not pursuing it at this time, so I don't see that they're harmed by the stay remaining in place, Your

Honor.

THE COURT: Alright.

MS. FATELL: Does the Court have any further questions?

THE COURT: No, ma'am, thank you.

MS. FATELL: Thank you, Your Honor.

THE COURT: Thank you, Ms. Fatell. Mr. Lewis.

MR. LEWIS: Thank you, Your Honor.

THE COURT: In other words, when you were talking about executing on a judgment, you were talking about in the event a lawsuit is brought against SUSE or am I -

MR. LEWIS: No, Your Honor.

THE COURT: Did I miss your point, and I may have.

MR. LEWIS: I never accuse a judge for missing a point.

THE COURT: Well, I'm offering you that opportunity.

MR. LEWIS: So, I will blink and answer the question this way, Your Honor. The stay should not be used as a sword. That injunction, pardon the expression, in the case doesn't limit itself to using it as a sword against the specific litigant that might be involved in the stay situation. Here's what's going on. If the Trustee wins in Utah, he then has, presumably, a judgment that says he owns the copyrights. He has now a judgment against Novell that says he owns the copyrights, and a judgment saying that he

owns the copyright means that he can sue all kinds of people for infringement and can proceed to try to execute against Novell as well. That's using the stay as a sword because that ability to use the copyrights for affirmative relief against Novell and against others will be without threat for the moment as long as the SUSE issue remains undecided because no matter what you were told this morning, the fact is that the two cases are tied up. That's precisely why the Judge in Utah bifurcated them and sent the other off to arbitration in the first place, because there was a key piece of the Utah case that had to be decided elsewhere first, and I want to remind the Court that no matter what the Trustee says again this morning, the debtor said in invoking the stay two years ago that SUSE commenced the arbitration and seeks a declaratory judgment that SCO does not own perhaps its most valuable asset. How can you get away from that? That's what - you know, there may be some argument about just what part of the Code was included or wasn't included and that's for later on, but there's no question that even back then SCO saw the SUSE arbitration as a threat to its most valuable asset, its Unix copyrights that it claimed to own and why is that? Because even if Novell sold those copyrights to SCO as SCO claims, SCO turned around and transferred them to - or at least this is our allegation, to SUSE. If you don't own the copyrights, you can't sue for infringement on them, and

that's a very simple proposition. That's why SCO wanted the arbitration stopped because it threatened its most valuable asset. There's no way around that, Your Honor. You can talk about how the copyright issue is set for - that's going to be decided in Utah. It is and it isn't. It is in the sense of deciding whether the copyrights were transferred from Novell to SCO, but it isn't in the sense that it's not clear that arbitration won't turn right around and decide that the copyrights were then transferred by SCO to United Linux. And just briefly, to bring you to the merits argument, Your Honor, two quick points. First of all, the fact that SUSE hotly contested it doesn't mean that we haven't shown the very low level of probably success on the merits that's required here. Secondly, if you read the language that we quote, that's in the District Court's opinion from that agreement and the reason we quote it from the District Court's opinion is because that's in the public record and we could do it safely, if you read the language of the contract, which is the first and most important place to start, it's pretty clear that's what the contract says. Now, SCO has arguments as to why this or that or the other thing changed that or didn't mean what it might seem to say on the face of it. I don't want this Court to decide that today. My only point is, it's a pretty fair argument on its face, and that's pretty much what we have. We have a complaint that quotes

the agreement. We have an answer that makes allegations. Everybody says his witnesses are going to say this or say that, that's enough for us to show probable success on the merits according to the applicable standards. I don't think that's really an issue here. If the chances of our succeeding were so slim, I don't think we'd be having an arbitration at all. We wouldn't have spent a lot of money pouring money into that. You can argue these points, Your Honor, but beyond a certain point it's like what happened at the motions to convert. You can get into the merits but you don't really want to.

THE COURT: I know.

MR. LEWIS: I think it's a fair conclusion that we've met the standard, the low standard for probable success - even a slight probability of success on the merits is enough. That's the standard, and I think we've met that standard, and I don't propose to spend a lot more time on that.

THE COURT: Alright.

MR. LEWIS: Now, in terms of what's fair or not fair, and the argument that we're somehow interfering, I want to remind the Court that the arbitration was ongoing when this bankruptcy case was filed. We were about to have another trial in Utah in September, and the bankruptcy's filed on the eve of that trial, literally, the Friday before.

THE COURT: Yes.

MR. LEWIS: The Court will remember.

THE COURT: Yes.

MR. LEWIS: We didn't just say, Okay, fine. We continued with the arbitration because we thought we were entitled to. We didn't say, Okay, well, we won the summary judgment, the partial summary judgment in Utah and so, we don't care anymore. We continued. It was the debtor that stopped us. This estate that stopped us by bringing it's motion, claiming that the stay applied, and asking the Court to enforce it, and the Court so found. Now, with that in mind and with the summary judgment in our favor, there is a question at that point whether it's important enough to continue to bring a stay relief motion given that we now have a judgment in our favor and we've been stayed, but that's changed now too, Your Honor. That's what the timing is all about. We would have had these two trials pretty close together as it was anyhow if there had been no bankruptcy. We don't know when the Tribunal would reset this other trial, but whatever burden there is on the Trustee and his counsel to handle two things coming up is the same burden on us, and I'm sure the parties can find a way with the Tribunal to work out a proceeding that makes sense in terms of timing. If we don't get it started now, who knows when it will happen, and I just don't think there can be any argument that while a

favorable judgment for SUSE in the arbitration may not resolve every question about the value of the assets. It clearly affects that value materially. That's what the debtor said in 2007, nothing has changed. That's why it's important to go ahead with this. In terms of the cost, Your Honor, first of all, we have no real facts in front of the Court. We just have counsel's representations about possible costs, $400,000, you know, just - it's only cost $400,000 to get almost there. Sure we have a hearing. It's at half price, and the trial in Utah isn't going to cost anything in lawyers' fees, because that's on contingency. You know, there are going to be costs, travel costs, lodging costs, food costs, maybe expert costs and so on, but we're not having that problem in Utah at all. This is going to be the only thing that's going to enjoin the estate. We don't really know what the estate has or doesn't have. We know it recently settled. I know what the number is with Auto Zone, but -

MS. FATELL: Objection, Your Honor. This document was filed under seal. It is not a matter of public record as to any details -

MR. LEWIS: I'm not going into details.

MS. FATELL: Details other than the fact that it was settled, respectfully.

MR. LEWIS: Yeah, if you'll let me finish, what was

involved is not clear but the Court is aware of what the situation is, and we all - but we don't know what's going on with the estate. We don't know really what's been going in terms of shutting down operations or saving money or conserving money, but again, I want to emphasize that if there's anything that money is in the estate for, is to determine what the estate has to reorganize with. What better purpose, what more important purpose if there are limited resources than that. None. And so, even if it impinges on the estate and some of its business operations which the operating reports suggest continue to lose money despite the fact that the Lewis loss of money was the whole reason - one of the main reasons this case was converted, then maybe it's time to shut those down altogether and save money if that's what it takes to get through this arbitration, because it's going to have to happen, and our point on the shield and sword issue is that if it's done in a way that offsets the timing sufficiently, the Trustee is going to have an unfair advantage for some considerable point of time with respect to the outcome of the Novell litigation to use that result against Novell and others when that result could be undermined by what happens in Switzerland. That's the point.

THE COURT: I see now. It's not that they will use a favorable result in Utah against SUSE, but that they will

use that favorable result.

MR. LEWIS: Yeah. They might use it against us too, and we have, Your Honor, we do have customers to whom we sub-license besides Novell. All of that's up in the air while this sit around. That is a harm to us in addition to everything else. We'd like to know where we stand and after 2 1/2 years, we ought to know where we stand. That's a long time, Your Honor, for this to have been on the back burner, and while it's true that the Trustee has not been around for the 2 1/2 years, the Trustee's been in this case for four months now. He's already announced to this Court that he believes that - he's reviewed the litigation in general and decided that the claims that the debtor has against Novell are meritorious and they're worth pursuing vigorously. There's no more need for a breathing space if there was one when the Court agreed that the stay applied and enforced the stay at the beginning of these cases 2 1/2 years ago. It's just not so anymore. It's time to get these cases wrapped up, Your Honor, and it's time to get them wrapped up in a manner that is expeditious and fair, not to have them drag out another two years while we decide the SUSE arbitration. So, I submit, Your Honor, that whatever it takes to get that SUSE arbitration decided and if there is a scheduling issue, the parties will deal with it, precisely as they would have dealt with it had there been no bankruptcy. No one wants to

be in two places at the same time, and frankly, I think we can all take judicial notice of the fact that it's not possible to be in two places at one time, and so, we're no more anxious to be trying the arbitration at the same time than they are. We would find a way, as they would, to work with the Tribunal, work with the District Court or wherever it's going to be to make a schedule that works, and frankly, if we don't get the arbitration started now, if we don't get stay relief so that we can go tell the Tribunal that we're clear to go, let's talk about what needs to be done, let's talk about a schedule. They have to fit their schedules too, there are three arbitrators. They're not just sitting around waiting for us to say, Okay, guys, see you next week. That being so, it's not likely that the two are going to conflict anyhow, but if it starts to develop that way, the parties will obviously want to fix that because while it may be a burden on the Trustee to try to try two cases at the same time, it's a burden on us too. We're not too anxious to do that. That's no different for us. So the notion that we're trying to interfere because we've suddenly got interested in this again, just in light of the history of why we're where we are today, which is not our fault, and what we might want to do and how we could do it, it just makes no sense to suggest that we want to interfere. The only thing that makes sense is that the Trustee is looking for a period of time

where he has a judgment he can use as a broad sword while the risk of being undermined in the arbitration remains somewhere in the future, and I think that's totally unfair and inappropriate for a case that's 2 1/2 years old where the Trustee's already decided where he wants this case to go. Thank you, Your Honor.

THE COURT: Now, let's assume that I granted a limited stay relief to permit the Trustee to file the final brief that you mentioned, Mr. Lewis, in the arbitration and to commence the scheduling process; would that be a workable solution here? In other words, I am concerned about a two-front sort of fight going on, particularly for the Trustee, and you know, and who the stay is designed to protect at the moment. But at the same time, I don't want to face a situation where following that jury trial, assuming for this purpose that SCO is successful, that there is any substantial delay in proceeding with the arbitration. For example, I would not - you know, I perhaps shouldn't indicate my inclination, but I wouldn't be inclined to continue the stay while an appeal was pending because we all know how long that can take, that process, and if for any reason there was then a remand for further proceedings in the trial court, you know, then we have delay upon delay. So, I do appreciate the concern about delay. At the same time, just as a sort of practical matter, it doesn't quite make sense to be

litigating in Utah when a decision against SCO will probably moot that whole arbitration and the cost attendant to that arbitration are obviously a concern to the Court.

MR. LEWIS: Your Honor -

THE COURT: But I'm trying to fashion whether some limited stay relief can be both efficient and fair.

MR. LEWIS: Your Honor, I guess - I understand the Court's concern, concerns of there being two fronts. As I've said, we're no more anxious for that to happen than the Trustee is. We can't be in two places at one time. Yes, Morrison and Foerster's a big firm and all that good stuff, but first of all -

THE COURT: The witnesses and the -

MR. LEWIS: Yeah, you've got to get people scheduled and then furthermore, Your Honor, you know, you don't just start picking people off the vine this late in the case and say, Okay, go fight them in Switzerland. You know, What's you name, go fight them in Switzerland.

THE COURT: Right.

MR. LEWIS: You know, you're going to use the same people because it's the only thing that makes sense not only from a cost point of view, but from a result point of view.

THE COURT: Yes.

MR. LEWIS: So, we have the same problem, and as I've said, Your Honor, I am confident that had there been no

bankruptcy and there had been a conflict in the scheduling, the parties would have figured out a way to work it out. I imagine they would do the same thing here because it's survival. It makes no sense to do anything other than that, and I would suggest, Your Honor, that the best result is simply to grant stay relief and if a problem develops, let the parties come back before this Court if they need to, but what I'm concerned about, Your Honor, if you grant some kind of limited stay relief, then the Tribunal's going to get the wrong message about what's going on and who knows what the effect is going to be with the Tribunal that's been waiting a long time to know what's going on. I would rather just have stay relief with the proviso that if a problem develops the parties will of course confer, and if they confer and we are somehow intransigent, which we won't be, but if we were, then the Trustee would be coming in here complaining about that, and I don't think we'd want that to happen even if we were otherwise inclined to be intransigent. And I'm sure the Tribunal will work with us as well to try to schedule something that makes sense so we can get the witnesses to the right places at the right time without being up 24 hours a day. So, I would ask the Court not to put any limitations, just to grant us stay relief. You can give us some guidance unofficially on the record, what you'd like to see and we'll try to adhere to that guidance, but I am concerned about stay

relief that is limited in some way because of what the Tribunal may read from that is, you know, we're not going ahead because you know what, it's going to get yanked on us anyhow. We're just not interested, and then we are going to have to start all over again, and it doesn't matter whether we started the arbitration or they started the arbitration, both parties are going to have to sink money into it again if it has to happen again. Now, clearly, if we win in Utah, as we hope to do, then it seems to me, you know, we're probably going to say, you know what, we really don't need this arbitration anymore or we'll put it off because we don't need to bear the expense. That's pretty much what happened when the bankruptcy was filed and the Court determined that the stay applied because we won on the basic ownership issues. That's no so anymore, and the circumstances have changed dramatically. This case - and I want too emphasize this again, I know the Court's aware of it, but it's 2 1/2 years old. When are we going to have this decided? When are we going to know where we stand? I don't think anybody can contest that whatever the exact scope of the ownership issue and the resulting right to sue for slander, title, and copyright infringements and all that other stuff, the exact scope of that we all don't know, but I think it's fair to say, and the debtor admitted this in its papers way back when, that a favorable result for us in Switzerland is going

to impinge seriously on the value of those copyrights even if SCO owns them. So, it's not like the copyright issue is teed up for one place and not for another place. It's teed up in both places for purposes of this Court. That's why the District Court deferred to the arbitration rather than trying the thing itself because it didn't make any sense to try it itself. It's not going to try it this time either, whether SCO owns the copyrights for purposes of suing on infringement because it transferred them to United Linux. That's an issue that was coming up in the District Court and basically the District Court said, you know what, that's an arbitration issue, I have to send this to arbitration, and I'm not going to bother deciding it even though it's important to decide.

THE COURT: Right.

MR. LEWIS: And the District Court, the little bit of selective quotations from the District Court's opinion doesn't change the fact that the District Court clearly recognized the interplay between the two. So, I urge the Court to grant stay relief today with some guidance for the parties about cooperating, and let's get the show on the road so we can get this case taken care of one way or the other before it goes on forever. Thank you, Your Honor. I appreciate the time.

THE COURT: Thank you, Mr. Lewis, it's been very helpful, your comments. Yes, Ms. Fatell.

MS. FATELL: Your Honor, if I may, first I do want to acknowledge that Mr. Normand is on the phone and I don't know if he wanted to add anything, if I may ask, Your Honor, to anything that's been said so far. May we ask Mr. Normand if he wants to add anything since he is more familiar with the SUSE litigation?

THE COURT: Mr. Normand, do you have anything to add to at least what work remains to be done and the scheduling of the arbitration?

MR. NORMAND (TELEPHONIC): Your Honor, this is Ted Normand. I would make two points very briefly in part out of concern that the first point has been mooted given the direction that Your Honor has at least indicated he may be going, but I did want to underscore that on the shield/sword point, we are not currently pursuing any claims for what Mr. Lewis calls "infringement". Ms. Fatell has specified, the District Court has stayed our claims against SUSE, and we don't dispute that. So, this trial is not a claim for infringement nor are we pursuing any claim in any other venue for infringement, nor after the trial, if we were fortunate enough to win, would we be able to tell the world that we have just proved copyright infringement. So, on the shield/sword argument, I think that falls flat under the facts. On the second point, and this may be more for Ms. Fatell to address and she may be on the point of saying this,

I didn't follow Mr. Lewis when he responded to Your Honor's last question. I don't know why we would allow for even the possibility of not only parallel proceedings but a proceeding in the arbitration close in time at all to when the trial was resolved. And again, maybe I misunderstood Mr. Lewis, but it would seem to me to make more sense that the Court would enter some order that made clear that the arbitration shouldn't proceed within a certain period of months after the trial or else all the concerns that everyone has been talking about would be implicated.

THE COURT: Thank you, Mr. Normand. Just help me out with one thing, and that is, the brief that everyone has been talking about which remains to be submitted in the arbitration, what is involved in the filing of that brief?

MR. NORMAND (TELEPHONIC): Well, to some extent, I'm not the best person to answer that question, but I may be relative to the people available to Your Honor the best person to answer the question. I'm not the lead attorney on the case -

THE COURT: Okay.

MR. NORMAND (TELEPHONIC): - but my understanding is that is a lengthy, substantive brief that is meant to reflect all of the evidence that one has gathered and plans to present to the Tribunal. I don't want to overstate it, but I think it's the equivalent of a lengthy summary judgment

brief. I think the real expenses that Ms. Fatell has pointed out would be travel, the length of a two-week trial where, you know, presumably you show up a week early and get ready, and paying the arbitrators, which is no small cost, and those would be, I think, costs that would exceed what would already be the significant costs of putting together the final brief.

THE COURT: Alright, thank you, Mr. Normand. Ms. Fatell, yes.

MS. FATELL: Your Honor, since I am gathering from the Court the direction that you may be going -

THE COURT: I really, when I ask a question, it really is a question.

MS. FATELL: Okay, well then I'm going to respond to some of the comments that were made.

THE COURT: Please, please, yes.

MS. FATELL: When the argument was made that SUSE has presented enough to satisfy the third prong that there's a likelihood that they might prevail on the merits, Your Honor, all they've done is acknowledge that there's a dispute, and if that where the standard and the threshold, then any dispute that involved two parties and one of which was the debtor, would meet that threshold to say, I'm likely to prevail because I disagree with the debtor. So I don't think that's sufficient to meet that prong, and even though I know it may not be a very high bar, there is a bar there, and

there's been no ruling, that I'm aware of, on any of the facts. There's been no analysis of the documents at issue. While I think there was a reference that the District Court may have looked at the contract briefly in terms of deciding whether it should go to arbitration, there was not a full factual and evidentiary hearing on those documents and what they say, and we submit that there is a full story to be told and that to the extent that there's ambiguity and witnesses are entitled to come in and testify as to the intent of the parties, again we submit that the debtors' position will bear out and they certainly did not intend to transfer in this transaction all of their interests in Unix. So, we don't think that they've met that burden. In terms of the arguments that have been made here, I think it's interesting to note that Novell and SUSE are interchangeably referred to here as "we", and we're really seeing that they're seeking two bites at the apple, and they're seeking to get a leg up, and they are seeking to deny the debtor its day finally in court on this ownership of copyrights issue by trying to argue that these are very distinct issues but overlap and that it's critical that they both be decided very close in proximity. Again, as Mr. Normand said, as we said repeatedly, we are not suing SUSE on copyright infringement. We are pursuing our claims as to the ownership of this copyright and if down the road we pursue SUSE or anybody

else, SUSE's not here to defend the world. If we sue SUSE and we prevail or we lose, that's one issue. We still may have the basis for some other reason to assert a copyright claim or some other claim regarding the Unix assets against third parties. So, I just don't see why that is the ultimate determination as SUSE wants this Court to believe as to whether this debtor should reorganize, liquidate, et cetera. It has options here. They are not tied to the SUSE arbitration. As I said before, if we prevail against Novell and IBM, not on copyright infringement but on the other issues that we have, there could be a substantial recovery to equity here.

THE COURT: Yes.

MS. FATELL: And where the case will go from there, we don't know. Your Honor, even preparing this brief, and clearly I am less knowledgeable than Mr. Normand as to what would be involved, but just in terms of the timing, this case was last - there were activities in this case most recently in 2007, as everybody has acknowledged.

THE COURT: Yes.

MS. FATELL: So, to suggest that all we have to do is sit down and knock out a brief in a couple of days, it seems to me that there's going to be a lot of time required to go back and look at the documents, refresh people's memories, you know, review the evidence that's come out in

the discovery stage in preparing that final submission. I respectfully suggest that that is not something that can be done very quickly in very short time, nor should it be done at the same time that the litigation is going forward in Utah because again, it will involve the same people. It has too.

THE COURT: Okay.

MS. FATELL: I'm troubled that the Tribunal might get the wrong impression if the Court grants limited stay relief. I'm sure that the people who serve on these Tribunals are very skilled and intelligent and bright people and understand that litigations go on, on all different fronts, and to the extent they have a question as to exactly what limited stay relief means, they can certainly consult with a U.S. Bankruptcy lawyer, but, Your Honor, to grant stay relief and throw this into really a black hole, I think would be very detrimental to this estate. We've already acknowledged that the relief should be denied without prejudice for them to come back at the appropriate time. We don't know what will happen in March. We don't know how the trial will go. We don't know what the parties will resolve, if anything, what the Court will rule, where that will go. There needs to be a time after that is completed to see where the dust settles before we launch into an action by SUSE to stop us from suing them when we're not suing them. I'm just really struggling with how that makes any sense, Your Honor,

and so again, I would urge the Court not to grant stay relief at this juncture, and I think we're sort of talking about crafting - Well, the Court is talking about crafting or fashioning some type of limited stay relief almost in a vacuum because again we don't know what will transpire between now and the conclusion of that trial, and to try and set a scheduling order or put the parties to work on agreeing on a scheduling order in that black hole to me seems like it would not be very productive, and so, I would suggest that we see what happens with the litigation on this underlying issue and for all we know, maybe SUSE's going to say, You know what, I'm not going to stop them from suing us because they're not suing us. They may see the light at some point, and say, there's no point in proceeding with this arbitration, you know, this is going in a different direction and this is not an issue for us anymore. We just don't know.

THE COURT: Right.

MS. FATELL: And, so, I don't think it makes sense to burden the estate with those issues at this point in time. And with that, I will sit down.

THE COURT: Thank you, Ms. Fatell.

MS. FATELL: Thank you.

MR. LEWIS: Your Honor, may I -

THE COURT: Mr. Lewis, you may certainly. We've heard from Mr. Normand -

MR. LEWIS: I appreciate that, you're very patent.

THE COURT: - and it's your motion and you get the last word.

MR. LEWIS: Okay. I wished that worked at home, Your Honor.

THE COURT: I do too.

MR. LEWIS: Can we make that a rule of court? Your Honor, a couple of things. The idea that we're asking for two bites of the apple, we already have two bites of the apple. That's exactly what the District Court decided. It was going to decide this issue, and then when we brought to its attention it's really an issue for arbitration, they said go arbitrate, but it knew it was an important issue for the Utah litigation. The Utah litigation is essentially not over until this issue is decided. In fact, one wonders if you can really have a final judgment in Utah until this issue is decided. We'll come to that someday, I suppose, but that's what the Court did. It said, you know, I'm going to send this off and you basically bring the result back and we'll see where we are. So - and I don't hear the Trustee anywhere along the line saying, Fine, we won't seek to enforce judgment, we'll just let things be cool, as it were, until the arbitration is decided as well if we win in Utah. I don't hear that. I only hear, No, don't do anything yet. Now, on the question of how long it's going to take? It may

take a little while to write the brief, but you know, Your Honor, it's going to take even longer and things are going to be even worse the more time we take, and if we don't get this started now, you know, the Tribunal may look at this and say, You know what, this is just going to go stale. You guys come back and we'll form another Tribunal someday if you ever apply and then we'll be two or three years up. We're just talking about getting this thing back on track, Your Honor. We're not talking about trying it tomorrow. If we wait until we see what happens in the Utah trial to even think about getting started again, we may be talking about doing something a couple of years from now, and where will we be? We'll be sort of tied up. The idea that somehow because the infringement claims aren't teed up at the moment, that the Swiss arbitration is irrelevant is just nonsense. The value that SCO has its whole business model, is to sue people for infringement based upon the copyrights. That's what it does. The one business the Court has heard about in the motions to convert of servicing some Unix users and so on, that's not a big business. That's not what this company is about.

THE COURT: Right.

MR. LEWIS: It's about this litigation. The Court recognized this when the Court granted stay relief for us to finish the Utah trial, and the debtor recognized it, once again, in arguing that the stay should apply to the Swiss

arbitration. It's not our fault that things have gotten stale. It's the debtors' fault. The debtor filed a bankruptcy and invoked the stay. Why let them get more stay? Why take the risk of further delay? Why take the risk of further costs beyond what is unavoidable right now by further delaying things? And on the final point, Your Honor, on terms of what the Court should do today, I don't think this Court can say that Novell has been outrageous or unreasonable or uncooperative in this case. In fact, we've not been here before this Court very often for the most part. We've granted extensions when they were asked for as we did in this instance. I asked the Court to trust us to behave professionally in terms of scheduling, and if we don't, the Trustee will be in a position to come back and complain to you. I don't want to be the one who defends that. I don't think it will happen. But if you don't turn us loose now to start working with the arbitrator to set a schedule that works for everybody, which is what we would do anyhow, then we're going to be here for another two years. Now if - and the changes of this happening before the trial in Utah, it seems to me, are virtually nil. No one really argues that. And so if we win in Utah, as I fervently hope we do, then there probably isn't any need for an arbitration and if we're determined to go ahead anyhow, having gotten stay relief, then the Trustee can come in and ask the Court for some

further relief on the grounds that at that point it really is a waste of the assets of the estate, maybe. Why anticipate all of that? Let's just get the thing back on track so that we can get it rolling and get it scheduled. If there are problems with - this Court left it to the parties to work out schedules for the discovery and so on in the sale and conversion motions.

THE COURT: Right.

MR. LEWIS: And the Court will recall that was a difficult problem because of the short fuse, and we actually had to have a hearing or two, but it worked. The parties weren't outrageous. We certainly weren't outrageous. There's no reason to suppose we will be again. So I suggest, Your Honor, that we just get stay relief, let's go tell the Tribunal that we're free to proceed, we have some scheduling issues, we want to schedule this in a way that comports with the schedule in the Utah trial, and let's see where it goes, but if we go to the Tribunal with a thing that says the Court has given us stay relief to tippy-toe, they're just going to throw up their hands maybe and say, You know what, we don't want to do this. Let's just kill this thing and you guys come back when Judge Gross tells you to come back. I think that the only appropriate result today is to grant us stay relief. We will understand the need to schedule in a rational fashion, as we would have had there been no

bankruptcy. There's no indication, we've not heard anything suggested today that the scheduling of the trial in 2007 and the arbitration in 2007 was done in a way where Novell was trying to - or SUSE were trying to bury the debtor. Why would we do that now in front of this Court? Thank you, Your Honor.

THE COURT: Thank you. Thank you, Mr. Lewis. Well, I was really hoping to decide it right here and now, but I do want to give it a little bit more thought, and I want to go back having been sort of pointed to some of the arguments and statements in the documents, to go back and actually re-read those statements in the context of your arguments. I don't think it's going to be - it's not going to take long to issue a ruling. I certainly am sensitive to the fact that the arbitration has been stayed for a long time now, but I'm equally sensitive and concerned to the fact that we have a trial date in a very substantial matter which may moot the arbitration, that that is forthcoming, it's two months away, but I do want to give it some thought at least as to what if any sort of limited relief I might be able to fashion or in the absence of limited relief whether or not to lift the stay and sort of allow the matter to proceed on a long leash but with the understanding that if it got out of hand or were inequitable in someway to the debtor I could sort of - I hate to say it, but yank back on the leash a little bit. So -

MR. LEWIS: And I don't want to be here when you do that, Your Honor, so it won't happen.

THE COURT: Alright. I'll let you be on the telephone. So, let me just see where we come out in my thinking a little bit further and I certainly, as I say, I'm not going to delay matters by delaying my ruling. So you will hear from me within the next week, and I do appreciate it, and in the meantime, I hope it was a good year for everyone. I hope it will be a better year even in 2010, and I wish you a Happy New Year.

MR. LEWIS: Thank you, Your Honor. We wish the same to you.

THE COURT: Thank you.

MS. FATELL: We all do, and thank you for your patience.

THE COURT: Absolutely, counsel. Good day to you.

(Whereupon at 11:45 a.m., the hearing in this matter was concluded for this date.)

I, Elaine M. Ryan, approved transcriber for the United States Courts, certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Elaine M. Ryan January 7, 2010

Elaine M. Ryan
2801 Faulkland Road
Wilmington, DE 19808
(302) 683-0221